ADULTERY IN NATIVE LAW

Adultery in Native Law may be defined as the carnal connection of a man with a woman who is a party to a subsisting customary union, entitling the husband or guardian of the woman concerned to claim compensation in damages from the adulterer.

A customary union is the union of a man with a woman in a conjugal relationship. While it is permissible for a man to be a party at one and the same time to be a party to more than one customary union, it is not permissible for a woman to be a party to more than one customary union at one and the same time. The obvious implication of this is tha the conjugal fidelity expected from a wife in Native Law is necessarily more stringent than that expected from a husband. It is clear that the grant of conjugal rights by the husband to one of his customary wives can not be looked upon as marital infidelity by any of his other wives. On the other acts of infidelity with women other than his lawful wives would constitue marital infidelity and would amount to what may be regarded as adultery although it is doubtful as to whether a single act of that kind would under Native Law constitute an adequate ground for an action on the part of any of his lawful wives for the dissolution of the customary union to which she is a party, there can be not doubt that repeated acts of adultery on the party of the husband might be considered sufficient justification for the desertion of the husband by a lawful wife. Under the Natal Code of Native Law repeated acts of adultery on the part of the husband constitute sufficient ground for an action for dissolution of the customary union on the part of the wife.

As far as the wife is concerned any act of marital infidelity on her part is regarded in Native Law as adequate justification for an action for the dissolution of the customary union on the part of the husband and for the return of all the lobola paid for such a wife, less a pro rata deduction for the number of children born during the subsistence of the union, which children remain with the husband. Apart from the right of the husband to an action for dissolution of the union is his right to an action against the co-adulterer for compensation in damages. This latter right does not depend upon whether the husband

exercises his rights under the former. In other words a husband may forgive his wife and condone her misconduct but he does not thereby necessarily forgive her paramour for the injury inflicted upon himself (James Nodada vs Peter Mokoena, 1943 N.A.C.(C&O) in which Viviers vs Killian, A.D. 1927 p 45 was qouted with approval). In the same case the point was made that in Native Law more often than not a husband will sue the co-adulterer for damages rather than sue the wife for divorce. In other words whereas in European society where adultery has been committed by one of the spouses the emphasis in any resultant action is primarily upon the dissolution of the marriage and only secondarily upon seeking for damages against the co-respondent, in Bantu society the situation is reversed. As the Court put it "in fact, in the majority of cases spouses do not seek a divorce because of the adultery committed, but mainly because the wife or husband as the case may be, refuses to return and live with the innocent party". The principle of Native Law is similar to that of the Common Law, namely, that the resumption of cohabitation with his wife after the commission of adultery by her does not diminish the husband of his right to sue the co-adulterer for damages for adultery (Enoch Sogoni & ano. vs Maggadaza, 1935, N.A.C.(C&O) 18.

Proof of Marriage or Valid Union

In an action for damages for adultery it is of course essential to prove for the plaintiff that a valid marital union exists between himself and the woman concerned. If the plaintiff fails to discharge the onus upon him to prove conclusively the subsistence of a lawful union between himself and the woman affected, he will not be entitled to damages as there is in fact no adultery in such a case.(Mbulali Siyangapi vs Nomlauli Mkondweni, 1943 N.A.C.(C&O).

On the question of liability for damages for adultery it must be remembered that the mere fact that a woman is living apart from her husband does not necessarily mean that the union has been dissolved and anyone who commits adultery with a woman in such circumstances will be held liable for damages and he cannot be heard to say that he thought that the union had been dissolved because the parties to it were living apart nor will it avail him to say that as far as he knew the wife had no intention of returning to the husband. Unless the union has been duly dissolved in proper form, a co-adulterer with her will be held liable in damages (Maqgireni vs Swelindawu Benene, 1937 N.A.C.(C&O).

In view of the absence of any general system of the registration of customary unions in most parts of the Union, it is generally impossible for a husband to produce any documentary evidence in proof of marriage. He is consequently compelled to rely upon other methods of proof such as calling as witnesses the person to whom he gave lobola for the woman (Siyangapi's case) or the person or persons who witnessed the transaction. In Twalindwe vs Nxova Neku vs Ngoto Moni, 1938 N.A.C.(C&O), H sued K and G for damages for adultery with his wife, W. K was sued in his capacity as Kraalhead for G. The Defendants' plea was a denial that W was the wife of H and demanded absolution from the instance. The plaintiff was called upon to prove that a valid customary union between himself and W existed. He proved that dowry had been paid and accepted and that he and W had lived together as man and wife at Plaintiff's kraal. The Native Assessors to whom the facts of the case were put stated unanimously that "this was a marriage in accordance with Native Law and Custom".

