

PAULINE MUYAMBO  
versus  
EUNICE BERE

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE, March 16, 2007

**Civil Trial**

Mr *Kwaramba*, for plaintiff  
Mr *Kwenda*, for defendant

CHITAKUNYE J: The plaintiff sued the defendant for adultery damages in the sum of \$60 000 000-00 (old currency). The claim was amended to \$5 000 000-00 (revalued) before the commencement of trial.

The defendant denied liability contending that she was not aware of the marital relationship between the plaintiff and the plaintiff's husband.

The issues for determination comprised:

1. whether the defendant was aware that the plaintiff and her husband were married;
2. whether the relationship between the defendant and the plaintiff's husband is an adulterous relationship;
3. whether the plaintiff is entitled to damages as claimed; and
4. quantum of damages.

The plaintiff gave evidence after which the defendant testified in person. The plaintiff tendered her marriage certificate in evidence. The marriage was solemnized on 23 February 2000 in terms of the Marriages Act [*Chapter 5:11*]. That marriage still subsists. The plaintiff's evidence was to the effect that she had been staying in Gokwe with her husband. Both of them were working. Her husband Godwin Muyambo lost his job. He later secured employment with First Bank Mutare Branch. She remained in Gokwe for about a year. They

would meet once a month. Later she moved to join him in Mutare. She then noticed that there was a lady who was dropping her husband by the gate. She inquired with her husband who gave out an explanation. As that lady continued to come to pick and drop her husband by the gate she made effort to confront her but the lady reversed quickly and drove off. Her husband assaulted her for her efforts. In agreement with her husband she left for United Kingdom. She came back after five months. She observed that that lady was still picking up and dropping her husband as previously. She eventually confronted this lady who is the defendant at Muyambo's work place and assaulted her. In between she had communicated with the defendant after discovering a message left by the defendant meant for her husband. She had made it clear to the defendant she was Muyambo's lawfully wedded wife. That apparently did not deter the defendant till the physical confrontation at Muyambo's work place.

Efforts by their church elders to intervene and stop the relationship between the defendant and the plaintiff's husband were fruitless.

Eventually the plaintiff's husband left this matrimonial home and went to live with the defendant. According to the plaintiff it is the defendant who in fact came with the defendant for him to pick up his clothes and she left with him. This was in 2003. Since then her husband has not come back home. It was the plaintiff's evidence that the defendant must have known that the plaintiff's husband was married. If she did not know at first then certainly the encounters she had with her were adequate for the defendant to realize that her boyfriend was in fact a married man.

The defendant's contention that she did not know that Godwin Muyambo was married could only go as far as the time when the plaintiff was in Gokwe. The defendant herself confirmed that she noticed that her lover was now jittery and no longer allowing her to get into his house as she had been doing before. The plaintiff's husband

had gone on to tell her that his estranged wife had forced herself onto him.

Surely that was adequate to warn defendant that she was dealing with a married man. The defendant's contention that the plaintiff's husband kept on telling her it was over between him and the plaintiff is without merit. If they had divorced surely the plaintiff would not have come to the house and even lived there. According to the defendant after the plaintiff returned from United Kingdom, the plaintiff and her husband stayed together for eight months after which the plaintiff's husband left the matrimonial home. Surely that is not the conduct of parties who are divorced. The defendant did not deny the several confrontations over the phone and physical by the plaintiff. She certainly became aware of the marriage but opted to continue with the relationship. If therefore she is given the benefit of the doubt regarding knowledge of the marriage at the inception of their relationship, she cannot be said to have not known even after those encounters.

Clearly therefore the defendant became aware of the marriage as soon as the plaintiff came to Mutare from Gokwe when the plaintiff's husband stopped her from entering his house.

The issue as to whether the relationship between the defendant and the plaintiff's husband is adulterous is obvious.

The marriage between the plaintiff and her husband still subsists. It is a marriage in terms of the Marriage Act [*Chapter 5:11*]. Any intimate relationship the plaintiff's husband may have outside that marriage is adulterous. The fact that the defendant claims to be married to the plaintiff's husband in terms of customary law is not a defence in this case. That union, if any, is a nullity and the defendant should surely have been advised of this by her legal practitioners. The woman the court recognizes as Godwin Muyambo, wife is the plaintiff.

