

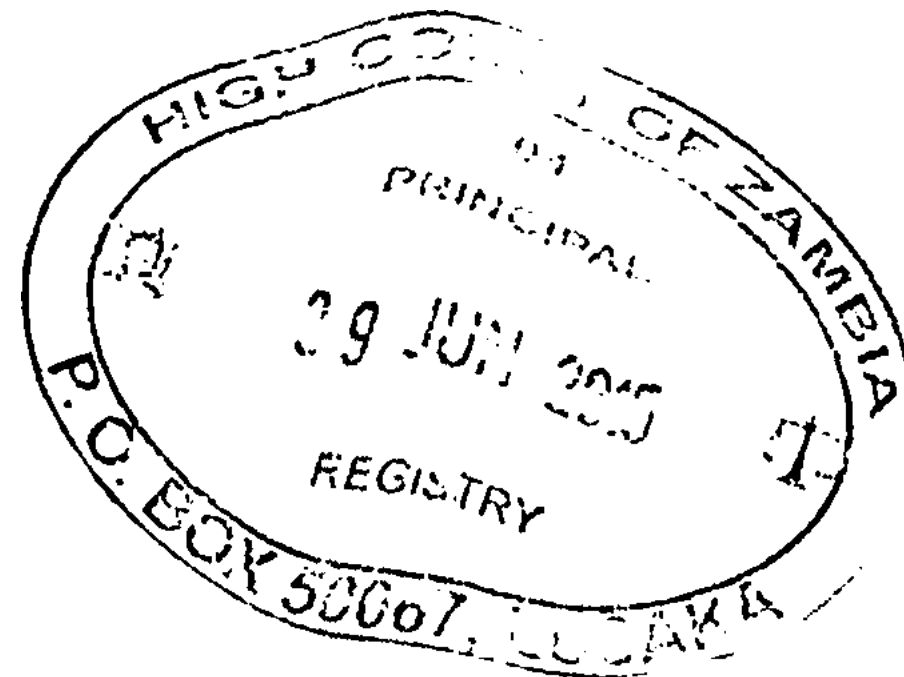
IN THE HIGH COURT FOR ZAMBIA

2012/HP/D119

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Divorce Jurisdiction)



BETWEEN:

MARY KAMPAMBA CHANDA

PETITIONER

AND

LINUS CHANDA

RESPONDENT

BRIDGET SIAMASIKU

CO-RESPONDENT

Before the Hon. Mrs. Justice A.M. Banda-Bobo on the, 2015.

For the Petitioner: Mrs. R.P. Bwalya - National Legal Aid Clinic for Women.

For the Respondent: Mr. D. Bwalya - M/s Lloyd Jones & Collins - Lusaka.

JUDGMENT

Cases referred to:

1. *Venter V Venter & Joubert, (1966) ZR 60 HC*
2. *Butterworth V Butherworth & Engelfield (1920)*

Legislation and other authorities referred to:

- *Matrimonial Causes Act No. 20 of 2007.*

On 22nd August, 2012, the Petitioner herein petitioned for the dissolution of her marriage, which marriage was legally contracted on 17th December, 1994, pursuant Section to 9(1)(a) and (b) of the **Matrimonial Causes Act. No. 20 of 2007**. The Petitioner also cited, besides the Respondent, a Co-Responded Bridget Siamasiku.

In her petition, she among others indicated that there are three children of the family, born on 16th April, 1996, 27th March, 1998 and the last one born on 4th August, 2007.

In the particulars for adultery, she alleged that in 2003, the Respondent got married to Catherine Nachila Sichela, at which point he started living in two houses, and he had a child with the said Catherine.

After the demise of the said Catherine in 2011, the Co-Respondent came on the scene; with whom the Respondent has a child. In paragraph six (6) of her petition, she stated that there are three children born to the Respondent during the subsistence of the marriage, with the 1st one born in 1997, the second one born in January, 2006 and the last one born in 2011.

In paragraph 6 of the particulars of adultery, it was the Petitioner's statement that the Respondent wrote her a letter stating that he was not happy in their marriage and wanted a separation so that he could live a happy life as he could no longer make the Petitioner happy. She further stated that he has continued with his affair

with Bridget, the Co-Respondent. She prayed for the dissolution of the marriage, among others. She prayed for damages from the Co-Respondent.

When the matter came up for hearing of the petition, the Respondent indicated that he was not contesting the divorce and did not object to the marriage being dissolved. Having looked at the petition, I granted the decree nisi. On the Question of damages, I asked the parties to make submissions before court, and that I would deal with that prayer separately.

The other prayers were subject of appropriate separate applications. Unfortunately, there has been no submission from Counsel for the Petitioner. Respondent and Co-Respondent filed joint submissions. In their submissions, they placed reliance on the Case of **Venter V Venter & Joubert, (1966) ZR 60 HC**¹ where a number of principles were set out, which had to be considered when awarding damages in adultery cases. It was argued that damages for adultery are compensatory and not punitive. Further, that the same case set out, under two heads, the damages that may be awarded, vis:

- (i) Damages for the actual value of the spouse, who as a result of the adultery is lost to her spouse,
- (ii) Damages for injury to the other spouse's feelings, to her marital honour and her family life resulting from adultery.

