

ALAN FRANK WALKER

Versus

KEVIN TAYLOR

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 22 MAY 2008

Ms N Ncube, for the plaintiff
K I Phulu, for the defendant

Civil Trial

NDOU J: The plaintiff sued the defendant for adultery damages in the sum of \$50 000 000,00 plus interest thereon calculated at the rate of 30% per annum from the date of service of summons to date of full and final payment. The plaintiff further prays for costs of suit on an attorney and client scale. The defendant disputes committing adultery with the plaintiff's wife at all. The plaintiff relies on circumstantial evidence in support of his case. He testifies that he has always suspected that the defendant was having an affair with his wife. According to the plaintiff, because the defendant spends a lot of time with his wife, it follows therefore that he committed adultery with her. The defendant vigorously disputed spending a lot of time with the plaintiff's wife but concedes that because the three were friends, they naturally spend some time together. I propose to deal with the testimony of various witnesses in turn.

Alan Frank Walker: He states that he knew the defendant from their schooling days at Hamilton High School, in Bulawayo. They again met in England their friendship further developed. The same happened when they returned to Zimbabwe. He said when he was still engaged to his wife in 1989 he started suspecting that the defendant and his wife [fiancé at the time] were having some

intimate relationship. He had brought her to Zimbabwe to introduce her to Africa. They were based in Bulawayo it seems. He decided to take her to Inyanga for holidays. She invited the defendant to join them in Inyanga which conduct did not go down well with the plaintiff. When they were in Inyanga he had a reason to be concerned by their behaviour towards each other to such an extent that he confronted his fiance and told her that their conduct was unacceptable and said to her that she should choose between him and the defendant. Obviously she chose him and he accepted the choice culminating in their marriage on 28 July 1990. Meanwhile the defendant went back to South Africa where he was resident at the time. He, however, returned to Bulawayo in the 1990s i.e. after the plaintiff had tied the knot with his wife. Once more he stated that he had reason to worry about the way the defendant socialised with his wife. He confronted his wife about what he viewed as their improper association. She told him that she had a right to have male friends. In 2000 he had a heated argument with his wife after he found her with the defendant at his house at night. As a result he left the matrimonial home for a period of ten (10) days. He, however, returned to the matrimonial home on condition that the defendant did not visit his wife at the matrimonial home. He said that on the day in question he had actually been at the Old Miltonians Sports Club with his wife. The defendant was also present without his own wife. His wife went and spoke to the defendant and when she returned she was in tears and demanded their vehicle keys. She told him not to worry and indicated that she was going home and he should remain at the club. About half to three quarters of an hour later a mutual friend offered him a lift home.

He wanted to go and ascertain what the problem was with his wife. When he got there he did not find the defendant but found his wife and one Dawn. His wife was under the influence of alcohol. She was no longer upset. He later heard from someone that in fact when Dawn arrived at their house, she found the defendant with his wife. He told his wife that he was going to confront the defendant on what gave him the right to go to his house at night and be with his wife when she was in a state of distress. His wife snatched the telephone receiver from his hand and told him not to confront the defendant as she was entitled to have her male friends at the house. That is what made him leave the matrimonial home for ten days as alluded to above. A year later his wife commenced divorce proceedings against him. He had reason to go back to the matrimonial home and their late domestic worker, one Nephi Ngwenya informed him that she had witnessed the defendant and his wife having sexual relations in the car. [In fact in the late Ms Ngwenya's "dying declaration" she stated that she only saw them kissing and fondling each other in the kitchen ... and they proceeded to the car and as it was dark she could not see properly but could only hear them making coupling sounds and she informed the gardener Debson Matshazi].

He said the defendant continued to see his wife at the Cattleman Restaurant on Friday afternoons. He was however not privy to what happened in the restaurant as he was a *persona non grata* there after he had had an altercation with the restaurant's owner. It seems he was just suspicious as he saw his wife and the defendant's vehicles parked there. He also mentioned an incident when he went back to her matrimonial house to give her maintenance money. They argued and during the exchanges she said even if she had sexual intercourse with the defendant she would

not change her divorce. He understood this statement to be an admission that she had had sexual intercourse with the defendant.