On the other hand in Sofiba vs Gova,(1 N.A.C.7) the union between H and W had been arranged in the absence of H and on his return from work H had only stayed three weeks with W who had denied that intercourse had taken place between them. By a majority of two to one the the Court decided that a valid union between H and W had been proved. At the same time the dangers inherent in a marriage by proxy, such as this one apparently was, were hinted at and the Court pointed that it could uphold a marriage where the consent of the husband to the contract had not been given, where he was not even at the kraal to which the girl had been sent and there was nothing to show that he was likely to be there within a reasonable time. In Maqqireni vs Swelindawo Benene, 1937 N.A.C.(C&O) H entered into a customary union with W and lived with her for six years. Thereafter W deserted H and went to live with X as his wife. H sued X for damages for adultery and the question arose at to whether W was still the wife of H. Upon the question being put to the Native Assessors they expressed the following opinion:- "Pondo custom is that as this woman married another man before the dowry(given for her) had been returned she is still the wife of the former husband. The woman should 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 the message that he could not get them". With this expression of opinion the Court was in agreement and held therefore that the mere intimation to plaintiff that he could get his cattle without some further effective step being taken to endeavour to return the dowry was not sufficient to dissolve the marriage. Defendant was well aware of the previous marriage and it was his duty to ensure that it had been dissolved before taking entering into marriage. Damages were accordingly awarded against the defendant for adultery, as the marriage between H and W was held to be proved.

Proof of Adultery

Not only must the husband prove the existence of a valid union between himself and the woman affected he must also prove that the adultery did actually take place. Original Native Law demanded that the plaintiff should produce evidence either that he had found the defendant in the act of adultery with his wife or that he should produce some article of clothing or personal effects of the defendant taken from him on the scene of the adultery as proof. This was known as a "catch" and much reliance ~~wa~~ is placed in this kind of evidence in Native Courts but the Native Appeal Court has felt called upon to point out the danger of accepting indirect evidence as adequate proof of adultery. In the case of Gqweta Magwenkwe vs Mtiywa Mkelwana, 1938 N.A.C.(C&O) it summarised these dangers as follows:-

"In earlier times Native Custom demanded that a husband should personally effect a catch before he could claim damages for adultery; latterly this custom has been somewhat relaxed, no doubt, owing to the frequent and lengthy absences of husbands at the mines and the consequent impossibility of them making a catch personally; but even then it was required that the catch should be made by some male relative. Even this safeguard is being done away with and the tendency is growing up of relying on the evidence of the wife and of a "go-between" only. This is unsafe and leaves the door open to the bringing of false charges. It is the easiest thing possible to make a charge of adultery and in the majority of cases the unfortunate defendant can only deny the ~~x~~ charge. His only chance of succeeding is by tripping up the witnesses in cross-examination and when there are only t-wo witnesses~~x~~ that chance is considerably reduced. If the proper proof of adultery were more strictly insisted upon the number of adultery cases brought before the court would most probably be substantially reduced".

The question has been raised as to whether the fact that the Defendant had admitted adultery was in the absence of ~~allow~~ other evidence sufficient to establish an action for damages. It was laid down however in Raji vs Selongalonga, 4 N.A.C. 12 that the mere admission of adultery was insufficient to be established an ~~X~~ action for damages and that proof of the commission of the act of adultery must be forthcoming. In that case evidence of the adultery had been led as also the fact that at a beer drink the Defendant had admitted that the Plaintiff's wife was his ~~metsha~~. This latter 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, but from the rest of the wording of the judgment it is by no means clear that the Court then laid down equivocally 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 Yamafi vs Zwelindaba Maselo and, 1935 N.A.C.(C&O) 25.

The wide interpretation given to the term "catch" may be gathered from what happened in a case where two married women quarrelled over the husband of one of them. In the course of the altercation one of the husbands learnt that his wife had committed adultery with the other. Regarding the information gathered in this way as a "catch" he sued the other for damages for adultery with his wife and was successful in his action (Govu Busakwe vs Komeni Taluve, 1937 qouting Capuko vs Ngazulwane, 2 N.A.C.12 and Zenzile vs Kokolo, 2 N.A.C.25. On the other hand if there is no doubt as to whether the husband had access to his wife during the period he says he was absent, the fact that he finds his wife pregnant on his return is regarded as sufficient proof of the adultery, the "catch" of which is the charge of pregnancy, and the husband is entitled to damages for adultery, if not for the higher damages allowed when pregnancy results. (Gantweni vs Mini, 1912, N.A.C.).