With regard to the actual value, the court was told that there are two subheads, namely pecuniary and consortial loss. Counsel went on to state what each of the two entailed, as the record will show. Counsel argued that from what he had shown, it was difficult to make a precise mathematical assessment of damages because of the imprecise nature of matters such as injuries to feelings, loss of consortial qualities and the like. He reiterated that damages are awarded to compensate and not to penalise.

I was also referred to the case of **Butterworth V Butherworth & Engelfield (1920)**² on what may be taken into consideration when assessing damages in respect of those imprecise matters.

Counsel contended that two main considerations could be extracted which he put in form of Questions, namely

- (i) What is it that the adulterer has destroyed, and what is its worth?
- (ii) By what methods and circumstances was the adulterous association brought about?

Counsel said that to answer the first Question, the court ought to examine the evidence to see how the husband and wife were living before the adulterous relation with the Co-Respondent became a factor. Counsel contended that if the couple had been happy together, then the Co-Respondent's actions would have caused serious damage, but if the Couple's relation had been already

strained, or they lived apart much less or possibly none at all, damage will have been caused.

Counsel then went on to assert that at the time the Respondent's association with the Co-Respondent became a serious factor, the Petitioner and Respondent's marriage was already strained as the two were no longer living together and the Respondent had committed adultery with two other women to the knowledge of the Petitioner.

As regards the method and circumstances that brought the adulterous association about, it was Counsel's contention that the general conduct and character of all three parties will be material, when it came to estimating consortial loss and injury to feelings. It was argued that the conduct of the wife would be material, because it may show that either through unkindness or indifference, she contributed to the breakup of the marriage, a factor, which Counsel contended would operate in mitigation of damages. With regard to the husband, his conduct would act as a direct pointer to his consortial value, and with regard to the Co-Respondent, the nature and extent of the part she played in the husband's down fall will not only give some indication of his worth as a husband, but will also directly affect the injury suffered by the wife to her feelings.

It was Counsel's argument that from the evidence given in the petition, the Petitioner and Respondent married in 1994 and seemed to be happy, but problems arose when the Respondent had

an affair with someone; and he continued from then on to have other affairs before he linked up with the Co-Respondent herein.

Based on the above, Counsel contended that the association between the Respondent and Co-Respondent did not substantially injure the Plaintiff's feelings as the marriage had already been strained by the Respondent's previous affairs.

Further, that according to the evidence, the couple did not engage in sexual intercourse from 2007, a time prior to the Respondent and Co-Respondent having any association, a further pointer to the strain in the marriage or an indication of an unhappy marriage. Counsel contended that at the time the association between the Respondent and Co-Respondent began, the Respondent was of little consortial value as a husband to the Petitioner.

Based on the afore stated, Counsel submitted that the Petitioner's actual pecuniary loss is negligible and her consortial loss is not very high, since by the time the Respondent and Co-Respondent got involved, the marriage was no longer a happy one. Consequently, the injury suffered to her feelings by the conduct of the Co-Respondent is not of much substance as the Respondent had already been seriously involved with two other women before the Co-Respondent, and to the Petitioner's knowledge.

I have seriously considered the evidence on record and fully applied my mind to the submissions by Counsel for the Respondent and

Co-Respondent. I have also fully considered the authorities availed to me in the submissions and for which I am grateful.

The Matrimonial Cause Act, of 2007 of the Laws of Zambia allows a party to a marriage to claim for damages. It is couched thus,

*“11 (i) A party to marriage, whether husband or wife, may, in a petition for divorce on ground that the other party to the marriage has committed adultery with a person, or on grounds, including that ground, **claim for damages from that person** on ground that that person has committed adultery with the other party to the marriage and subject to this section, the court may award damages, accordingly.” (Underline by court for emphasis only).*

From the above, it is clear that an aggrieved party has the right to claim for damages.

As has already been pointed out in the cited authorities, damages awarded by court for adultery are to compensate the injured party but not to penalize the party at fault. An injured party will be paid damages for the actual loss suffered as a result of the adultery and damages for, injury to the aggrieved party's feelings and marital behaviour emanating from the adulterous affair. These, according to **Venter V Venter (Supra)** are classified as pecuniary loss and

consortial loss. Based on these the court has to determine what it is that the aggrieved party has suffered. This is determined on the evidence that is presented before the court.

As was submitted by Counsel, the court must examine the evidence to see how the couple lived before the adulterous relationship with the Co-Respondent became a factor. With regard to the consortial loss, the court would have to examine the general conduct and character of the three parties to see what role each one played in the relationship which could have led to the evolving of the adulterous relationship.

