

CHIPO DERA
versus
CYNTHIA KAMBEZA

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE 12, 23 and 29 July 2010

Civil Trial

E Jera, for the plaintiff
J Ndomene, for the defendant

KUDYA J: The plaintiff issued summons out of this court on 4 June 2009 seeking US\$10 000-00 adultery damages against the defendant. On 3 February 2010 she reduced the amount to US\$5 500-00 being US\$3 000-00 for loss of consortium and US\$2 500-00 for contumelia. The defendant contested the trial.

At the pre trial conference held on 23 April 2010 two issues were referred to trial. These were:

1. Whether or not the defendant had a sexual relationship with the plaintiff's husband
2. If so, what quantum of damages is the plaintiff entitled to

The plaintiff testified, produced a 79 paged bundle of documents as exh 1 and called the evidence of two witnesses. These were Sergeant Timothy Manatsa and her housemaid Mary Mudala. The defendant also testified and called the further evidence of the plaintiff's husband Stephen Dera.

It was common cause that the plaintiff and her husband contracted a customary law union in May 2004. The union was blessed with a minor child born on 31 August 2004. On 31 March 2006 they contracted a civil marriage. The married couple took residence in a cottage in Budiro at the premises owned by the husband's father. The defendant, a single lady, came and rented the main house at the premises.

The plaintiff alleged that after the defendant took residence, her husband's behaviour changed. He no longer came home after work. He stopped sleeping at home. When she enquired with him he was flippant and angry with her. In May 2008 she found the defendant's

bank card in his wallet. She confronted the defendant and her husband over the bank card. She was dissatisfied by the explanation they gave. Her husband's behaviour did not change. One day she forced her way into the defendant's bedroom and found her husband's clothes in the defendant's wardrobe. She went and reported her discovery to the police. Her discovery and report did not bring about the required change in behaviour. One morning in November 2008 after the defendant's maid opened the main door to the main house, acting on a tip off, she barged into the main house and proceeded to the defendant's bedroom. While she was in the passage she saw her husband emerge from the defendant's bedroom. He was naked save for a pair of floral under pants. She had a glimpse of the purple silk sleeveless night dress that the defendant wore before she hurriedly closed her bedroom door. She had a scuffle with her husband in the passage. She formed the opinion that the two had been sexually intimate from the state of near undress that her husband was in and from the fact that he had not spent the night at home.

She alleged that she was satisfied beyond doubt that the defendant was engaged in a sexual relationship with her husband after she scrolled through his cell phone. The screen saver was the picture of the defendant. In the phone was another picture of a smiling defendant. She was shocked by yet a third picture. Her husband and the defendant lay in bed, with their bodies from the waist to the toes covered by blankets while their upper torsos were naked. The two were kissing. She took the cell phone into her custody. Her husband went and made a report at Glen View police station that she had stolen his cell phone. She was arrested. At Glen View police station she showed Sergeant Manatsa the contents of the cell phone. The defendant was called to the police station and the three parties were counseled.

The defendant did not keep away from her husband. She used to text her rude messages each time her husband did not sleep at home. The messages indicated that she was with him. She allegedly told her that her husband would not return to her as he had tasted the defendant. In yet another message she derided her for being a married widow. She averred that these messages left her in no doubt that the two were enjoying a sexual relationship. She produced print outs of five cell phones. These appear on pages 3 to 79 of exh 1. They relate to the cell phones bearing number 011 639 111, 011 629 770, 0915 124 200, 0912 810 886, and 0912 849 053. Those bearing 011 covered the period from 9 January to 24 March 2009 while the Econet lines covered the period from 29 November 2009 to 28 February 2010.

She further stated that her father in law eventually evicted the plaintiff and her husband from the cottage and left the defendant occupying the main house. Her husband looked for rented accommodation for her and the child in Warren Park where she is residing. He left her before he filed for divorce. The divorce action is still pending. She believed that her husband and the defendant's love affair blossomed as demonstrated by the flow of telephonic traffic between them. It was common cause that the defendant uses telephone number 791649 at her workplace and cell numbers 0912 810 886 and 0915 124 200. The other lines belonged to her husband. She underlined the numbers which demonstrated the incessant communication that went on between the defendant and her husband. The level of communication between the defendant and her husband was astounding. I was satisfied that it was adequate proof of the existence of a love affair between them.

She alleged that her happy marital union was destroyed by the defendant. She was a church going respectable wife. She was demeaned by the conduct of the defendant to her fellow church mates and surrounding community including the police. She was at risk of contracting HIV and Aids. She treated the defendant as a younger sister before she discovered her love affair with her husband. Her husband would assault her in the defendant's presence.