Where there is no catch, actual or constructive, the plaintiff will have to adopt other means to prove his allegations beyond reasonable doubt as has been repeatedly laid down by the Native Appeal Courts (Sonku Ntsundushe vs Nqwiliso Tutu, 1938 N.AC.(C&O).

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This case must be contrasted with another in which the fact that the Defendant after appearing in a headman's court where judgment was given against him, had voluntarily ~~paid~~ tendered five head of cattle to the Plaintiff. Upon the latter refusing to accept the cattle tendered on the ground that they were not in reasonable condition, the defendant thereafter not only refused to replace the cattle but denied the adultery and in the Appeal Court put forward the plea that he had ~~lent~~ offered to the cattle to the headman on condition that they should be retained until the birth of the child when it would be proved that he was not the father of the child of the plaintiff's wife, as alleged. The Court held that the fact that the Defendant had voluntarily paid for 5 head of cattle as a result of the headman's judgment must be regarded as an admission on his part of intimacy with plaintiff's wife and of the paternity of the child (Lupondo Mbulwana vs Madondile Nggindere, 1935 N.A.C. (C&O) 68.

The circumstances in which the defendant was found with the wife of the plaintiff may ~~may~~ be such as to raise a presumption ~~that~~ which, if not rebutted, may lead to the conclusion that adultery did take place. Thus where the defendant was found with plaintiff's wife alone in the kitchen hut at a late hour with the door closed and without a light it was held that the circumstances created a very strong presumption against him, ~~He~~ and in view of his failure to rebut the presumption the Court held that the adultery had been proved, especially as the woman had admitted that adultery had been committed that night (Daniso Mlanjana vs Nomfoza & ano. 1936 N.A.C.(C&O) 100). ~~Reference~~ In the same case referred finding of was made to an earlier case in which the ~~fact that~~ a woman ~~had been found in the~~ at night in the hut of a man other than her husband had been accepted as sufficient to establish the fact that adultery had taken place. (Ngonyolo vs Beyana 5 N.A.C.S).

the Defendant Another

~~An~~ instructive case on the question of proof of adultery is Sondovana Mbila vs Mokoted Mbakela, 1943 N.A.C.(C&O) in which it was held that where a man is found at night time with another man's wife sleeping in an unlighted kitchen hut, while the rest of the family are sleeping in the dwelling hut, the presumption that adultery had taken place is so strong that it requires the clearest evidence to rebut it. Such facts would to the mind of a native court be insurmountable proof of adultery. The court went on to refer to Kleinwort vs Kleinwort 1937 A.D. 123 "for the common law on the matter which corresponds to the native views on the subject. Charges of adultery must be fully proved. (Zibulele Mdi-tshwa & Mzimni Mdukulwana vs Magiwu Mkwetana, 1943 N.A.C.(C&O); also Mqadalana vs Malala & Mvunge Limani, 1941 N.A.C.(C&O) where the husband had been absent from his wife for two years and she gave birth to a

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In another case the Defendant ~~woman~~ was found sitting together with the wife of another man. Upon them being approached by the latter, the defendant ran away and the woman confessed to her husband that she had committed adultery with the defendant. "At the spot where the two had been sitting was found a kilt and a can of beer". The Appeal Court, by a majority decision from which the President (Braatvedt, P) dissented, held that although the mere sitting together of two persons was in itself no proof of adultery, the circumstances surrounding such action might materially alter the view to be taken of it and that in the case in question the comparative isolation of the place, the finding of the kilt and the immediate observance of the normal customary procedure confirmed the view that a 'catch' had been effected (Mtshato Ngqangula vs Nkantselana Mgayi, 1938 N.A.C.(C&O) 39)

child within six months after his return. The husband alleged that he did not cohabit with his wife after his return and he sued D for adultery with his wife. The court held that (i) the probabilities were against the husband not having cohabited with his wife upon his return, (ii) therefore the possibility could not be ruled that out of his being the father of the child (iii) that the delay of the husband in reporting pregnancy to the defendant was fatal to his case, (iv) that the proof that Defendant was responsible for the pregnancy was not conclusive.

