

JUDITH TIKIWA  
versus  
MAKOMBORERO ADIYOLAH CHARLIE

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, 25 September 2014

### **CIVIL ACTION**

*N. P. Munangati, Manongwa* for plaintiff  
*O. T. Sanyika*, for defendant

CHITAKUNYE J: On 24 April 2012 the plaintiff issued summons against the defendant claiming adultery damages in a total sum of USD 25000-00 and costs of suit. The plaintiff alleged that the defendant committed adultery with the plaintiff's husband, Major Mejasi Tikiwa, leading to the plaintiff suffering damages in the sums of USD 15 000-00 for loss of consortium and USD 10 000-00 for *contumelia*.

The brief facts of the case were that:- In 1994 the plaintiff and Major Mejasi Tikiwa married each other under customary law. Their marriage was apparently unregistered. On 6 December 2001 their marriage was solemnised in terms of the Marriages Act, [*Cap 5:11*].

The marriage was blessed with 3 children whose ages were given as 17, 15 and 9 years respectively.

During the formative years of the marriage the plaintiff was employed as a secretary/receptionist. She later left employment in agreement with her husband so that she takes care of the family as a full time house wife.

In her declaration the plaintiff alleged that in November 2011 she discovered a love message on her husband's phone from the defendant. She reacted by replying to the message and advising the defendant that she was married to Major Mejasi Tikiwa in terms of the

Marriages Act [*Cap 5:11*] and that they had three children so could the defendant stop the relationship with her husband.

Despite this response the defendant proceeded to commit adultery with the plaintiff's husband. This adultery has continued to date. In fact, in January 2012 the plaintiff's husband left the matrimonial home to go and cohabit with the defendant at stand 1776 Area D Westgate. This is her husband's property which he had apparently acquired without her knowledge.

As a result of the adulterous relationship the plaintiff alleged that she has suffered loss of consortium by the reason of the loss of comfort, society, love, companionship and assistance provided by her husband. She pegged her damages for loss of consortium at USD15000-00.

The plaintiff further alleged that by virtue of the continued adulterous relationship, she has suffered damages by way of the *contumelia* inflicted upon her by the defendant in the sum of USD10 000-00. That *contumelia* is aggravated by the flagrant conduct of the defendant who has openly portrayed a picture of being married to the plaintiff's husband and even borne a child out of that relationship.

In her plea, the defendant denied committing adultery. She contended that at the time she went into a relationship with the plaintiff's husband she was not aware that he was married and more so in a monogamous marriage. She further contended that in any case she understood that the plaintiff's marriage to her husband had gone sour; their marriage had irretrievably broken down when she came onto the scene.

The defendant denied that she was cohabiting with the plaintiff's husband. She at the same time contended that the plaintiff literally drove her husband out of the matrimonial home and straight into the solace of the defendant's arms. As a consequence of this the plaintiff did not suffer any loss of consortium. No damages are therefore due to the plaintiff. The parties' positions were crystallised in a joint Pre-Trial Conference minute. In that minute the parties agreed that:-

1. The plaintiff's husband is legally married in terms of the Marriages Act, [*Cap 5:11*];
2. The plaintiff's husband issued summons for divorce in February 2012;
3. A child was born out of the relationship

4. When the defendant is in Zimbabwe, she stays with plaintiff's husband at No. 1776 Westgate, Harare.

Issues for determination were captured as follows:-

1. Whether the defendant knew that the plaintiff's husband was married to the plaintiff at the same time she was engaged in an intimate relationship with him.
2. Whether the plaintiff suffered any damages due to the adultery and the quantum thereof.

Though both parties had indicated that they would be calling two witnesses each, only the plaintiff and defendant testified.

1. WHETHER THE DEFENDANT KNEW THAT THE PLAINTIFF'S HUSBAND WAS MARRIED TO THE PLAINTIFF AT THE TIME SHE WAS ENGAGED IN AN INTIMATE RELATIONSHIP WITH HIM.

