IN THE CUSTOMARY COURT OF APPEAL
EDO STATE OF NIGERIA
HOLDEN AT BENIN CITY

ON THURSDAY, THE 17TH DAY OF JUNE, 2010

BEFORE THEIR LORDSHIPS

JOSEPH OTABOR OLUBOR … … PRESIDENT (PRESIDED)

PETER OSARETINMWEN ISIBOR ... … JUDGE

PETER AKHIMIE AKHIHIERO … … JUDGE

APPEAL NO. CCA/16A/2007

BETWEEN:

MR. ODION IRABOR … … APPELLANT

AND

MRS. FAITH IRABOR … … RESPONDENT

JUDGMENT
DELIVERED BY PETER AKHIMIE AKHIHIERO (JCCA)

This is an appeal against the judgment of the Benin City District Customary Court, Benin City, delivered on the 12th day of February, 2007, in Suit No. BC/DCC/60/2006.

In the said suit, the respondent (as petitioner), claimed against the appellant (as respondent) as follows:

"1. Dissolution of marriage contracted between the Petitioner and the Respondent on the 16th day of August, 2003.

2. Custody of the surviving 3 children be granted to the Petitioner.

3. Refund of the ₦300.00 bride price through the court to the Respondent's family.

4. ₦15,000.00 at ₦5,000.00 each for the three children for feeding and maintenance allowance monthly.

5. Respondent to take full responsibilities for the educational, clothing and health needs of the three children.

6. An order of court giving the Petitioner access to the Respondent's house to remove her personal belonging as listed in the body of the claim above."

At the trial court, the respondent testified and called no witness.

Likewise, the appellant testified and called no witness.

The respondent's case at the trial court was that on the 16th day of August, 2003, she got married to the appellant under Esan Customary law. The appellant paid the sum of ₦300.00 as dowry, and they lived together as husband and wife. The marriage was blessed with three surviving children aged 6 years, 5 years and 1 year and 2 months respectively.

Sometime during the marriage, the appellant abandoned the respondent and the three children at Benin City and relocated to Uromi. After waiting for him for a while, the respondent took the children to Uromi and continued to cohabit with him there. At Uromi, the appellant was always beating the respondent. He formed the habit of leaving home early in the morning and returning very late at night. He stopped giving her money for feeding and became more violent. The respondent was constrained to flee from her matrimonial home with her children to seek refuge at Ewu with her family.

While at Ewu, the respondent's son, Endurance, fell sick and was hospitalized. She informed the appellant about the situation but there was no response from him. She was constrained to borrow the sum of ₦6,150.00 to pay the hospital bills.

The respondent urged the trial court to dissolve the marriage and grant her claims.

On the other hand, the appellant's case was that while the respondent was at Ewu with their children, he told her to return to Uromi to enable the children resume their schooling at Uromi but she refused. The respondent later left Uromi for Benin. The appellant

was in agreement with the respondent that the marriage should be dissolved. He wanted the custody of their children. He agreed to be paying ₦500.00 monthly as maintenance for each of the three children.

After considering the evidence of the parties, the trial court gave its judgment and ordered a dissolution of the marriage. The custody of the three children was granted to the respondent and he was ordered to refund the dowry of ₦300.00 to the appellant through the court. The court also ordered that the appellant should be paying the sum of ₦3,000.00 per child every month as maintenance.

Furthermore, the respondent was granted leave to remove her remaining properties from the appellant's house, while the appellant was ordered to pay the sum of ₦6,150.00 to the respondent as refund for hospital expenses incurred in respect of the hospitalization of their son.

Dissatisfied with the judgment of the trial court, the appellant filed a notice of appeal with two original grounds of appeal. Subsequently, with the leave of this court, six additional grounds of

appeal were filed. All the grounds of appeal are reproduced and re-numbered as follows:

"GROUND 1

That the judgment is against the weight of evidence.

GROUND 2

The trial court erred in law in ordering the respondent to pay the sum of N6,150.00 to the petitioner as what she used in discharging her son, Endurance, from the hospital when the petitioner did not specifically make a claim for the said amount.

