

FEZILE MURAHWA

Versus

MAYIBONGWE NCUBE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 12 AND 21 OCTOBER 2021

Civil Trial

B. Ndove, for the plaintiff
No appearance for the defendant

KABASA J: This judgment is only concerned with the quantum of damages payable to the plaintiff. This is because the defendant did not appear on the date of trial. The plaintiff sued the defendant for adultery damages. The entitlement to damages was resolved in the plaintiff's favour since the defendant was in default, leaving the issue of the amount of damages the plaintiff is entitled to.

On 22nd June 2018 the plaintiff issued summons claiming US\$12 000 in adultery damages. The basis of the claim, as elaborated in the declaration, is that the plaintiff married Stanley Murahwa in terms of the Marriage Act, Chapter 5:11. The marriage was solemnised on 24th July 2002. The two were happy and enjoyed each other's comfort for 15 years. In February 2017 and January 2018, the defendant, who is the plaintiff's husband's workmate started an adulterous relationship with the plaintiff's husband. The 2 are police officers. Efforts to stop the relationship were in vain and the defendant continued with the relationship despite the plaintiff's attempts to dissuade her.

The adulterous relationship resulted in the plaintiff losing her husband's love and support. She has suffered emotional and psychological stress as her husband no longer shows her love, has withdrawn conjugal rights and became abusive towards her.

As a result, the plaintiff's claim for US\$12 000 based on contumelia and loss of consortium, was broken down as US\$8 000 being for contumelia and US\$4000 for loss of consortium.

The matter had been referred to trial on 3 issues, *viz:* -

1. Whether or not the defendant was, at all material times, aware of the existence of a marriage relationship between the plaintiff and one Stanley Murahwa.
2. Whether or not despite such knowledge the defendant entered into and continued with an adulterous affair with plaintiff's husband, Stanley Murahwa.
3. Whether or not the plaintiff suffered damages in the sum of US\$12 000 and is entitled to same.

It being common cause that the plaintiff is married to the defendant and the marriage still subsists and the plaintiff having filed the many WhatsApp messages exchanged between the defendant and her husband, the proof of adultery was taken off the table when the defendant defaulted on the date of the trial. By defaulting she as good as accepted that the plaintiff had advised her to desist from the adulterous relationship, showed her she was married under the Marriage Act but the defendant did not desist, resulting in the plaintiff's husband abandoning her and the children for the defendant.

Mr Ndove for the plaintiff filed an affidavit of evidence and heads of argument in support of the quantum of damages the plaintiff is entitled to. In her affidavit of evidence the plaintiff reduced her US\$12 000 claim to US\$7 000, being US\$4 000 or its equivalent at the prevailing bank rate for contumelia and US\$3 000 or its equivalent at the prevailing bank rate for loss of consortium.

In *Chipo Dera v Cynthia Kambeza* HH 175-2010 KUDYA J (as he then was) considered the following factors in coming up with an award for adultery damages:-

1. the character of the woman involved.
2. the social and economic status of the plaintiff and the defendant.
3. whether the defendant has shown contrition.
4. the need for deterrent measures against the adulterer to protect the innocent against contracting HIV from the errant spouse and
5. the level of awards in similar cases.

After observing that the plaintiff's marriage had all but collapsed due to the conduct of the interloper and her husband had sired a child with the defendant and instituted divorce

proceedings, the learned Judge considered an award of US\$800 as adequate to compensate the plaintiff for contumelia and US\$400 for loss of consortium.

In justifying the quantum of damages, *Mr Ndove* referred to ROBINSON J's remarks in *Katsumbe v Buyanga* 1992 (2) ZLR 256 at 258 H-259 A where the learned Judge said: -

“Accordingly, unless they are prepared to take a strong and principled stand in this regard in support of the vital institution of marriage, the courts will only be party to society's further slide down the slippery slope to the unlicensed promiscuity which scoffs at the spiritual prohibitions against pre-marital and extra-marital sex and which has landed the world in sexual moras over which the monster AIDS now presides in all its frightening aspects.”

MWAYERA J (as she then was) echoed the same sentiments in *John Gore v Simon Chiware* HH 276-14. In that case a nephew had lured his uncle's wife into an adulterous relationship and sired a child with her. She had moved out of her matrimonial home lowering the husband's social esteem in a rural community where his family lived whilst he worked in South Africa.