Under cross examination she concluded that the two had a sexual relationship from the kissing photo and almost naked husband emerging from the defendant's bedroom coupled with the words and deeds of the defendant. She denied that her union was tumultuous before the defendant strayed into her matrimonial domain. When she was cross examined, her evidence on which cell numbers belonged to the defendant was not disputed. The only thing that was disputed was that such communication was proof of the existence of a sexual relationship between her husband and the defendant.

Timothy Manatsa came to know the plaintiff, her husband and the defendant because of the marital discord that the three generated which came to the police for resolution. At the time he was based at the victim friendly unit of the police. He was involved in counseling the two women. He confirmed the version given by the plaintiff involving the circumstances in which he came to view the photographs in her husband's cell phone. He could not recall whether the plaintiff's husband and the defendant were kissing in the photograph. He formed the opinion that the defendant was having a love affair with the plaintiff's husband.

The plaintiff's maid, Mary Mudala confirmed the plaintiff's testimony to the hilt. She started working for the plaintiff in October 2008. The plaintiff and her husband quarreled over

suspicious that he was having a love affair with the defendant. She was present when the plaintiff barged into the defendant's house and saw the plaintiff's husband almost naked emerge from the defendant's bedroom that Saturday morning. She also saw the pictures in the husband's cell phone. She concluded from the picture in which the defendant was in bed with the plaintiff's husband and his near nakedness in the passage that the two were having a sexual liaison. Notwithstanding that she remains in the employ of the plaintiff and that for that reason she may have been tempted to give evidence favourable to the plaintiff, I was satisfied that she was a truthful witness. She lived with the parties and must have seen what transpired. Her version on the cellphone pictures was confirmed by an independent police officer.

In her evidence, the defendant denied engaging in a love or sexual relationship with the plaintiff's husband. She became aware even on the first day that she commenced to lease the main house that the plaintiff and her husband had a discordant and quarrelsome relationship. At first she was in good books with the plaintiff but the relationship deteriorated over housekeeping and gardening issues which came with sharing the grounds and washing lines. She recalled one incident in which the plaintiff dumped her husband's clothes at her door shouting that he was now her husband. She left the clothes on the ground on the advice of the plaintiff's father in law.

She intimated that she rarely telephoned the plaintiff's husband and did so over rentals as he was the landlord's agent. She disputed being the owner of 0912 810 886 and 0915 124 200.

Under cross examination she reluctantly acknowledged that her relationship with the plaintiff deteriorated because she harbored the suspicion that she was having a love and sexual relationship with her husband. She revealed for the first time pushing the plaintiff out of her bedroom when she came in search of her husband. She admitted she attended Glen View police station where she was counseled over the plaintiff's suspicions. She visited the police station at least twice. She fared badly over the frequency and intensity of the telephonic communication between the plaintiff's husband and herself. Her explanations were contrived falsehoods.

I found her to be a poor witness. I did not believe her protestations of innocence in the face of the clear testimony of the plaintiff and her witnesses. She called the plaintiff's husband to testify on her behalf. His evidence was in agreement with hers to the extent that he denied the existence of either a love or sexual relationship between them. He however contradicted

her. She said she left his clothes where his wife had dumped them but he alleged that the defendant took them into the house for safekeeping. He unwittingly confirmed the plaintiff's version that his clothes were in the defendant's house. He was an untruthful witness. He stated that he was married before he married the plaintiff. His marriage certificate indicates he was a bachelor. He alleged that he had an acrimonious marriage from the very beginning with his wife who was a bossy control freak. He averred that she hated the defendant for no apparent reason. He added that she hated her because she had a better lifestyle than her; earned in foreign currency when she was still earning in local currency and during the time of economic shortages was able to buy goods from across our borders. He admitted that there were pictures in his phone but averred that they belonged to the plaintiff and not the defendant.

He was confused on his marital status before he married the plaintiff and after the separation and issue of divorce summons. He alleged that his father was the one who found the defendant contrary to the defendant's own version. He did not recall that he was the one who showed her around the house when she first came. He stated that his wife hated the defendant for petty reasons; one of which was that she longed to stay in the main house. It was strange that he would make this allegation in the face of his own admission that they had stayed in the cottage four years before the defendant came onto the scene. He alleged that he was forced by the plaintiff to contract a civil union.

He was a poor witness who pre-empted questions. He answered unasked questions and did not provide answers to questions that he was asked. He was untruthful on the nature of his relationship with the defendant.

