IN THE HIGH COURT OF TANZANIA

AT MBEYA

ORIGINAL JURISDICTION

(Mbeya Registry)

(DC) CIVIL APPEAL NO. 33 OF 1995

(From the decision of the District court of S'wanga District at Sumbawanga in Civil Civil Appeal No. 49/95 - Orig. Urban Court Civ.C.56/95)

PHILLIP MAYAI ..... APPELLANT

Versus

MARY KIMANGA ..... RESPONDENT

JUDGEMENT

SHAYO, PRM (E.J.):

This appeal by the appellant, Phillip Mayai, has got all the merits it deserves under the sun. The appellant and the respondent, Mary Kimanga had met in S'wanga township sometime in February, 1993. Out of sexual desire they cohabited and decided to live together as concubines up to June, 1995 when the concubinage could not longer subsist, so they parted one another, and in fact it was the respondent who decided to desert the appellant after some prolonged misunderstandings. Out of shear reasons, in July, 1995 the respondent, believing that she had, during the concubinage, acquired a matrimonial status, filed a suit in Sumbawanga Urban Primary Court against the appellant, claiming some maintenance allowances totalling Shs.80,000/=.

The trial court after gathering all the evidence appertaining to the case, unanimously came to a finding that the two parties were not presumed husband and wife. But for some reasons not clearly established, it purported to allow part of the respondent's claim to a tune of 21,800/=. The respondent still harbouring some belief that she was not sufficiently given justice, decided to appeal to the district court against the trial court's decision. The district court allowed the appeal on the grounds that under section 160 (2) of the Marriage Act 1971 the respondent had a legal right for maintainance and that, also under section 60 of the same Act she was entitled part of the matrimonial property. The first appellate court thus varied the trial courts decision by allowing the whole of the claim Shs.80,000/=.

The present appellant was aggrieved hence this second appeal. This appeal was heard in the absence of the respondent by under the provisions of Section 35 of the M.C.A. '84. It is plainly clear from the evidence adduced at the trial court that the two parties in this case could not have been said to have acquired the status of husband and wife out of their concubinage relationship. They were rather living together out

of shear convenience, and when life got sour, the respondent fled away probably to look for an alternative prosperous concubinage. That being the position, and after the trial court had fully satisfied itself that there was no presumed marriage, it erroneously granted part of the relief. Yet, as if that was not enough, the district court went further wrong by granting the whole relief claimed on the ground that there was a presumed husband and wife relationship to justify the the application of section 160 (2) and section 60 of the Marriage Act.

This was a very serious misdirection on the part of the district court. There was no presumed marriage under section 160 (2) of the Marriage Act, and further, there was nothing to even suggest, that there was any divorce or separation in the circumstances of this case to warrant division of matrimonial property not even any claim for maintenance under the law. In fact there was no scintila of evidence that the two parties had even acquired any property together to justify the first appellate's court purported application of Section 60 of the Act.

Since the two parties were living in concubinage and there was no evidence to support a presumption that they were married, and further that they only met at Sumbawanga independently of one another, I can see no legal liability on the part of the appellant to pay any maintenance allowance to the respondent after the break up of their unfertile concubinage. What I can safely say is that the claim by the respondent was in law misconceived and farfetched in the circumstances. Both two lower courts erred in entertaining such a suit from the very inception. The decisions of the two lower courts, are therefore quashed and set aside.

In the light of the foregoing reasons, I allow this appeal with costs to the appellant.

A.A.M. MSHANGO
JUDGE
13.8.96

At Mbeya

13th August, 1996

- For appellant: Mr. Materu, Advocate.
- For respondent: Absent.