

IN THE HIGH COURT OF TANZANIA

AT DODOMA

(PC) CIVIL APPEAL NO. 7/2010

(Arising from the decision of the District Court of Manyoni vide Civil Appeal No. 8/2009 of Kintinku Primary Court)

JACKSON MTAPILAAPPELLANT

VERSUS

PETER ALOYCE.RESPONDENT

J U D G M E N T

13/10/2011 & 06/12/2011.

KWARIKO, J.

The respondent herein won a suit for claim of damages for adultery against the appellant herein and the appellant's appeal before the first appellate court was unsuccessful. Therefore, through Mr. Ruhumbika learned Counsel the appellant filed this appeal upon the following two grounds:

1. **THAT**, the learned Magistrate who heard the first Appeal at Manyoni erred in law and in fact by finding that the Appellant had ***committed adultery*** with the wife of the respondent, which act amounted to "UGONI" as known in Swahili, whereas there was no conclusive evidence to show that the Appellant was found in "***flagrante delicto***" having a love affair with the said respondent's wife.

2. **THAT**, since **adultery** as a matrimonial wrong could merely be assumed, apart from being unable to make available any eye-witnesses to prove the allegation, the first Appellate court erred in law and in fact by failing to order for the evidence of the Respondent's wife to be recorded.

Briefly the facts of the case at the trial as revealed by the respondent are to the effect that on 4/1/2009 at 10.00 pm the appellant was found having love affair with, the respondent's wife at Njamasi Nyakanga's house. The respondent raised alarms while the two ran away. When people answered the alarms others pursued his wife while himself and others managed to apprehend the appellant and was sent to the Village Executive Officer for his safety. The following day the appellant filed a criminal charge against the respondent on allegations of assault. That, the appellant had taken the respondent's wife and have had been living together since 2008.

In his defence the appellant did not have much to say as he only said he went to court to answer court summons and that he did not commit any adultery with the respondent's wife.

The trial court found that adultery had been proved against the appellant and awarded the respondent damages at a tune of shs. 1,500,000/= or nine (9) cows over and above what he had claimed at shs. 624,000/= or seven (7) cow which was legally wrong anyway.

In dismissing the appellant's appeal the first appellate court found that the appellant's witness NJAMASI NYAKANGA, DW3 also

supported the respondent's evidence that he had found his wife having love affair with the appellant.

When the appeal was called for hearing, the respondent did not appear though was aware of the date of hearing. Thus, the appeal was ordered to be heard in his absence.

Mr. Ruhumbika learned counsel for the appellant argued this appeal and submitted that the first appellate court failed to appreciate that there was no proof of adultery in this case. That, since it is difficult to prove adultery, the adulterers should be found in ***flagrante delicto*** having a love affair. That, in this case no evidence was tendered to prove the alleged adultery but only circumstantial evidence was presented. Mr Ruhumbika finally submitted that there were possibilities in this case of framing the allegation against the appellant.

Now the issue to be decided is whether this appeal has merits.

Firstly, the appellant says that there was no evidence to prove adultery as alleged. This court has dispassionately gone through the evidence by the respondent and found that he said that, after he found his wife and appellant having love affair he raised alarms while chasing the two. That, people gathered and some of them pursued his wife while himself and others chased and apprehended the appellant. However, no witness came to support this respondent's evidence. This is so because one RAPHAEL MABARANGU, PW2 said he answered the alarms and found almost the entire village gathered (he did not mention the place) and upon inquiry the respondent stood-up and said had found the appellant committing adultery with his wife while the

appellant admitted the allegations. PW3, HAMISI MGARU testified in the same effect.

Thus, according to this evidence no one participated in either chasing the appellant or respondent's wife and then had the former caught. The respondent's wife was not seen at the gathering and no one testified where she had been. The respondent also did not testify how and where in particular he found the two committing adultery at NJAMASI'S residence and what actually they were doing when he found them. He did not either explain how he identified them at night. Not even the Village Executive Officer whom the appellant was said to have been sent for his safety came to testify on these allegations.

Although in law not only direct evidence can prove adultery but also circumstantial evidence; but in this case even the circumstantial evidence was not there to prove the adultery allegations. In the case of **GAI IPENZULE V SUMI MAGOYE [1983] T.R.R. 289**, My learned brother Mwalusanya, J (as he then was) had this to say:

*"It is not the law that direct evidence of persons caught in **flagrante delicto** is the only admissible evidence to prove adultery. Very rarely adultery is proved by direct evidence; the common practice is that adultery is proved by circumstantial evidence".*

I entirely agree with my learned brother. Although, the respondent complained that the appellant had eloped with his wife since 2008 and had been looking for her, but nobody else came to support this evidence.

Even though the first appellate court was emphatic that the appellant's witness, DW3 admitted that the respondent found the appellant committing adultery with his wife but what I understood this witness's total evidence is that he responded to the respondent's question by saying that if he found the appellant committing adultery with his wife then what steps did he take!

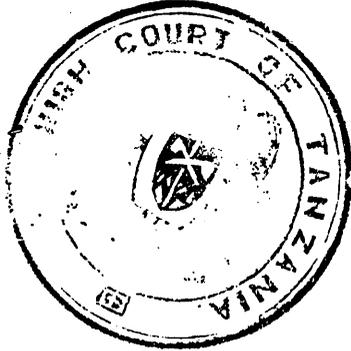
What the respondent's evidence shows is that he was suspecting that his wife was having an affair with the appellant but there is neither direct nor circumstantial evidence to prove the same. If the alleged association was going on from 2008 what steps did the respondent take against it? This question was not answered during the trial.

Although it was raised as the second ground of appeal but Mr. Ruhumbika learned counsel did not discuss it to the effect that the first appellate court erred in law and in fact by failing to order for the evidence of the respondent's wife. Although not argued but the court is compelled to discuss the same since even though it was not raised the court must have discussed the same. Thus, the respondent's wife evidence was necessary in this case. Her evidence could have shed light on the status of the alleged marriage with the respondent and what was going on between them before the alleged incident occurred. This woman also could have testified on what actually happened on the alleged material night. This court could as well order her evidence to be taken but since the respondent's evidence is suspect I find no need to order the same.

Although the two courts below found concurrently against the appellant but the same missed out on the clear shortcomings posed on the respondent's evidence which I have herein above highlighted. Thus, the respondent's evidence did not prove the

allegations of adultery against the appellant as required in law.
This appeal is thus allowed with costs.

Order accordingly.




(M.A. KWARIKO)

JUDGE

06/12/2011

AT DODOMA

06/12/2011

Appellant: Present in person

Respondent: Absent

C/C: Mr. Emanuel.


(M.A. KWARIKO)

JUDGE

06/12/2011

ORDER: Judgment be typed and supplied to the respondent.


(M.A. KWARIKO)

JUDGE

06/12/2011