GROUND 3

The trial court erred in law when it dissolved the marriage between the petitioner and the respondent when there was no credible evidence that the marriage had broken down 'irretrievably on grounds of constant quarrelling, beating, desertion and unfaithfulness on the part of the respondent' as specifically claimed by the petitioner in her claim.

GROUND 4

The trial court erred in law in dissolving the marriage of the appellant and respondent without pronouncing on whether the marriage had actually broken down 'irretrievably on grounds of constant quarrelling, beating, desertion and unfaithfulness on the part of the respondent' as specifically claimed by the Petitioner in her claim.

GROUND 5

The trial court erred in law in dissolving the marriage of the petitioner and appellant on its reasoning not backed up by evidence.

Particulars of Error

(a) The court stated in its judgment thus:

'from the look of things both parties have agreed on the dissolution of that marriage. None of them is desirous on the continuation of the marriage ----------'

(b) The petitioner/respondent before the trial court was clearly on stated alleged grounds (sic).

GROUND 6

The trial court erred in decreeing that the appellant should be paying ₦3,000.00 monthly per child when there was no evidence to sustain such award of damages.

GROUND 7

The trial court erred in law by ordering the respondent/appellant to allow the petitioner remove her alleged remaining properties in his house when there was no credible evidence that the petitioner had anything left in the house of the respondent.

Particulars of Error

No evidence as to the items allegedly left in the house of the respondent/appellant to warrant the trial court's stated directive.

GROUND 8

The trial court erred in law in ordering the respondent/appellant 'to pay the sum of N6,150.00 to the Petitioner as what she used in discharging her son Endurance from the hospital'

Particulars of Error

The stated sum of money does not form part of the Petitioner's claim."

The parties filed and exchanged their briefs of argument in accordance with the rules of this Court.

In the appellant's brief of argument, the learned counsel for the appellant, Chief M. I. Ukpebor, distilled four issues for determination as follows:

"(i) Whether from the evidence before the trial court, the marriage between the appellant and the respondent had broken down irretrievably to warrant the order of dissolution of same as did the trial court.

(ii) Whether the respondent claimed ₦3,000.00 each in favour of the monthly upkeep and maintenance of the three children of the marriage to warrant the grant of same by the trial court.

(iii) Whether the respondent led credible evidence regarding her properties allegedly left in the house of the appellant to warrant the order of

the trial court directing the appellant to allow the respondent remove her 'remaining properties in the house'.

(iv) Whether the ₦6,150.00 awarded in favour of the respondent for discharging one Master Endurance Irabor by the trial court was legal as there was no such claim before it."

In his brief of argument, learned counsel for the respondent, Okuns Aihie Esq., framed three issues for determination as follows:

"1. Whether the trial court was competent to dissolve the marriage between the appellant and the respondent based on the consent of both parties.

2. Whether the trial court can exercise its discretion in the award of costs and in granting an order not stated in the Writ of Summons.

3. Whether the trial court being a District Customary Court was, bound by the rules of strict technicalities."

When we juxtaposed the issues formulated by the appellant's counsel with those of the respondent, we observed that the issues framed by the appellant's counsel are more germane to the determination of this appeal. We shall adopt the said issues and modify them to give them more precision and clarity. An appellate court is not under a regimental duty to take the issues as formulated by the parties. If they appear awkward or not well framed, an

appellate court can reframe them. See the following cases on the point:

1. Latunde v Lajinfun (1989) 3 NWLR (Pt. 108)177;
2. Unity Bank Plc v Bouari (2008) 7 NWLR (Pt 1086), 372 at 383.

Consequently, the issues for determination in this appeal are as follows:

1. Whether from the evidence before the trial court, the marriage between the appellant and the respondent had broken down irretrievably to warrant the order of dissolution of the marriage as granted by the trial court. (Grounds 1, 3, 4,5)

2. Whether the award by the trial court of the sum of N3,000.00 per child for monthly upkeep was proper (Ground 6)

3. Whether the respondent led credible evidence regarding her properties allegedly left in the house of the appellant to warrant the order of the trial court directing the appellant to allow the respondent to remove her remaining properties in the house. (Ground 7)

4. Whether the ₦6,150.00 awarded in favour of the respondent for discharging one Master Endurance Irabor from hospital was legal as there was no such claim before the trial court. (Grounds 2 & 8)

Arguing the first issue for determination, the learned counsel for the appellant, Chief M. I. Ukpebor, submitted that the evidence

upon which the court hinged its decision to dissolve the marriage was insufficient to sustain the grounds for the dissolution of marriage as enshrined in section 5 (1) and (2) of the Matrimonial Causes Act, Cap. 220, Laws of the Federation of Nigeria, 1990.