The plaintiff's evidence was basically a confirmation of how she got married to Major Mejasi Tikiwa, firstly under customary law and subsequently in terms of the Marriages Act; [Cap 5:11]. She alluded to the lifestyle they led as a family and the fact that before the defendant came onto the scene they lived happily together as a family with her husband.

The plaintiff's evidence on this issue was to the effect that in November 2011 she discovered a love message sent by the defendant to her husband on her husband's mobile phone. When she saw the message she reacted by replying using the same mobile phone advising the sender that Major Tikiwa was married to her in terms of the Marriages Act and so the sender should stay away from him. This is how she hoped the defendant, as the sender, would know about the marriage. After this she never saw similar messages on her husband's phone again.

The defendant on the other hand contended that she never saw any message advising her of the marital status of Major Tikiwa and telling her to stay away from him. She thus continued with the relationship and would phone Major Tikiwa at anytime of the day and night without any hindrance. Each time they phoned each other they would talk for long on the phone. This tended to confirm to her that her lover was not married.

The circumstances of this case are such that the issue of whether the defendant knew that her lover was married to the plaintiff at the time she was engaged in an intimate relationship with him is no longer crucial. Even if one were to accept the defendant's story

that at the inception of the relationship she was not aware of the marriage, it is common cause that even after being fully aware of the marriage and being served with summons in this matter, she has continued with the relationship. The defendant was heard to say she cannot stop the relationship because there is now a child between them and that in any case the plaintiff's husband has sued for divorce and so the plaintiff's marriage is all but over.

Adultery is basically the act of sexual intercourse between a married person and someone other than their legal partner. If at the inception the defendant was not aware that her lover was married, when she became aware that he was in fact married to the plaintiff in terms of the Marriages Act [*Cap 5:11*] she did not stop the relationship. She has continued being intimate with a man she knows is married in terms of the Marriages Act. She in fact said that she cohabits with him as man and wife whenever she is in Zimbabwe. Clearly the defendant has no regard to the sanctity of marriage.

Accordingly, the defendant did commit adultery with the plaintiff's husband and continues to do so to date with impunity.

## 2. WHETHER THE PLAINTIFF SUFFERED ANY DAMAGES AS A RESULT OF THAT ADULTERY AND THE QUANTUM THEREOF.

The contentious issue is thus whether plaintiff suffered any damages as a result of that adultery and the quantum thereof.

The plaintiff's evidence was to the effect that she suffered damages as a result of the adulterous relationship the defendant had and still has with her husband. The damages consisted of loss of consortium and contumelia.

It was her evidence that for about 17 years she lived well with her husband. However, from the time she discovered that the defendant was having a relationship with her husband things changed. From about December 2011 the husband started sleeping out which conduct he never used to do except when he was out of the country on duty. He was no longer eating from home. The husband began denying the plaintiff her conjugal rights in the home.

Whilst previously they would go on holidays as a family, this ceased. In December 2011 they did not go on holiday as had become the norm. For the first time they had a miserable December festival period in their family. The husband left for Malawi leaving the family with inadequate money for a decent meal at Crown Plaza Hotel.

As things unfolded she was alerted to a picture on facebook which depicted her husband, the defendant and two other women. Inscribed on it was a message to the effect that the defendant had 'caught' a wealthy man for herself and she would not let go. The fact of this publication made her feel hurt and humiliated.

After this publication she received numerous phone calls from friends and relatives concerning that publication and this added onto the pangs of hurt and humiliation.

In January 2012 the plaintiff's husband deserted the matrimonial home without explaining himself.

On 1 February 2012 the husband issued summons for divorce. Upon being served with the divorce summons the plaintiff began her own investigation to ascertain what was happening. It was during this investigation that she discovered that her husband was staying at 1776 Westgate and was cohabiting with the defendant. She also discovered that the property they were cohabiting at belonged to her husband. The husband had apparently not disclosed to her his acquisition of this property.