The remarks by MWAYERA J are worth repeating. She said:-

“The truth of the matter is that no amount of money can replace the pain and suffering occasioned by adultery but the court has to make a reasonable assessment in line with the circumstances of the case.” I respectfully associate myself with these remarks. In awarding adultery damages the court is in essence saying ‘We give you money because there is nothing else we can give you, otherwise there is no money equivalent to the loss and pain as the loss cannot be measured by way of a monetary value.’”

In casu, the plaintiff, in her affidavit of evidence stated that the discovery of the adulterous relationship caused her unbearable pain, hurt, injury and indignity due to the fact that: -

- a) the defendant is her husband's workmate and used to see the plaintiff at the police station as she would often drop him off at work and bring him food.
- b) She trusted the defendant as a police officer and a work mate to her husband.
- c) the defendant continued with the relationship even after she had confronted her and exhibited to her proof of her marriage.
- d) the defendant has succeeded in alienating her husband's affection from her and the husband has deserted the matrimonial home.

- e) she is a teacher and a respected member of the community. She has suffered indignity as she now has to contend with being known as the woman who lost her husband in adulterous circumstances.
- f) she married her husband at a very young age, both of them were virgins and enjoyed a happy relationship until the advent of the defendant.
- g) the defendant's suggestion that her husband is a well-known womaniser hurt as that is not a correct characterisation of who he is.

There is no doubt the plaintiff is hurting and the hurt is continuing as her marriage appears to be crumbling.

Mr Ndove referred to a number of cases where varying amounts were awarded. In *Mtungwazi v Sibanda* HB 61-90, \$5 000 was awarded where the interloper had persisted with the adulterous relationship resulting in the wife being deprived of her conjugal rights. The parties had however continued to live together.

The same amount was awarded in *Ngavazi v Marimbiri* HH 98-92 against an unrepentant woman who was in an adulterous relationship with the plaintiff's husband.

In the Gore case (*supra*) the appeal against the court *a quo*'s decision to uphold a Chivi Chief's award of \$2 200 or delivery of 5 herd of cattle was dismissed, with the Judges of appeal agreeing that the amount was in sync with awards in cases of a similar nature.

MAWADZE J in *Muhwati v Nyama* HH 137-2011 awarded US\$5 000 as adultery damages after observing that the plaintiff's marriage had been virtually destroyed. She had lost her husband of 24 years to the defendant and her dignity and self-esteem had been lowered in the eyes of her peers, workmates, fellow church members and the public at large.

The learned Judge referred to MALABA J's (as he then was) decision in *Khumalo v Mandishona* 1996 (1) ZLR 434 (H) on the factors to be considered in arriving at an estimate of damages due to the plaintiff for contumelia.

In casu, the plaintiff has been married for 19 years, is a teacher and must have been known to her husband's workmates and that community. The defendant did not show contrition but her not defending the matter at trial stage spared the plaintiff the further hurt and

indignity of having to testify. There was no evidence of HIV transmission although the risk was there.

MAWADZE J also referred to cases where the damages awarded for both loss of consortium and contumelia were below \$10 000. (*Nyandoro v Tizirai* HH 12-06, *Chinyadza v Phiri* HH 76-09).

Regard being had to the factors to be considered in the estimation of damages for contumelia, I am of the view that an award of US\$3 000 would be appropriate. No amount of money can really be said is adequate in cases of compensating the pain caused by adultery.

As regards loss of consortium, the plaintiff has to live without the comfort and love of her husband of 19 years. Her description of the life they lived before the defendant came onto the scene was not controverted.

I am therefore of the considered view that an amount of US\$3 000 is fair to compensate her for the loss of consortium.

The defendant defended this matter up until the date of trial. The plaintiff was unnecessarily put out of pocket and therefore entitled to recover her costs in full.

I am therefore satisfied a case for punitive costs has been made and will award such in the exercise of my discretion.

In the result judgment is entered for the plaintiff in terms of the amended draft order.

Ndove And Associates, plaintiff's legal practitioners
Messrs Pundu And Company, defendant's legal practitioners