He maintained that the evidence relied upon by the trial court was the "constant quarreling, desertion and unfaithfulness on the part of the appellant." He further argued that there was no evidence of the duration of the alleged desertion adduced at the trial to justify the finding of the trial court.

Arguing further on the issue, the learned counsel submitted that there was no credible evidence adduced at the trial to prove the allegation of infidelity levelled against the appellant by the respondent.

He urged the Court to set aside the dissolution order and to restore the marriage.

In his response, the learned counsel for the respondent, Okuns Aihie Esq., submitted that the marriage between the appellant and the respondent was under the Esan customary law and that the applicable law for the determination of the matrimonial dispute is Esan customary law. He submitted further that under customary

law, there are normally no grounds for the dissolution of marriage as required under the Matrimonial Causes Act.

Learned counsel submitted that under Esan customary law, a marriage can be dissolved for a number of reasons provided the reason is cognizable under the particular custom in question. He referred the Court to excerpts from the book FAMILY LAW IN NIGERIA by E. Nwogugu, at page 217 where the learned author stated that "Technically, there are no grounds for divorce under customary law because divorce may be effected by the mutual consent of the spouses."

He submitted that the decision of the court was based on the mutual consent of the parties and that the appellant cannot blow hot and cold.

He urged the Court to discountenance all the submissions of the appellant's counsel on the requirements of the Matrimonial Causes Act.

We have carefully considered the submissions of both counsel in relation to this issue. Without much ado, the point must be made that the provisions of the Matrimonial Causes Act do not apply to matrimonial proceedings in respect of marriages

contracted under customary law. For the avoidance of doubt, section 114(6) of the Matrimonial Causes Act, CAP. M7. Vol. 8 Laws of the Federation of Nigeria, 2004 provides as follows:

> "Nothing in this Act shall have effect in relation to a marriage which is not a monogamous marriage or which is entered into in accordance with Muslim rites or with any customary law (underlining supplied) in force in Nigeria"

Sequel to the aforesaid provision, we agree with the submissions of the learned counsel for the respondent that we should discountenance the provisions of the Act in the consideration of this appeal.

Furthermore, on the issue of proving grounds for the dissolution of marriage under customary law, it is settled law that none of the parties has a legal duty to prove any grounds for divorce as is required under the Matrimonial Causes Act. What is required is that there must be a formal act on the part of the petitioner to show that he/she is "tired and not willing to continue with the union." See the cases of: Okpanam v Okpanam (1972) E.C.S.L.R. (Pt 11) 561 and Nwangwa v Ubani (1997)10 NWLR (Pt. 525) 559 at 569.

From the evidence adduced at the trial, the respondent was clearly fed up with the marriage, hence she instituted the suit for

divorce. The appellant did not contest the prayer for dissolution of the marriage at the trial. Since he consented to the divorce at the trial, he cannot turn around on appeal to challenge the divorce. We agree with the respondent's counsel that the appellant cannot blow hot and cold.

In the event, we hold that the order for the dissolution of the marriage by the trial court was valid and we resolve issue one in favour of the respondent.

Arguing issue two, the learned counsel for the appellant submitted that whereas the respondent claimed ₦5,000.00 for each of the three children for their upkeep at the trial, the appellant contended that he could only afford the sum of ₦500.00 each because of the nature of his employment. He faulted the award by the trial court of ₦3,000.00 to each child on the ground that there was no such claim before the court.

He further submitted that it is settled law that the court cannot award to a party what is not claimed or proved by the said party. He urged this Court to quash the said award.

Responding, the learned counsel for the respondent submitted that the trial court has the power to exercise its discretion to award

the sum of ₦3,000.00 per child. He referred the Court to the provisions of Order XI(1) of the Customary Court Rules, 1978.