Thus in M.Gxumisa vs Sidubedube & Mngawomule, 1936 N.A.C.(C&O) it was held that the fact that Defendant had connection with a woman after the birth of an adulterine child was in no sense proof that he had connection with her prior to that event. The admission of such evidence would seriously prejudice the defendant. The plaintiff in cases of adultery must prove that he could not have been the father of the child born to his wife. Where it is not possible to say with certainty that he could not have been the father, judgment must be given for the defendant in the form of absolution from the instance (See Mbaliso and Mbaliso vs Bango Mtshalu, 1936 N.A.C.(C&O)).

Necessity for Report

An important aspect of adultery cases in Native Law is the necessity for the husband to report the pregnancy arising out of the adultery to the co-respondent immediately he becomes aware of it. Failure to do so may be fatal to his action. In Charles Mapheleba vs Mtsekuza Gaula, 1943, N.A.C.(C&O) the Native Assessors stated that Sotho Law on this point as follows:- "It is Basuto Custom that if the report of the pregnancy is not made to the seducer, the father cannot recover damages . Even if he(the defendant) admits intercourse but denies paternity, he would not be liable. The same rule applies with even greater force in adultery cases." The court accepted this statement of the law and went on to observe:- "We are asked to observe that this rule is harsh and in conflict with equity and justice, but it would be equally unjust and inequitable to deny the respondent a defence which the custom of his tribe gives him for he would be seriously prejudiced in his defence by being deprived of the opportunity of questioning the woman when her pregnancy is discovered. The Appellant

who is a Basuto observing Basuto customs must be aware of the laws obtaining in his own tribe and he has therefore only himself to blame for the position in which he now finds himself".

It would appear, however, from the decision in Gantweni vs Mini 1912 N.A.C. that even if the defendant might be exonerated from blame for the pregnancy owing to failure to report it to him timeously, he would nevertheless he held liable in damages for adultery if it were proved that he had intercourse with the plaintiff's wife during his absence.

Person to be sued for Adultery

The person to be sued by the husband for adultery with his wife is the adulterer. Where the adulterer is a minor inmate of a kraal, the adulterer must be sued assisted by the kraalhead. But if the so-called inmate of a kraal is living away from his kraalhead in a separate kraal, he alone will be held responsible for the adultery (see Magogwana Thomas vs Mbikanye Diniso & Diniso, 1937 N.A.C.(C&O). This right on the part of the husband to sue the adulterer he possesses even if he has condoned his wife's offence. A husband may forgive his wife and condone her misconduct but he does not thereby necessarily forgive her paramour for the injury inflicted upon himself (James Nodada vs Peter Mokuena, 1943 N.A.C.(C&O)) in which the judgment of Solomon C.J. in Viviers vs Killian, 1927 A.D. p 450 was qouted with approval).

Cases have occured where a married woman has committed adultery during a time when she was away from her husband's kraal and was actually at the kraal of her father. A difficulty is often created by the refusal of the woman and/or her father to disclose the name of the adulterer to the husband to enable him to claim damages. In such cases the question has arisen as to whether the husband was entitled to hold the woman's father responsible for her state and therefore to claim damages from him. Dealing with this question in Mhletywa Nobabem vs Njikilana Ncanca, 1943 N.A.C.(C&O) the Native Appeal Court said: "There have been a number of cases before this court in which it was sought to make the father of a wife responsible for the amount of damages usually awarded against an adulterer when pregnancy has resulted from adulterine intercourse at the father's kraal and the wife

and the father have refused to disclose the name of the adulterer. In these cases the Native Assessors seem to have drawn a distinction between cases in which the woman had been compounded under the custom of Ukuteleka and cases in which the woman was not impounded. Among the Tembus and also some other tribes where a woman has been impounded by her father and she, while so impounded, committs adultery and becomes pregnant and she and her father refuse to disclose the name of the adulterer, the injured husband may, after he has released his wife, recover the damages for adultery and pregnancy from her father. (See Ndabèni vs Mangunza, 2 N.A.C.48; and Dick Nyeougama vs Nodunge, 3 N.A.C.23.