He said he confronted the defendant thrice about his association with his wife. First he confronted him at his place of business. The defendant ushered him out of the shop down the street and said it was embarrassing to talk about the matter in front of his customers yet the only person in his shop was his [defendant's] wife. The defendant denied any physical contact with his wife. He left to go to confront his [plaintiff's] wife and Nephi Ngwenya. By the time they were exchanges the defendant arrived. He said he did not know who had invited the defendant. His wife forced Ngwenya into the house and locked her inside. On confronting his wife, the defendant intervened and said words to the following effect "are you going to believe this k... bitch". He responded that he believed her and to this the defendant laughed loudly and uttered the words "Walker your marriage is over". He said he walked away leaving the defendant and his wife together.

He also testified that initially when the defendant moved to Bulawayo for the first three(3) months the defendant used to socialize with his (i.e defendant's) wife. But, thereafter, they hardly saw him with his wife. He also sought to introduce a "dying declaration" made by the late Nephi Ngwenya. [There is a dispute on whether it is indeed a dying declaration]. The plaintiff was cross-examined at some length. He stuck to his version throughout such examination. I am satisfied that he gave his testimony very well. He did not seem to exaggerate his story. He did not seek to say he saw the defendant and his wife indulge in sexual relations. He was open that he was relying on circumstantial evidence. He gave details of the source of his suspicion that the defendant and his wife were involved sexually. In such

circumstances he could have easily lied and said he witnessed a sexual encounter bearing in mind that the parties spent a lot of time together.

Debson Matshazi: He is an employee of the plaintiff, the latter having initially fired him between 1997 and 2001. He resumed working for him in July 2005. He stated that he knew the defendant as someone who used to visit at the plaintiff's place of residence where he worked. He also said he used to work with the late Nephi Ngwenya at the plaintiff's residence. Besides being a gardener, he used to carry out duties of receiving Mrs Walker's clients as she operated a beauty therapy business from the residence. As far as this matter is concerned he testified that on one night his employers left for drinks. He said they would usually return very late each time they went out drinking. Around 2300 hours Mrs Walker returned alone. He personally did not see her arrive but was called by Nephi Ngwenya who indicated that Mrs Walker arrived crying. He went to investigate the source of her tears with a view of assisting her. At that juncture the defendant arrived and they walked for a distance. He then observed the defendant comforting Mrs Walker by hugging her and telling her to stop crying. He was standing in a dark spot with Nephi Ngwenya. They were watching and he was surprised as he saw figures of Mrs Walker and the defendant in the dark. They were about ten (10) metres away and as such he could hear that they were breathing as "as if they were people making love". Under cross-examination he said on the night of the events he described he did not see the type of car the defendant was driving. He said when he heard the sounds described above, Mrs Walker and the defendant were behind Mrs Walker's vehicle a bakkie. He said because they were in the dark he could not say whether or not they were standing. His testimony is

consistent with what is contained in the affidavit of Nephi Ngwenya which I ruled admissible in terms of section 27 of the Civil Evidence Act [chapter 8:1]. I am satisfied that Debson Matshazi gave his testimony very well. He did not seek to be biased against the defendant. If he so wishes, he could have easily lied and said he actually saw the defendant and Mrs Walker indulge in a sexual act rather than seeing human shadows in the dark and hearing the two breathe as if they were making love.

Cathrine Walker:

Defendant's case opened with the evidence of Mrs Cathrine Walker. She said she knew the defendant as a friend for many years since 1987. She, however, denied that she had an extra-marital affair with the defendant which culminated in sexual intercourse. She however, confirmed that during the Inyanga holiday plaintiff seemed "unhappy" when they were in the company of friends, inclusive of the defendant but he never confronted her about the alleged affair between her and the defendant until 2000. Her testimony about this confrontation is the following. They went out for drinks on the evening in question at the club, they fought and she left the plaintiff behind and went home crying. After she left, the defendant, in the company of her female friend followed her to her home. She said she was crying because she realised that her marriage was over on account of the plaintiff's aggressive and abusive behaviour, especially when he was under the influence of alcohol. Before this incident, the plaintiff had assaulted her. After leaving the club she went home crying. The defendant arrived at her home followed by her female friend. The defendant advised her to give the plaintiff a second chance. He assured her that there is a good side of the plaintiff. Her female friend on the other hand was encouraging her to leave the plaintiff on account of his abusive conduct. Her female friend went away