Reverting to the matter in Casu, I granted a decree nisi to the Petitioner on grounds of unreasonable behaviour and adultery. I directed the parties to file submissions over the issue of payment of damages by the Co-Respondent. The Co-Respondent had not appeared during the hearing, but filed submissions regarding the Question of damages. As indicated earlier, the Petitioner did not file any submissions with regard to her own prayer for damages. In the cited case of **Venter V. Venter (Supra)**, it was held that

“a Petitioner in divorce proceedings must prove damages for adultery though the Respondent and Co-Respondent do not defend.”

It is patent in Casu, that while the Respondent and Co-Respondent put up a “defence”, the Petitioner did not adduce any evidence, other than what she stated in her petition to prove her claim for damages in this matter, as was required, as “damages are always in issue” to borrow the words of **Blagden CJ**, as he was then in the **Venter** Case (Supra).

The Learned CJ went further in that case to cite a passage from **Mayne & McGregor on Damages**, 12th Edition at para 986, where the learned authorities stated

“Even if the Defendant fails to deny the allegations of damages, or suffers default, the Plaintiff must prove his loss”.

The Petitioner can only prove her loss by adducing evidence before court of the loss that she or he has suffered as a result of the adulterous relationship. This is the evidence that was not laid before this court.

Be that as it may, I will still consider the petition evidence and submissions by the Respondent and Co-Respondent. It is not in dispute that the couple got married in 1994, and have three children, the last one having been in 2007. It was the Petitioner’s evidence that in 2003, the Respondent married someone else with whom he had a child and that at that point in time he was living in

two houses. It is also her evidence that the Respondent had a child born 1997. It is clear from the above that problems in this marriage could have started as far back as 1997, when he first had his child called Mirriam Chanda. However, there is no evidence laid before court to determine what could have led to this state of affairs, whether it was the husband's behaviour or the wife's behaviour which could have led the husband into someone else's arms. The court cannot speculate, save to say that the fact of him marrying another woman and having a child is a pointer to an unhappy marriage. It is evident from the petition that the Respondent had subsequent affairs which the Petitioner seemed to have tolerated. It was her own evidence during the hearing that in fact the Respondent had four children during the subsistence of the marriage from different women besides the Co-Respondent herein. The Question that one would ask would be, in these circumstances, what is it that the Co-Respondent destroyed that had not already been destroyed by the Respondent's previous relationships with the other women? My answer would be basically, nothing. **(See Butterworth V Butterworth) Supra.**

In her particulars of unreasonable behaviour, the Petitioner, under paragraph 1 stated that the Respondent had stopped being intimate with her in 2007, as they last had sex when the Petitioner had their first child. In the particulars of adultery, under paragraph 4 thereof, she states that Catherine Nachila died in 2011, but however, she discovered that there was another woman by the name of Bridget Siamasiku, the Co-Respondent herein, and that the

two now have a child together. What is not clear is whether the Respondent and Co-Respondent entered into this relationship while he was co-habiting with the late Nachila or he moved on to the Co-Respondent after the demise of Nachila. Be that as it may, it is clear that from 2007, there had been no intimacy between the Respondent and the Petitioner. This again points to the unhappy state of the marriage. This is confirmed by the Petitioner where she states in paragraph 6 of particulars of adultery that;

“the Respondent further wrote a letter to the Petitioner stating to her that he is not happy in their marriage and wants s separation so that he can live a happy life and take care of his children and that he could no longer make the Petitioner happy, hence she should find someone who will make her happy”

It would be safe to conclude that the adulterous affair between the Respondent and Co-Respondent was brought about as a result of an unhappy and strained marriage. This conclusion is based on the evidence before court as the Petitioner did not provide any evidence of what could have led to this state of affairs as she ought to have done. In the circumstances it would not be possible to apportion blame, as it is not possible to examine the conduct of the wife and husband prior to the adultery. I want to agree with Counsel that at the time the association between the Respondent and Co-Respondent began, the Respondent was of little consortial

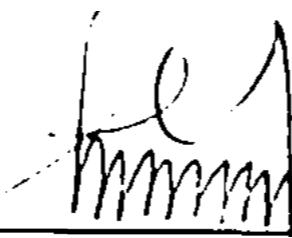
value as a husband to the Petitioner. That being the case, I find that the Petitioner's actual pecuniary loss is negligible and consortial loss not high. I do not deem that she had suffered any injury to her feelings or marital honour as at that time, the Respondent had consorted with other women before associating with the Co-Respondent. Her loss, if any, occurred when the Respondent first had a child three years into their marriage.

On the basis of the evidence before me, I find that the Petitioner has not proved damages for adultery. She has not proved her loss for the award of damages. The claim is therefore dismissed for lack of merit,

Each party to bear own costs.

Leave to appeal is granted.

Dated at Lusaka this day of, 2015.



Mrs. Justice A.M. Banda Bobo
JDUGE