In Komeni Mtoto vs Bele Gqodo, 4 N.A.C.27 (a Tembu case) the Native Assessors, however, expressed the opposite view which the Court accepted, thus overruling the previous decisions. Where a wife has not been impounded but is living at her father's kraal for any reason whatever, the law seems to be well established that the father is not liable for damages if he and his daughter refuse to disclose the name of her paramour (See the cases of 1. Maqinga Mganyelwa vs Mangaliso Qwesha, 3 N.A.C.22, (ii) Mhlangaba vs Dyalvani, 2 N.A.C.139, (iii) Sofoniah vs Ketshane, 3 N.A.C.22, (iv) Magilwana vs Mazinyase, 3 N.A.C. 24. On the authority of these decisions the Court found in favour of the father (i.e. exonerated him from liability for damages). The Court refused to accept the statement of Hunter in "Reaction to Conquest" p205 that if the woman at the time of adultery was resident at the kraal of her people, they are liable in damages. "The statement of the law is not in accordance with the decidions cited. Nor is it possible to justify the ~~f~~ judgment on the ground of equity and justice. There may be a good deal to say of holding the guardian responsible where he is holding the woman under the custom of ~~K~~ Ukuteleka, and where he (the father) actually supports the wife in her refusal to disclose the name of the adulterer. In such cases he makes himself a party to the wrong done to the husband and it is axiomatic that where there is an infringement of a legal right there must be a legal remedy, but we can see neither equity nor justice in holding a guardian responsible in a case, for instance, where the

husband has left his wife unprovided for and she has been compelled to go to her people for support". The court takes the view, in other words, that the responsibility of the woman's father in the circumstances indicated, is not absolute and depends upon the extent to which the husband can be held responsible for his wife's absence from his kraal. If she is absent from his kraal because he has failed to maintain and support or because he has failed to carry out his marital obligations under the customs of the tribe to which she or he belongs, e.g. to release her when she has been impounded under the Ukuteleka custom then he cannot expect her father to exercise over her the usual duties of a guardian and so to disclose to him the name of the adulterer. On the other hand the father's failure to disclose the identity of the adulterer merely amounts to active support of her daughter in a misdemeanour for which there is otherwise no justification, the father will be held liable in damages.

Defences against Adultery

A husband will not be granged damages for adultery with his wife if there is reason to believe that there was collusion on his part in the adultery of his wife. Thus in Madlanya vs Matshini & Hlanga 1913 N.A.C. an action for damages for adultery and pregnancy, the evidence showed that during the whole time the adulterous conduct was taking place the Appellant and his wife were occupying the same hut. He had not given evidence himself but his wife stated that they were not cohabiting as she was nursing a child. The Court could not believe this and held that the child born was that of her husband. The wife further stated that her intimacy with the Respondent had extended over a period of seven years and that her husband knew about it. The Court held that if the facts were as stated by the wife there was collusion on the part of the husband and that he could not recover damages. Similarly in an action for damages for adultery and pregnancy where it is shown that the husband had access to his wife during the time of the alleged adultery the Court would not grant him damages unless he proved satisfactorily that he had not had intercourse with his wife (Bulu Mlungwana vs Bokileni Tonyela, 1913 N.A.C. 86.

Nature and Amount of Damages

Under original Native Law damages in cases of adultery were assessed in terms of cattle. At that time the only currency known among Natives was cattle and so all their business transactions were dealt with on the basis of cattle payments: cattle were paid for lobola and cattle were paid for also in settlement of cases of adultery or seduction and this was almost the only method in which payment was made. The history of the change over from the use of cattle as the sole basis of the assessment of damages in the Transkeian Territories is an interesting one. As was stated in Mvelo Ngovusa vs Rasini Xelo, 1912 N.A.C. when Magistrates Courts were first established in the Territories (Transkei) the practice of claiming settlement in cattle and giving judgment in terms of cattle was continued. "By this time however, a slight modification was had crept in together with the acquisition of sheep by natives and dowries were at times paid partly in sheep; these sheep had however generally been obtained by means of barter for cattle and so when sheep were paid it was always arranged that so many sheep should represent one beast and the fiction was kept up of computing in cattle the amount of dowry paid". "T he next change came when Colonial Laws with regard to the collection of revenue by means of stamp duty was introduced into these territories and when in framing a summons the value of the item claimed had to be stated to enable the court officials to assess the stamp duty to be paid, and it then became the practice to place a value x upon cattle claimed in dowry and other cases, but this valuation was entirely for revenue purposes, and not for the purpose ofhaving it decided that cattle of a stated value should be received, and cattle continued to be/accepted the basis of settlement in native cases and the old x native custom thus continued to be observed.