Adultery is proved amongst other ways either through circumstantial evidence; *See R H Hahlo: The South African Law of Husband and Wife 3rd ed p 377 2nd paragraph* or by direct evidence of a party to that adultery: *See Norman Scoble: Law of Evidence 3rd ed.*

In *Smit v Arthur* 1976(3) SA 378(AD) the head note reads:

“In an action for damages on the grounds of the defendant's adultery with the plaintiff's wife, where there is no direct evidence of such adultery the issues must be resolved not by appraising each incident pointing to adultery simply on its own circumscribed facts, but by a careful survey of the whole of the history of the relationship of the parties of their behaviour at all relevant times. All the relevant facts must necessarily go into the melting pot and the essence must finally be extracted therefrom.

While the triad of desire, opportunity and willingness will often be sufficient to justify the inference of adultery, it does not follow that each of those elements must be independently proved depending on the circumstances; proof of the first two of those elements might justify an inference that the third, too, was present.”

In the present matter, there is no direct evidence that the defendant committed adultery with the plaintiff’s husband. There is, however, sufficient circumstantial evidence which shows that they must have had sexual intercourse. There was certainly evidence of a love affair between them. It started with the plaintiff’s husband taking custody of the defendant’s bank card. It developed to the husband keeping some of his clothes in the defendant’s bedroom. The husband was caught semi-naked emerging from the defendant’s bedroom. He ended up capturing on his cellphone an act of intimacy between them as they lay in the blankets kissing with the upper portion of their bodies naked. I am satisfied that these factors demonstrate the presence of the triad of desire, opportunity and willingness which is sufficient to found that the act of sexual intercourse took place between them.

I hold that the defendant had sexual intercourse with the plaintiff’s husband. It was common cause that she was at all material times aware that he was married to the plaintiff.

She sought US\$5 500-00 as damages for both loss of *consortium* and *contumelia*. Loss of *consortium* involves the loss of companionship, love, affection, comfort and services. She testified that her husband stopped from coming home. When he was away from home she was deprived of his attention. He eventually permanently deserted her and thereafter instituted the pending divorce action. She has justified an award of damages for loss of *consortium*.

Contumelia is equated to the injury that was inflicted on her by the adultery. It covers both the physical and psychological harm. She demonstrated in her evidence that she suffered physically at the hands of her husband at times in the presence of the defendant. She was hurt

emotionally. Her self-esteem was battered and her standing in the community took a knock.

In assessing the appropriate damages I am guided by the following factors:

- a. the character of the woman involved;
- b. the social and economic status of the plaintiff and the defendant;
- c. whether the defendant has shown contrition;
- d. the need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse; and
- e. the level of awards in similar cases.

In the present matter the plaintiff's husband instigated the affair when he was 32 after two years of marriage. The defendant went into the affair with her eyes wide open. The plaintiff was a woman of good character. She was a religious woman. She was betrayed by the defendant whom she treated as a younger sister. The conduct of the defendant was aggravated by the fact that she had a boyfriend whom she introduced to the plaintiff in a bid to hide her affair to her husband. When the affair came into the open she aggravated her conduct by heaping indignities through text message against the plaintiff. She was not contrite at all. The defendant earned more money than the plaintiff and lived in better accommodation. Her husband may have been lured to the defendant by her better financial muscle.

There was no evidence that the plaintiff contracted either HIV or Aids. She however is overawed by the prospect of having contracted either of these dreaded conditions.

In *Chinyadza v Phiri* HH 76-2009 I awarded the plaintiff damages in the sum of US\$1 500-00 for contumelia and US\$500-00 for loss of consortium. It seems to me that the circumstances in the *Phiri* case were more aggravating than in the present matter. In that case the parties had been married for seven years when the adultery started. In the present matter the parties had been married for four years if one pays regard to the

customary union or two years if regard is had to the civil marriage. I would estimate damages for loss of *consortium* in the sum of US\$400-00.

As regards contumelia, her marriage was destroyed by the interloper. Her husband instituted divorce proceedings which are still pending. Her husband sided with his lover which further compounded her hurt. Unlike in the *Phiri* case, there is no evidence that the plaintiff contracted HIV. I estimate that US\$800-00 is adequate to compensate her for *contumelia*.

In the result it is ordered that the defendant shall pay the plaintiff the sum of US\$1 200-00 as damages for adultery with interest thereon at the prescribed rate from to the date of judgment to the date of full payment and costs of suit.

Jakachira & Company, plaintiff's legal practitioners
Thondhlanga & Associates, defendant's legal practitioners