

DAMBUDZO OLIVER MUNYEBVU
versus
TALENT MUSVIBE

HIGH COURT OF ZIMBABWE
TSANGA J & MAXWELL J
HARARE, 8 February & 11 May 2022

Civil Appeal

Mr Unzemoyo, for the appellant
Respondent, in person

TSANGA J: The respondent (as plaintiff) sued the appellant (as defendant) for adultery damages in the court below and was granted the sum of \$150 000 for *contumelia*. The appellant denied the claims. There being no pictorial or phone evidence of the adultery or any witnesses who had come to court having seen the appellant and the respondent's wife together, the magistrate observed that the only evidence that the court could rely on was the oral evidence of the respondent and his wife who gave evidence.

The lower court found that though the appellant denied knowing the respondent, it was apparent that the two were acquainted with each other. The appellant also knew a lot about the respondent more than a person who is not acquainted should. The respondent, on the other hand, also knew the appellant's phone numbers and where he stays in Avondale. He knew the business he operated and knew the names of the appellant's wife from the Eco cash amount sent to the respondent's wife by the appellant from his wife's phone. The appellant's defence had essentially been that they were fabricating a case against him to milk him out of money. The court below found on a scale of probabilities that the respondent's version was more credible and that the respondent's wife's explanation as to how relationship started was lucid. According to the court, her statement that the first sexual encounter with the appellant was rape did not affect her credibility. The magistrate found the issue to be beside the point as the real issue before the court was whether or not adultery had subsequently occurred.

The magistrate relied on the case of *Chipo Dera v Cynthia Kambeza* HH 175/2010 in which it was said that adultery is proved through either direct or circumstantial evidence. The court assessed factors taken into account and concluded that the respondent had suffered heartache in seeing his wife become erratic. He had to bear the obvious embarrassment in society which comes with a partner having behaved in the manner his wife and appellant did.

In arriving at a reasonable quantum for *contumelia* the court relied on *Tapiwa Shiri v Owen Vere* HH 65/20 where MANZUNZU J dismissed a claim for US\$300 000 and awarded RTGS \$40 000. Looking at this particular case the court ordered appellant herein to pay ZW\$150 000 as damages for *contumelia* together with interest at prescribed rate and costs.

There were ten grounds of appeal which were inelegantly worded in that they were largely factual and repetitive in and of themselves hence unnecessarily superfluous in their quantity. However, the essence of their gravamen when crystallised were the following grounds of appeal:-

1. The court erred in finding the evidence of the respondent's wife credible since she said she had been raped but had never reported the case.
2. That the court erred in finding that the wife's evidence corroborated the respondent's circumstantial evidence when the respondent had admitted he had no evidence.
3. The court erred in relying on a single witness who was the plaintiff's wife considering that she had an interest adverse to that of the appellant
4. The court erred in ordering contumelia damages which induce a sense of shock and are out of sync with previously decided cases

The prayer was that the appeal succeeds and that the award of the court a quo relating to *contumelia* damages be set aside and substituted with a dismissal with costs.

Submissions

Mr *Unzemoyo* who argued on behalf of the appellant submitted that the gravamen of the appeal was that the court ought to have made a determination on credibility. Whilst acknowledging that findings of fact are the domain of the trial court, he submitted that there were instances where the court did not make a determination on credibility. In particular he pointed to the claim by respondent's wife that she had been raped on their first sexual encounter and that there was no plausible explanation why she failed to report. He also submitted that the wife had a personal interest in the outcome of the matter and that her

credibility flew away when she said she was raped. Regarding the use of circumstantial evidence, he argued that the court ought to have dealt with proved facts.

The respondent who was a self-actor submitted on the other hand that only his wife could have given the best evidence on the adultery and that she was the main witness. Regarding the rape his submission was that it was not correct that his wife had said she was raped and that in any event it was not his duty but hers to report the matter. His wife having been the author of an affidavit sworn to on the adultery, he submitted that she had come to court with respect to that affidavit. Whilst he admitted that the marriage had not yet been dissolved he stated that they were no longer living together. Regarding the appellant's challenge of the quantum the respondent submitted that the appellant still has his shop and butchery and also works at Old Mutual. He also submitted that the amount should take into account inflation and that he needs the money to start the divorce process. There was also said to be no contrition on the part of the appellant who had instead been threatening the respondent with death.

The appellant's lawyer stood by his submissions and emphasised that the quantum was high and that adultery damages should not be the road to riches. On damages appellant sought to pay ZW\$50 000 as damages with interest at prescribed rate in the event that his appeal was not upheld.

Analysis

The failure to report rape does not mean that a witness is not credible since there are many reasons why rape victims do not report such as fear of losing the marriage. Furthermore, in a 1998 study entitled Culture and Choice Lessons from Survivors of Gender based violence in Zimbabwe; one author Alice Armstrong unearthed that:-

“People in the study reported a “cultural attitude that all sex involves a degree of force, particularly the first time because women are not supposed to say “yes” to sex”.¹

Also if the respondent and his wife were out to milk the appellant, there is no reason why he failed to report them to the police. The ground of appeal that the respondent's witness should have been disbelieved simply because she had stated that the first sexual encounter with the appellant was rape is lacking in merit and is dismissed.

