

JOHN GORE
versus
SIMON CHIWARE

HIGH COURT OF ZIMBABWE
UCHENA and MWAYERA JJ
HARARE, 27 May 2014 and 12 June 2014

Civil Appeal

T. Matiyashe, for the appellant
Ms N. Mazhandu, for the respondent

MWAYERA J: The appeal was occasioned by an award of adultery damages of \$2 200 or delivery of 5 herds of cattle by Chivi Magistrate court on 14 March 2013. The court *a quo* upheld the determination of the Chivi chief on award of adultery damages. Irked by the confirmation of the quantum of damages the appellant approached this court and highlighted the following grounds of appeal;

1. the learned magistrate misdirected himself in making a finding of fact that the respondent had established or proved on a balance of probabilities that he is entitled to such an amount of damages and that the woman in question was married to the respondent despite the fact that they were living separately for more than two years.
2. the court *a quo* further erred in awarding such a windfall of damages to the respondent without at all any justification for doing so. In any event damages for two consenting adults can only be exemplary not punitive. In this particular instance the court failed to take into consideration the fact that the two parties were living apart for more than two years and the respondent had neglected her. The appellant prayed that the appellant be directed to pay \$200 or 1 herd of cattle.

There are common knowledge aspects worth noting for ease of the judgment. It is clear from the record that both the appellant and the respondent's wife Molyne admitted having an adulterous relationship which resulted in a child being born. It is not in dispute that when the adulterous relationship commenced the lady Molyne was actually staying at her matrimonial home and she only moved away when she was 6 months pregnant. Further it is common cause that the appellant and the respondent were related as uncle and nephew and that the respondent was working in South Africa. It is also not in dispute that the nephew that is the appellant lured the woman Molyne into the affair when she was still married to his nephew and staying at the nephew's residence. The luring was with promises of material gains from the appellant as gleaned from the record.

To sum up the common cause aspects one can aptly point out that the luring of a nephew's wife led to an adulterous relationship which culminated in the 'birth of a child and destruction of a marriage relationship. What this court is called upon to grapple with is whether or not the amount of damages handed by the chief and upheld by the magistrate is reasonable in the circumstances. We are alive to the argument by the appellant that there was no breakdown as to *contumelia* and loss of consortium but that does not change the complexion of adultery damages. Adultery damages are without debate, for injury, hurt, insult, iniquity and loss of comfort and companionship. Adultery damages were granted together with costs in the total sum of \$2 200-00. Failure to use the term *contumelia* and loss of consortium does not in any way hamper proof of claim for adultery damages.

In coming up with a reasonable quantum of damages the court has to look at among other things, the harm occasioned which would encompass the marriage status, the character of the woman involved, the status social and economic of the plaintiff. The character of the defendant on whether he has shown remorse or contrition also comes under scrutiny. The manner in which adultery was committed in the wake of the AIDS pandemic, and to uphold the social moral fabric and the need to instil discipline and a civil way of interaction among humans also fall for consideration. The list is in exhaustive but baseline parameters can easily be formulated across the board. In the case of *Katsumbe v Buyanga* 1991 (2) ZLR 256H at pp 258-259 ROBISON J highlighted factors relevant to assessment of adultery damages and he aptly remarked on the need to uphold the moral fabric which remarks I subscribe to. He remarked. "Before addressing myself to the quantum of damages to be awarded to the plaintiff, I wish to say that, in my view, where a third party is shown to have intruded sexually upon a marriage and to have contributed to the breach of the duty of

marital fidelity which each spouse owes the other by committing adultery with the one spouse, the court in the absence of mitigatory circumstances, should be seen in their award of damages, to come down hard on the adulterer or adulteress as opposed to treating him or her with kid gloves for a variety of expedient reasons. The courts should ensure as far as is reasonably possible, that aggrieved spouse who approaches them is not made to feel after the award of damages that the adulterer or adulteress has been the winner and that it would have been better for the aggrieved spouse to have taken the law into his or her own hands. (underlining my emphasis). Hopefully we have not reached the stage where we have to be told that adultery is not something to be eschewed and condemned. Accordingly, unless they are prepared to take a strong and principled stand in this regard in support of 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 frightening aspects."

In casu, the appellant did not show any remorse or contrition by apologising to his uncle but exhibited some indifference and sought to blame the adultery on the long distance relationship between respondent and wife occasioned by economic needs to work in South Africa.

The pain and suffering occasioned cannot be understated given that the relationship, the breach of trust, the resultant adultery leading to pregnancy and an offspring. Clearly the risk of transmission of STI and the deadly HIV virus is high as evidenced by the pregnancy showing the sexual encounters were unprotected. That further perpetuates and heightens the pain and injury. The occurrence of adultery at the respondent's matrimonial home further compounds the situation as it lowered the respondent's social esteem in a rural community where his homestead and family was while he was sourcing for livelihood in South Africa. The respondent's wife was viewed as a married woman and she only fell out of virtue when the adultery was committed and for the obvious pregnancy she had to leave her matrimonial home. When wholistically viewed these aspects taken into consideration in conjunction with need to maintain the moral fabric it is clear the quantum of damages considered by the chief and upheld the court *a quo* cannot be held to be outrageous and unreasonable. Infact counsel for the appellant conceded the suggested \$200 in the circumstances was too little. The truth of the matter is that no amount of money can replace the pain and suffering occasioned by adultery but the court has to make a reasonable assessment in line with the circumstances of

the case. Having considered the circumstances of his cases the pain and humiliation caused. We find no fault in the court *a quo*'s findings in fact the damages awarded are in sync with cases of similar nature dealt with by this court. The following cases are instructive. *Chipo Dera v Cynthia Kambeza* HH 175/10 KUDYA J after a protracted trial held that adultery had been proved. He awarded a total of \$1 200-00 as damages for adultery together with interest.

In the case of *Martha Muhwati v Yeukai Purity Nyama* MAWADZE J after consideration of factors relevant in arriving at an estimate of damages due in an adultery claim initially pegged at \$20 000-00 awarded a total of US\$ 000-00 as damages for adultery together with interest. The judge in that case considered the levels of awards in similar cases together with the other relevant factors and observed that the level of damages for *contumelia* and loss of consortium range between US\$800-00 – US\$5000-00, depending of course on the circumstances of the case. He cited among others cases like *Khumalo v Mandishona* 1996 (1) ZLR 434, *H Mtungwazi v Sibanda* HB 61/90, *Nyandoro v Tizirai* HH 12/06, *Timothy Chinyadza v Melton Phiri* HH 76/09 and *Chipo Dera v Cynthia Vambeza* HH 175/10.

Given the circumstances of this case in light of precedent there is no basis for reading a misdirection in the court *a quo*'s award of damage.

We accordingly find no merit in the appeal and in the result, IT IS ORDERED THAT:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the costs of the suit on the ordinary scale.

MWAYERA J:.....

UCHENA J agrees:.....

Mangwana & Partners, Appellant's Legal Practitioners
Koto and Company., Respondent's Legal Practitioners