It was after the investigation that in April 2012 the plaintiff issued summons in this case seeking adultery damages against the defendant.

The plaintiff testified that as a result of the adultery relationship she lost love, care, support, companionship and assistance of her husband. The motor vehicle she was using was taken by the husband on the pretext of taking it for service and never to be returned. She now had to use public transport. That in itself was a form of humiliation for one who had gotten used to driving her car for so many years of the marriage.

She also testified that her husband stopped supporting her financially and she had to sue him for maintenance of which she was granted a sum of USD1 200-00 per month. The husband also began neglecting the couple's children. The plaintiff had to sue for the maintenance of the children. A maintenance order was granted in the sum of USD1 800-00 per month for the three children.

It was the plaintiff's testimony that these difficulties were all as a result of the defendant having intruded into her marriage and the husband now concentrating on providing for the defendant at the expense of his family.

The defendant's evidence on the other hand was to the effect that the plaintiff's marriage had broken down before she came onto the scene and so she should not be held

accountable. She however, could not deny that her coming onto the scene had its own consequences in that for the first time in the plaintiff's marriage she had to sue for maintenance both for herself and for the children. The plaintiff was also relieved of the car she had been using as Mrs Tikiwa. The question of conjugal rights is incontrovertible in that it is only the plaintiff who could credibly testify as to when she began to be denied of these rights. Equally the fact of now suffering from hypertension was not disputed. The stress and anguish the plaintiff underwent as a result of the husband's neglect of the family could not be denied.

The defendant also contended that the plaintiff's husband had been in love with one Tendai and so she could not be held accountable for the loss of consortium and *contumelia* as clearly the plaintiff's husband was already looking for sexual satisfaction somewhere else because of the plaintiff's shortcomings.

It is my view that the contention that Tendai had also been in love with the plaintiff's husband could not be a defence. The plaintiff clearly admitted that but went on to say Tendai apologised and stopped the relationship. Tendai's relationship did not result in the plaintiff being denied what she had become accustomed to as the wife to Mr Tikiwa. Mr. Tikiwa was also said to have apologised to his wife for his indiscretion with Tendai. The defendant could not rebut this evidence.

It is clear that whatever state the marriage was in prior to the defendant's intrusion, it was such that the plaintiff still enjoyed the companionship, society and services of her husband. She was still provided for by the husband. There was no loss of consortium.

Consortium is basically the association between husband and wife which embraces companionship, love, affection, comfort, mutual services and enjoyment of conjugal rights. A wife has a right to the *consortium et servitium* of her husband; that is to his society and services.

*In casu*, there is no doubt that the plaintiff has lost the companionship, society and services of her husband. The husband has abandoned the plaintiff and the children to go and cohabit with the defendant. The defendant has with impunity encouraged that by clinging onto the plaintiff's husband and vowing not to let go.

Whilst before the defendant's intrusion the plaintiff's husband may have been unfaithful he never abandoned his family. Indeed, that infidelity on his part is frowned upon

but it did not lead to actual loss of consortium. It is the relationship with the defendant that led to actual loss of consortium being complained of here.

In *Khumalo v Mandishona* 1996 (1) ZLR 434 at p 448-449 MALABA J had this to say on damages for loss of consortium:-

“I now turn to assess damages for the loss of consortium. The most important factor under this head is that there should be proof of actual loss of consortium. In other words, the wife should be shown to have left the matrimonial home as a result of the adultery.

Damages for loss of consortium are aggravated where the adultery has led to the breakup of the marriage. The plaintiff should not only show loss of consortium. He should also show that the loss was a result of the adultery the defendant committed with his wife and that he suffered damages as a result of the loss of consortium.

Where the defendant is not shown to have enticed the errant spouse to abandon his or her duties of providing the plaintiff with comfort, society and services the damages reduce.