The third issue is also quite obvious. The plaintiff is entitled to damages. She was clearly wronged by defendant. The defendant continues to wrong her with impunity. The real issue is on the

quantum of damages. The right to damages for adultery is usually under two separate and distinct heads namely contumelia and loss of consortium.

Contumelia incorporates the injury, insult and indignity suffered by the plaintiff as a result of the defendant's actions. Loss of consortium relates to the loss of comfort, society and service of the husband as a result of the adultery committed.

In the present case the plaintiff indicated that they were initially married under customary law in 1995. The marriage was later solemnized in terms of the Marriages Act [*Chapter 5:11*] on 23 February 2000. They enjoyed good relations. Prior to the adulterous relationship the marriage was stable. They had even agreed that she goes to the United Kingdom and after obtaining a permit, make arrangements for the husband to join her there. Unfortunately this did not work out that way and she returned after five months. They were also church elders at the church they attended. She has thus suffered in her good name and repute from the adulterous relationship. She felt greatly pained by the defendant's action especially that even when all was clear that she was in an adulterous relationship, the defendant did not stop.

On consortium it is common cause that as a result of the adulterous relationship, the plaintiff's husband left the matrimonial home and has not visited her. She thus has been deprived her rights as a spouse in a marriage. She has been deprived of the love, compassion, society and comfort of a husband.

To crown it all when she issued summons against the defendant, her husband as if in retaliation, issued summons for divorce. Though the defendant tried to say that the breakdown of the marriage had nothing to do with the adulterous relationship, it was obvious that the defendant was not serious.

She said this with disdain impunity or what I would term arrogance. Clearly the plaintiff's husband being nestled in the warmth of the defendant who provided him a car and a house in the low

density suburb and all the comfort of a woman out to out-do his lawful wife found himself unable to return to his matrimonial home.

The defendant's attempt to use the divorce summons to show that the reasons for the breakdown of the marriage had nothing to do with the defendant, was clearly mischievous. The summons was only issued after the plaintiff had commenced this case and it was intended as a defence to this case. If anything, the fact of the plaintiff's husband issuing that summons is an aggravating feature. It was also not in dispute that in 2003 the plaintiff suffered some form of shock and collapsed when her husband brought up the issue of divorce and division of matrimonial property. All this was as a result of defendant's relationship with the plaintiff's husband.

I am of the view that the defendant is directly responsible for the breakdown of the plaintiff's marriage. Her contention that at the time the plaintiff's husband propositioned her he told her he had had another lover by the name Patience, is not worth the effort it was made with. Clearly that is of no consequence. It is pure hearsay without any support. I am inclined to say the plaintiff deserves a good measure of damages. For lack of claims under separate headings the amount will be assessed globular.

The general principle is to look at decided cases for the range of awards. Unfortunately such range is no longer as useful as it used to be when our currency was stable. The loss of value of our currency has made the practice of comparison of awards extremely difficult.

In *Nyakudya v Washaya* 2000(1) ZLR 653 a total of \$20 000-00 was considered adequate for both contumelias and loss of consortium.

Such a sum would be meaningless today.

In *Nyandoro v Tizirai* HH 12-2006 a sum of \$100 000 000-00 was awarded for contumelia. With the revaluation that sum would have been \$100 000-00. This would again be very nominal today.

I am of the view that taking into account the aggravating features which include the defectod breakdown of the marriage, the defendant's persistence and lack of remorsefulness or apology to the

defendant. And also that as recognized by ROBINSON J in *Katsumbe v Buyanga* 1991(2) ZLR 256(H) at 258 H-259 A:

“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 the sexual morass over which the Monster Aids now presides in all its frightening aspects”.

Equally in *Nyakudya v Washaya (supra)* SMITH J noted the need to also consider the need for deterrent measures against the adulterer to protect the innocent spouse against contracting HIV from the errant spouse.

It is a reality that the Aids scourge demands that courts play the role in protecting the sanctity of the institution of marriage.

After weighing all the factors alluded to above, I am of the view that an appropriate award is a sum of \$1 500 000-00.

Accordingly judgment is entered for the plaintiff as follows:

- (1) \$1 500 000-00 (one million and five hundred thousand dollars only); and
- (2) costs of suit.

*Warara & Associates*, plaintiff's legal practitioners

*Chinamasa, Mudimu & Chinongwenya*, defendant's legal practitioners