

TANZANIA / JUDGMENT

magesa nila magese vs ibrahim kadushi

2020 tzhc 4215 14 december 2020

COURT
TZHCDECIDED
14 December 2020

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY
OF MUSOMA AT MUSOMA PC CIVIL APPEAL No 27 OF 2020 {Originating from Civil Appeal No
12/2020 at Bunda District Court and Civil Case No 72.2020 at Bunda Urban Primary Court)
MAGESE NILA MAGESE..... APPELLANT Versus IBRAHIM
KADUSHI..... RESPONDENT

RULING

7th & 14th December, 2020 Kahyoza, J. Ibrahim Kudushi sued Magese Nila Magese for adultery before the Primary Court of Bunda District at Bunda Urban. Ibrahim Kudushi emerged victorious. The primary court awarded him Tzs. 3,000,000/= as damages for adultery. Aggrieved, Magese Nila Magese appealed unsuccessfully to the District court of Bunda. Undaunted, he appealed to this Court raising the following grounds of appeal.

1. The appellate District Court erred on point of law to rely and act on evidence that was denied by maker, and thus, contradicting the respondent cases.
2. That the procedure used to procure, features and rely on the evidence of the court witness prejudiced the appellant case and denied him justice. i
3. That since it is in record that the appellant counsel was attending to High Court Criminal Session, his delay or inactions was wrongly used to deny the appellant the right to legal representation and also the right to be heard.
4. That since issues were drawn during the composition of Judgment the parties were denied the right of participation
5. That the District Court on appeal misdirect itself on point of law and facts to rely on assumption and search for evidence of its own self to support and give credit to them.
6. That since the only evidence that was used and relied upon to find the appellant liable is that of electronic evidence, the law that makes it applicable does not apply in Primary Court, the appellate court erred on point of law when it failed to discount /expunge the same from the record.

7. That the appellate evidence and case as a whole was never considered and that respondent taken wholesale as true thus the formers case was prejudiced and he was denied justice. In nutshell, the appellant and respondent were resided at Kung'ombe area. The respondent claimed in the primary court that on 1/3/2020 he went to his home place early in morning, where his second lived, knocked the door and after his wife opened the door the appellant escaped from his house. He found the appellant's cellular handset on his bed and with message showing that there were communications between the appellant and the respondent's wife. He went to the chairman of the hamlet to whom his wife admitted to have love relationship with the appellant. She later changed her mind ² and denied to admit voluntarily. She deposed that she was coerced to admit. The dispute was referred to the primary court and an appeal lodged to the district court. Finally, it landed to this Court. I heard the appeal and reserved a judgment. I came to learn that the Court of Appeal of Tanzania had made the judgment to the effect that the primary court has no jurisdiction to entertain a claim of damages for adultery, where the plaintiff is not applying for divorce or did he disclosed that the marriage he contracted with adulterer wife was either Islamic or customary marriage. The Court of Appeal made that decision in *Wilson Andrew v. Stanley John Lugwisha* Civil Appeal No. 226/ 2017 (CAT unreported. I gave the parties a copy of the judgment of the Court of Appeal and called upon them to address me on the issue whether the primary court had jurisdiction to entertain the claim based on the facts of the case. The appellant who was represented informed this Court that the primary court had no jurisdiction. The respondent left it to the Court to make its decision. The Court of in the case of *Wilson Andrew v. Stanley John Lugwisha* (supra) held, I reproduce the part of that decision in extension, 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 3 adultery are provided under Part V of the LMA which deals with Miscellaneous Rights of Action. 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." 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. There is no evidence in this case whether the respondent and the adulterer wife contracted a customary or Islamic marriage. The fact that the respondent's marriage was polygynous does not in itself prove that the marriage with the adulterer was either customary or Islamic. It is possible that the marriage was civil marriage. The respondent was required to prove, in the circumstance where he was not petitioning for divorce, that the marriage with the adulterer wife was either customary or Islamic marriage, in order the primary court to have jurisdiction. Jurisdiction of the court must not be

assumed. It must exist. 4 In the upshot, I find that the primary court had no jurisdiction to hear and determine the claim of damages for adultery without the respondent petitioning for divorce or proving that he contracted an Islamic or customary marriage with the adulterer. Consequently, I quash the proceedings and set aside the judgment of primary court. As result the proceedings and judgment of the district court have no grounds to stand on the same are quashed and its judgment set aside. I make no order to the costs. It is ordered accordingly. J. R. Kahyoza JUDGE 14/12/2020 Court: Ruling delivered in the presence of the parties. B/C Tenga J. R. Kahyoza JUDGE 14/12/2020 Order: Exhibits to be returned to the person who tendered them if no appeal is preferred. R. Kahyoza JUDGE 14/12/2020 5

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