after leaving her in the garden talking to the defendant. She was still crying on and off. She said the defendant's role was that of a very good friend who was trying to stop her from crying [giving her a shoulder to cry over]. The plaintiff was dropped off by a friend and found them still together in the garden. The plaintiff shouted to the defendant "what are you doing with my wife?" The defendant drove off.

She categorically denied ever enjoying any sexual relations with the defendant. She disputed the testimony of Ms Ngwenya that she and the defendant were in a car enjoying intimate company of each other. She confessed anger towards the plaintiff but said that was not the reason why she agreed to testify on behalf of the defendant. She decided to testify in order to tell the truth. She said, the plaintiff's conduct of assaulting her three times was the cause of the breakdown of their marriage. She said that the defendant was not the cause of the breakdown. She, however, conceded under cross-examination that she did not give the plaintiff's alleged violent conduct as the cause of breakdown in her divorce papers. From her testimony, the plaintiff was not amused by her association with the defendant yet she continued to associate with him. She called her association with the defendant as mere friendship. She said that she did not stop the friendship despite the plaintiff's expressed displeasure with it. Why would she risk her marriage of years by the continued association with the defendant? Why would she entertain him at the matrimonial home after leaving the club unceremoniously when the plaintiff raised objections about her dancing with the defendant? She was close to the defendant and he cared for her and she cared for him to the detriment of her own marriage. But, such close association does not necessarily mean that they had sexual relations. There

must be direct or circumstantial evidence evincing such sexual relations. I hold the view that she was not entirely truthful about her relationship with the defendant.

Kevin Taylor:

The defendant, testified also. He confirmed that he had known the plaintiff for several years as they were at school together in Bulawayo's Hamilton High School. They were friends at school but not close friends. He flatly denied any sexual intercourse with the plaintiff's wife. He, however, generally confirmed what his witness stated in court. He confirmed his close association with the last witness and the plaintiff's disapproval of such association. He could not explain why he kept associating with plaintiff's wife in the face of such open hostility from the plaintiff. In fact he testified that at some stage his association resulted in nasty exchanges when he confessed that he called the plaintiff "crazy" in the presence of his wife and a domestic worker. It would have been easier for him to keep away from the plaintiff and his wife and concentrate on his own family. His constant involvement indicates that he was very protective of the plaintiff's wife. It is clear that he was the source of their bitter confrontation. I am satisfied that the defendant is not being truthful about his association with the plaintiff's wife.

In this case the plaintiff is relying on circumstantial evidence to establish sexual relations between the defendant and his wife. For years, the plaintiff had harboured a suspicion that adultery was taking place between the defendant and his wife but never caught them red handed in the act. The evidence of Dabson Matshazi is crucial. He did not see the exact act as such, but on the day of the club incident he did not see the plaintiff's wife arrive. He was called to the scene by the late Nephi

Ngwenya as she was crying. He went to investigate but the defendant arrived and he decided to watch from a distance. He then saw the defendant hugging and comforting the plaintiff's wife. Thereafter he saw the figures in the dark and then breathing as people making love. This evidence was confirmed by that of the late Nephi Ngwenya

in her affidavit, *supra*. The only inference to be drawn from the testimony of these two is that the defendant was having sexual relations with the plaintiff's wife.

I am satisfied that there is sufficient evidence to establish on a balance of probability that the defendant committed adultery with the plaintiff's wife. On the question of damages I am satisfied that the amount of \$50 million was appropriate.

Accordingly, I order that the defendant pays the plaintiff the sum of \$50 million as adultery damages together with interest thereon at the prescribed rate from 14 November 2002 to date of payment in full. The defendant shall pay costs of suit on the legal practitioner and client scale.

Lazarus & Sarif, plaintiff's legal practitioners
Coghlan & Welsh, defendant's legal practitioners