The damages will also be low where the marriage is shown to have broken down in all but name at the time the adultery was committed.....

This is because the damages awarded constitute an estimated value of the comfort, society and services the guilty spouse would have continued to give to the plaintiff but for the adultery with the defendant. That award of damages seeks to put the plaintiff in monetary recompense as near as is reasonably practicable to the position he would have been had his wife not left him as a result of the defendant's adultery with her.”

*In casu*, it was only after the adultery had commenced that the plaintiff's husband abandoned his family and has not returned. It was also after he begun cohabiting with the defendant that he issued summons for divorce.

The coincidence whereby the husband sued for divorce only after commencing cohabiting with the defendant and the defendant's bragging that she had 'caught' a wealthy man and she will not let go clearly confirms the influence the adultery relationship has had on the plaintiff's marriage. The impunity with which the defendant has continued with the relationship served to confirm her determination not to lose her wealthy man.

I am of the view that the plaintiff certainly suffered damages for loss of consortium. Such damages must however be assessed taking into account all the circumstances of the case. I shall return to the factors after considering the issue of *contumelia*.

The question may be asked whether plaintiff has suffered *contumelia*.

*Contumelia* pertains to the injury, hurt, insult and indignity inflicted upon the plaintiff by the defendant as a result of the latter's adultery with the plaintiff's spouse.

The circumstances of the case show that plaintiff suffered *contumelia* as a result of the defendant's conduct. Apart from the facebook publication already alluded to, she also suffered the ignominy of being ostracised by her in-laws as a result of the defendant's intrusion. The defendant has waded into and ingratiated herself with the plaintiff's in-laws to an extent whereby the plaintiff is now viewed by some members of that family negatively despite the 17 years she lived in harmony with her husband. She is now not able to enjoy the fruits of the 17 years of working for the family.

The defendant has brazenly continued with the adulterous relationship despite becoming aware that her lover was in fact married. The defendant further exhibited her contemptuous attitude towards the plaintiff by not being remorseful or apologetic. Instead she seemed boastful in her stance of continuing with the adulterous relationship. The defendant gave the impression of someone celebrating the demise of the plaintiff's marriage and very eager to rub salt to injury.

It is my view that clearly the plaintiff has suffered *contumelia*. She has been hurt, treated with contempt and made to feel worthless by the defendant.

The assessment of damages in adultery cases is not an easy one. No sum of monetary value can be adequate to translate into the pain and anguish the plaintiff has suffered. The breakup of a marriage cannot be adequately compensated. As said by Colman in *Muller v Vink* 1972(1) PH B2-

“These losses and humiliation cannot be truly measured in money; and the practice of our courts has been to make rough and ready assessments whose amounts vary according to the circumstances of particular cases. In no sense can the award, in any case, be regarded even approximately as an assessment of the value of a happy marriage which has been broken up or the value of a faithless wife.”

Over the passage of time some basic factors have emerged as important in the assessment of damages. These include:-

- a) the character of the woman (or man) involved;
- b) the social and economic status of the plaintiff (and the defendant) ;
- 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;
- e) the level of awards in similar cases;

and, one may add, whether the plaintiff has suffered lack of consortium as well as *contumelia*, or just the latter.

In this case a marriage of 17 years standing was ruined by the adultery. Had the plaintiff not been a worthy wife the marriage could not have lasted for so long. Clearly there was some harmony and happiness in the family hence the longevity. The plaintiff impressed me as a woman of virtue dedicated to her family and Christian values. The defendant on the other hand gave the impression of a carefree woman who did not value the sanctity of marriage. To her it seemed a relationship with the plaintiff's husband was not an opportunity to miss despite his marital status. She had no regrets whatsoever about the consequences of her relationship with the plaintiff's husband on the plaintiff and the plaintiff's family. Clearly, she is selfish.