The last and most significant change came after rinderpest denuded the native territories of cattle in 1897 and it was found to operate very harshly upon Natives, because of the paucity of cattle possessed, and because of the greatly enhanced value of the cattle that had x survived the plague, to insist upon the settlement of all xxxxx cases in the xxxbasis of cattle computation, For instance, cattle which had been paid in dowry prior to rinderpset were manifestly

of much less value then than cattle after rinderpest. Similarly a man who suffered no greater damage after rinderpest by reason of the offence of adultery with his wife then he should have suffered for the same offence prior to rinderpest would yet get three or four times the value of damages after rinderpest by the receipt of three head of cattle as damages for adultery that he would have got by the payment of the same number of cattle prior to rinderpest and the privilege was thus conceded to the defendants in adultery cases of making settlements in money, and the practice then came in of allowing them to pay the money value which originally had been mentioned in the summons only for revenue purposes".

Later when the country was once more visited by plague and cattle were of very little value, in some cases not worth more than their hides and the Court held that it would be a manifest injustice to insist upon a Plaintiff accepting as a settlement of a tort against him cattle which were of very little value, if any value at all, and as the courts made a concession in rinderpest times with the view of relieving Defendants from what was recognised as being inequitable and burdensome, so then the same principles should be held to be applicable to Plaintiffs and they should not be prevented from claiming settlement on a cash basis, and should be relieved of the obligation of accepting cattle which might be of no real value whatever.

It must however be understood that in these remarks the court was referring only to cases in which the claim is one for damages for seduction or adultery and that the matter of claims in connection with dowry is not dealt with at all, as the two classes of claims stand on an entirely different footing, the former being actions provided on the commission of a tort and which in the nature of things must be brought in without delay, while the latter are matters arising out of contracts and may, at any rate under Native law custom, be "hung up" indefinitely.

The usual procedure today is for the Plaintiff to claim somany head of cattle as damages for adultery with a money valuation as an alternative claim, e.g. three head of cattle or their value (£15). Where the claim is stated in this form the Plaintiff cannot refuse to take cattle of fair average vale on the ground that he wanted money

and not cattle (see Bolani Mboli vs Luhaya Bodizo, N.AC.1913). Presumably Plaintiff cannot refuse to take money on the ground that he wanted cattle, not money.

The amount of damages awarded for adultery and pregnancy depends upon a variety of factors. Thus the question as to whether the adulterine intercourse was or was not followed by pregnancy may affect the amount of damages awarded. This in Ntsilana vs Mgcina Nopenya, 1916 N.A.C.62 the Native Appeal Court of the Transkeian Territories pointed out that it had been established custom for many years in Fingo districts to award lower damages for adultery without pregnancy than for adultery with pregnancy.

Then the status of the parties within the tribe may also affect the situation. Thus in Mpaipeli Ngwiliso vs Notshweleka, 1912 N.A.C. 315 the Native Appeal Court (Transkeian Territories) laid down that under Native custom a chief is entitled to damages on a higher scale than the amount allowed to minor chiefs of clans, and presumably commoners. The same view was taken in Nupekho vs Singengana & Ngina 1914 N.AC.46.

The relations existing between husband and wife may also be taken into account in assessing the damages to be awarded in an action for adultery. Thus where a husband has been deserted by his wife becuase of his ill-treatment of her he will not be entitled to full damages whereas if she deserted him without good cause and he repeatedly endeavourd without success to get her to return to him he would be entitled to full damages (Gxoyi vs Mdeka, 1912 N.A.C.6).

The Court should of course be on its guard against a husband being allowed to profit by the infidelity of his wife, especially in cases where husband and wife are living apart. Thus in Mxanwa vs Tayi, 1912 N.A.C. a woman had deserted her husband and gone to live with another man. The husband sued the latter for damages for adultery and was awarded damages. Thereafter the wife did not return to her husband who decided to sue for damages for adultery for a second time. The Court hedl that his only remedy in the circumstances was to sue for the return of lobola as it was obvious that the husband could not go on claiming damages for adultery with a woman who had apparently abandoned her union with him.

Right to Children begotten in Adultery

The children born to a married woman as a result of her adulterous conduct belongs to her lawful husband, on the principle that under Native Custom a woman cannot contract a second marriage while the previous one is in existence. A man taking a woman under such circumstances can only be regarded as an adulterer and according to Native custom the children begotten of the woman concerned begotten by an adulterer belong to the husband, even though the woman may have lived with the second man for many years without the former claiming her (See Mtangaya vs Mazwane, 2 N.A.C.8, Rwanza vs Nkanganiso, 2 N.A.C. 14; Lutole vs Sontsebe 2 N.A.C.165, Mbimbi vs Mobata, 2 N.A.C.69, Quvile vs Dololam & Tafeni, 5 N.A.C.21; Mnyiki & Motogu Mnonamba vs Ndongwana Mnonamba, 1937 N.A.C.(C&O)).

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