

DELICTS IN NATIVE LAW

1. ADULTERY — QUANTUM OF PROOF

"The Native Native Commissioner has found as a fact that the first defendant was found in the kitchen hut with plaintiff's wife on the night of the alleged adultery. There is ample evidence to support this finding, and it was incumbent upon defendant to give some explanation of his presence there. The fact that he was found with plaintiff's wife alone in the kitchen hut at that late hour with the door closed and without a light creates a very strong presumption against him, and this he has not attempted to rebut; and this, coupled with the woman's admission that adultery had been committed that night is, in the opinion of this court, sufficient to establish the charge against defendant. It is true that the woman subsequently denied the adultery, but she has given an explanation of her reason for doing so which is not unreasonable. In the case of Ngonyolo vs Keyona 5 N.A.C. 5 where it was proved that a woman was found at night in another man's hut, the Court held that in the circumstances the magistrate was correct in holding that adultery had taken place. The position in the present case is exactly similar. In the opinion of this court the Native Native Commissioner erred in holding that there was no proof of adultery."

Paniso Mlanya vs Namphutane. 1936 N.A.C.(C50)100

2. "It has been laid down in numerous cases in this court, that cases of adultery must be proved conclusively, and naturally the first thing the plaintiff is required to prove is that he could not have been the father of the child born to his wife. In the present case plaintiff's evidence as to the date of his leaving for work and his return therefore is very vague. As the case stands, it is not possible to say with certainty that he could not have been the father of the child."

Lenga Lubabia Mbalelo vs Bonga Ngakulu, 1936 N.A.C.(C50) 118

3. "This court has repeatedly laid down that in cases of this nature, Plaintiff must prove his allegations beyond reasonable doubt."

Sontsu Ntandukwe vs Ngwilelo Tute, 1938 N.A.C.(C50) 59.

DELICTS IN NATIVE LAW

NATIVE CUSTOM — NTLONZE

1. "The point having been put to the Native Assessors they state unanimously that the custom of "Ntlonze" — i.e. taking some article from an alleged tortfeasor for purpose of proving his connection with the tort in question — is not confined to cases of adultery, and that "Ntlonze" may be taken by force from an alleged wrongdoer". With this expression of opinion this Court is in agreement. It follows, therefore, that defendant was justified in taking the plaintiff's blankets of who found him committing a tort in her garden and the plaintiff's action for their recovery was premature, and defendant should not have been ordered to pay the costs (See A. Kunesha vs L. Bokolo 1933 N.A.C. (C.S.O) 40.

MABUKU MAQUTU vs NGULWA SANCIZI, 1936, N.A.C. (C.S.O) 86.

ADULTERY — "NTLONZE"

"Where two married women quarrel over the husband of & one of them, the husband of the other may regard it as a "catch" and claim damages (See Caputo vs Ngazuluwane, 2 N.A.C. 12 & Zengile vs Bokolo, 2 N.A.C. 25.)

GOU BUSAKWE vs KOMENI TALIWE, 1936 N.A.C. (C.S.O) 210

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ADULTERY — WIFE AS "GO-BETWEEN"

"There is at least no other recorded instance of an allegation that a man's wife has acted as "go-between" for him and another woman in the case of Nzabom vs Maswili 2 N.A.C. 147. The President of the Native Appeal Court in that case rejected the idea of such a thing happening. While this Court has the very greatest respect for the opinion expressed by an officer so well versed in Native tribal customs, we feel that the evidence in the present case does show that, while it is extremely rare for a wife to act as "go-between" for her husband, it is not impossible."

GOU BUSAKWE vs KOMENI TALIWE, 1936 N.A.C. (C.S.O) 210.

DELICTS IN NATIVE LAW

ADULTERY

The Right to Sue for Damages for Adultery

"It has been laid down by decisions of the Superior Courts and this Court too that it is not incompetent for an aggrieved husband who is married to his wife by Christian rites to be awarded damages for adultery even if he resumes cohabitation with his wife after the commission of the offence by her and her paramours and even if a claim for dissolution of the marriage does not accompany the claim. Under Native law the same principle has always been recognised but with this exception that the measure of damages among commoners, as distinct from claims by chiefs, has been regulated by scale."

Anoch Logoni v. Ano. vs Maggadaga, 1935 N.A.C. (C.G.O.) 18.