Further the defendant never showed any remorsefulness for her conduct. If anything she seemed to look at the plaintiff with scorn.

Another factor to note is that the prevalence of HIV cannot be overlooked. Acts of promiscuity are making a mockery of efforts to bring the spread of HIV infections under control. It is persons like defendant who seem to care less about marital status of their lovers who contribute to this problem. Indeed, the plaintiff's husband is not before me, but he is as guilty as the defendant in acts of promiscuity. If his attitude as portrayed by the defendant is true, he seems to care less about his family hence he had to be sued for maintenance for his family. It is time persons with the propensity for promiscuity were reminded that history will judge them harshly as uncaring spreaders of the deadly HIV virus.

In the assessment of appropriate damages court is expected to take into account the levels of awards in other cases. In this regard the most appropriate levels of awards are those that have been made after the multicurrency regime was adopted. In that regard I have considered some of the cases and circumstances of each case. I am of the view that whilst the awards range between USD 400-00 to USD 8 500-00 I should not lose sight of the circumstances of this case.

Cases noted included-*Chinyadza v Phiri* HH76/09 where a sum of USD 500-00 was awarded for loss of consortium; *Dera v Kambeza* HH 175/10 where a sum of USD400-00 was awarded for loss of consortium;

In *Jhamba v Mugwisi* 2010 (1) ZLR 124 where a sum of USD500-00 was granted for both loss of consortium and *contumelia*. The court holding that the plaintiff had by her conduct impliedly condoned the adultery hence the low figure; *Chenesai Rateiwa v Tsitsi Venge* HB152/11 where an award of USD4 500-00 for *contumelia* and USD1500-00 for loss of consortium was granted; and *Monica Muerudza v Ropafadzo C. Magora* HC 6334/13 where a sum of USD 8 500-00 was granted. In *Muhwati v Nyama* 2011(1) ZLR 634 damages in the sum of USD 5000-00 were granted for both *contumelia* and loss of consortium.

The level of awards that images since dollarization is of sums between USD 400 and USD 8500. That range takes into account the various factors alluded to above in each individual case.

*In casu*, there is not much to mitigate the defendant's conduct. The plaintiff has lost a well to do husband whose financial status was such that she reasonably expected to lead a good and comfortable life. That has all been deprived of her by the defendant's intrusion. She has virtually lost a lifelong investment in a marriage. No monetary compensation can be adequate to compensate for that. Though effort was made to portray her marriage as having been on the rocks, such effort was not supported by evidence. The marriage may not have been in its blissful years but it was certainly not over and remaining on paper only.

It is also important to realise that no amount of award will dissuade a guilty spouse from promiscuity. This court can only discourage incidences of adultery by awarding damages that take into account the circumstances of each case. The punishment for the defendant must be such as to dissuade her from such conduct without being unduly harsh. I am of the view that this case deserves a high level of award. The arrogance with which the

defendant approached the case shows she is little moved by the action. It is only proper that court expresses its displeasure at such attitude by awarding punitive damages.

After a careful consideration of the circumstances of this case I am of the view that a fair and reasonable award is a total sum of USD6 500-00 being USD3 000-00 for loss of consortium and USD3 500-00 for *contumelia*.

The plaintiff asked for costs of suit. I am of the view that she is entitled to the costs. The plaintiff had become dependent on her husband for support and that husband has been taken away by the defendant who is not apologetic. The defendant if anything, ought to have admitted adultery from inception and this could have saved the plaintiff a lot of costs. I am however, not persuaded to grant such costs on a higher scale as requested by the plaintiff. Costs will thus be on the ordinary scale.

Accordingly, it is hereby ordered that the defendant pays the plaintiff adultery damages in the total sum of USD6 500-00 with interest at the prescribed rate. The defendant shall pay the costs of suit.

*Munangati & Associates*, Plaintiff's Legal Practitioners  
*Messrs Matipano & Matimba*, Defendant's Legal Practitioners.