¹ Alice Armstrong Culture and Choice: Lessons from Survivors of Gender Violence in Zimbabwe Harare 1998 at p 76.

Turning to the essence of the second ground of appeal that in actuality the respondent had no evidence against him, suffice it to point out that the magistrate was very clear on the aspects of the circumstantial evidence that were taken into account in arriving at the decision. These have been adequately captured in summarising the magistrate's findings of fact in this judgment. In *Khumalo v Mandishona* 1996 (1) ZLR 434 (HC) it was stated that in a case where a person is claiming damages for adultery, the court is entitled to rely upon the evidence of a single witness who is the innocent spouse, if it is satisfied that he or she is a credible witness. But in order not to be misled by a plausible witness, it was said that the court has the discretion to seek some form of corroboration. The wife's direct evidence of her experience of adultery with the appellant filled this lacuna.

As to the third ground of appeal that the wife was an interested party, she was entitled to give her evidence having been the other party to the adultery. We are in agreement with the respondent that only she could have given the most direct evidence and the court in this instance believed her. There is nothing in the findings of the magistrate on facts that induces one to conclude that no reasonable court hearing that evidence would have reached that conclusion. That ground too is dismissed. Further, on the credibility of witnesses suffice to state that the standard of proof in civil matters is a balance of probabilities.

Turning to the issue of damages, what is notable is that the respondent had claimed the same amount for *consortium* and *contumelia* in the court below. As explained, in the Supreme Court case of *Misho v Sithole* 1992 (1) ZLR 291 (SC) the claim for adultery damages falls under two main heads, namely loss of *consortium* which could include loss of love, companionship, sexual privileges and assistance in good and bad times which a spouse is entitled to expect and consequent mental distress. The second head for claiming is *contumelia* encompassing the infringement of privacy, dignity and reputation. As discussed therein, the main element under which damages are awarded is loss of *consortium* which in this case there had been found to be no loss of consortium. The loss is regarded as less where the respondent has condoned the adultery and the marriage still subsists. It will also be less where to the knowledge of the other spouse the offending spouse has previously been unfaithful with various women and thus the possibility of the adultery occurring is not unexpected and the distress caused by the adultery is not so severe as it otherwise could have been.

In this instance the court found no loss of consortium not because there was no adultery but because it reasoned that the marriage had not fallen completely apart as the parties were still married. Suffice it to say that the reason why loss of consortium in particular is the major category for the award of damages under a claim for adultery is because it goes to the heart of compensating a wronged party for the loss of their marriage as a result of the interference by a third party. Indeed the argument in support of the continued recognition of adultery as a tort or delict, is that just as the state protects business entities from interference by third parties there is no reason why the state should stop doing so in the case of a marriage which has been interfered with by an adulterous party². Marriage being a contract is treated as no exception when it comes to protection from sabotage by third parties.

Contumelia, on the other hand, compensates for injured feelings, pain and suffering. Though damages under both these categories are difficult to quantify, courts nonetheless award damages though they will be at a somewhat lower level for *contumelia*.

As to the quantum for loss of consortium and *contumelia* the factors taken into account as outlined in the case of *Misho v Sithole* above include:-

- (a) the character of the woman involved;
- (b) the social and economic status of the plaintiff;
- (c) whether the defendant has shown contrition and has apologised;
- (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.

From the factual circumstances we cannot fault the lower court for finding *contumelia* damages due. Whilst finding that there was no loss of consortium because the marriage has continued to subsist, the lower court clearly erred in giving *contumelia* damages at the same level as those that had been claimed for loss of *consortium* given that *contumelia* is not the main category for the award of damages. Whilst magistrate drew attention to the case of *Tapiwa Shiri v Owen Vere* HH 65/20 where MANZUNZU J dismissed a claim for US\$300 000 and awarded ZW\$40 000 it must be borne in mind that the local currency has been devaluating rapidly and what was ZW\$40 000 in 2020 is not the same value to date. The

² For a discussion as tort see Lance McMillian, *Adultery as Tort*, 90 North Carolina Law Review. 1987 (2012). Available at: <http://scholarship.law.unc.edu/nclr/vol90/iss6/5>

appellant himself said he would be willing to pay ZS50 000 if this court so ordered. In reality the issue of his ability to afford the amount awarded is not the point as the court did take into account his personal circumstances and the factors that are to be considered that are outlined above before it awarded the ZW\$150 000. What this court considers relevant is that the two categories were claimed at the same amount yet damages for *contumelia* are generally less. Taking this reality into account as well as the stark realities posed by the current economic situation, this court therefore reduces the award of *contumelia* damages to be made from ZW\$150 000 to ZW\$100 000 on account that they are not the main category of damages and ought to have been less.

1. The appeal therefore succeeds in part with each party paying their own costs.
2. The order of the court *a quo* relating to the award of *contumelia* damages to read as follows:
 - a. The defendant is ordered to pay ZW\$100 000.00 as adultery damages for *contumelia* together with interest thereon at the prescribed rate calculated from the date of summons to the date of payment in full.
 - b. The defendant is ordered to pay costs of suit.

MAXWELL J:.....AGREES

Musara, Mupawaenda & Mawere Legal Practice, appellant's legal practitioners