Admission of Adultery without proof of Adultery. Is Admission a "Catch"

"It has been laid down (Raji versus Libugalanga, 4 N.A.C. 12) that the mere admission of adultery is insufficient to establish an action for damages and that proof of the commission of the act of adultery must be forthcoming." In that case evidence of the adultery was led as d. evidence of the fact that at a bar or in the defendant admitted that the Plaintiff's wife was his wetsha. This evidence was construed as corroboration of the evidence of the Plaintiff's wife and that of a go-between. The Appeal Court, however, took the view that the admission, if made, did not constitute a catch, and from the rest of the wording of the judgment it is by no means clear that the Court then laid down unequivocally that an admission of adultery did not constitute a good cause of action in the absence of proof of a specific act of misconduct." ✓

Lufele Yampha vs Zwelendata Musolo Samu, 1935 N.A.C. (C.G.O.) 25

EVIDENCE OF INTIMACY AFTER BIRTH OF CHILD

"The first allegation in the summons was that the pregnancy was the result of intercourse in 1932... and the fact that defendant had connection with her after the birth of the child, if he did do so, is in no sense proof that he had connection with her prior to that event. The admission of that evidence would have serious prejudicial effect."

MACHA GRUMISA vs SIDUBEDUBE & MNGAWOMILE, 1936, N.A.C. (C.G.O.) 50.

Adultery - Voluntary Tender of Cattle by Defendant held to be Admission of Adultery

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The facts of the case having been put to the Native Assessors they state:-

"Judgment was given and the defendant voluntarily paid without being forced to do so. A person who says he first went to see the child says so only in the case of a girl and not when it is a married woman. In the case of a married woman when a man pays he admits that he is the father of the child. Among Pondo it is not the custom to make a deposit of cattle pending the birth of the child." "In the opinion of the Court. the fact that defendant voluntarily paid for head of cattle as a result of the Headman's judgment must be regarded as an admission on his part of adultery with plaintiff's wife out of the paternity of the child."

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Dufundo Nkhalwana v Matondile Ngqindeva, 1935 NAC (C 50) 68.

N.B. This was a case in which judgment was given for Plaintiff, & defendant tendered for head of cattle which Plaintiff refused as not being in reasonable condition. Thereafter defendant not only refused to replace the cattle but denied the adultery, and put forward the plea that he had tendered over cattle to the Headman on condition that they should be retained until the birth of the child, which would prove that he was not the father of the child.

DELICTS IN NATIVE LAW

ADULTERY - FIRST HUSBAND Suing SECOND HUSBAND FOR DAMAGES.

"H was married to W. W deserts H and marries Y. H sues Y for damages for adultery. The Native Masters state:-"

"Local custom is that as this woman married another man before her husband had been returned she is still the wife of the former husband. The woman would have driven the cattle to her former husband if she was rejecting him. It was not the duty of the husband to come and fetch his cattle on receipt of a message that he could get them."

With other expression of opinion this Court is in agreement and holds, therefore, that the mere intimation to plaintiff that he could get her cattle without some further effective step being taken to endeavor to return the dowry was not sufficient to dissolve the marriage.

It appears from the evidence That defendant was well aware of the previous marriage and, although they say he was informed of the rejection, it was his duty to make sure that it had been dissolved before entering into the marriage If he entered into the marriage bona fide it was to have been expected that he would have explained all that had happened to satisfy him that the woman was free to marry instead of relying on a bold statement by her relatives that she had rejected her previous husband.

We are satisfied that there had been no just cause dissolution of the marriage with plaintiff and that he is entitled to judgment.

MAGGIRENI v SWELINDAWA KENENE, 1936, N.H.C.(C.S.) 202.

DEFECTS IN NATIVE LAW

ADULTERY — Ntouze — "a catch".

"Now the mere setting together of two persons is in itself no proof of adultery but the surrounding circumstances surrounding such action would materially alter the view to be taken of it and in this case the comparative isolation of the place, the findings of the kilt and the immediate observance of the normal customary procedure confirm the view that a catch was effected."

Mtshato Ngangula vs Mantselona Mgaya; 1938 N.A.C.(Coo) 37.

N.B. This was a case in which a man had been found with his wife of another man. Upon being sighted the man ran away & the woman confessed to her husband that she had committed adultery with the fugitive. "At the spot where the two had been sitting was found a kilt and a can of beer". The kilt was produced as Ntouze. The Appeal Court held that the husband had in the circumstances effected a "catch" and awarded him damages against the defendant. The President of the Court, Bonaventure dissenting from the judgment.