He argued that an appellate court can only be called upon to question the exercise of discretion by a trial court when it was not exercised judicially and judiciously. He cited the following cases in support: I.S.L.G.A. v Afolabi (2003) 18 WRN 74 at 77 ratio 4 and C.G.C. Nig. Ltd v Baba (2003) 23 WRN 44 at 49, ratio 5.

He submitted that the discretion of the lower court was exercised judiciously and judicially.

We have carefully considered the submissions of counsel on this issue.

In matrimonial proceedings, the sum to be awarded for the maintenance of a party to the proceedings, or the child of the marriage shall be determined by the following principles:

(a) the stations in life of the parties and their lifestyles;
(b) their respective means;
(c) existence or non existence of the child or children of the marriage; and
(d) the conduct of the parties.

See the following cases:

1. Adesanoye v Adesanoye (1971) 1 All N.L.R. 123

2. Hayes v Hayes (2000)3 NWLR (Pt. 648) 276

3. Oki v Oki (2000) 13 NWLR (Pt. 783)89

Upon a careful review of the evidence adduced at the trial, it is apparent that both parties are of humble origins. The appellant claimed to be a driver. As a matter of fact, there is no evidence whatsoever of the means of income of either party. Moreso, there was no evidence of his vocation in the village. His conduct during the subsistence of the marriage reveals him as a man of small means. This is also supported by his testimony that he could only afford to pay N500.00 for maintenance.

Counsel for the appellant submitted that the award must be in terms of the exact amount claimed. We do not agree with this submission. Rather, we agree with the counsel for the respondent when he submitted that the trial court had a discretion in the award of maintenance as provided in Order XI (1) of the Customary Court Rules, 1978, as follows:

> "A court may in its discretion make any order within its powers and jurisdiction which it considers the justice of the case demands whether or not the order has been asked for by the party who is entitled to the benefit thereof" (underlining supplied).

In the circumstances, we are of the view that the sum of N3,000 awarded to the respondent for the maintenance of each child per month is rather excessive. In its stead, the sum of ₦1,000.00 (one thousand naira) per month for each child which we consider more reasonable is hereby awarded.

Consequently, we resolve issue two partly in favour of the appellant.

Arguing issue three, the learned counsel for the appellant submitted that the respondent did not lead strict evidence to prove each of the items which she allegedly left in the house of the appellant. He submitted further that the said items are in the realm of special damages which must be strictly proved, more so, when the appellant denied the allegation at the trial. He concluded that the trial court erred in law when it directed the appellant to allow the respondent to remove the items.

Responding to the arguments on issue three, the learned counsel for the respondent submitted that the requirement of strict proof does not apply to District Customary Courts manned by lay men. He referred to the dicta of the courts in the following cases decided by the Supreme Court and the Court of Appeal respectively:

1. Onwuama v Ezeokoli (2002) 21 WRN 125 at 136-137; and
2. Okeke v G.C.C.C. Mapo (2001) 16 WRN 43 at 50

Learned Counsel submitted that the decision of the trial court is in accordance with substantial justice and that common sense required that once a court orders the dissolution of a marriage, parties should be granted access to remove their belongings from the matrimonial home. He maintained that the order of the trial court did not breach any statute.

We have considered the submissions of both counsel on this issue. It has been settled by a line of authorities that while considering the judgments of customary courts manned by lay men, the appellate courts must have regard to the substance and not the form. See the following decisions on the point:

1. Francis Nwanezie v Nuhu Idris and Anor (1993) 2, S.C.N.J. 139.
2. Agwu v Ibenye (1998) 4 NWLR (Pt. 574) 372; and
3. Akpan v R.T.Q.I. Church (2001) 15 NWLR (Pt. 736)326 at 346.

At the trial court, the respondent enumerated the items listed in the claim as the same items which she was seeking the order of the court to permit her to remove from the house of the appellant.

Although the appellant denied having the said items in his possession, the trial court granted the claim of the respondent in this regard. We agree with the learned counsel for the respondent, that the rules relating to special damages and strict proof do not apply to trials before a District Customary Court manned by lay men.

According to Nnaemeka – Agu J.S.C in Nwosu v Udeaja (1991) 21 N.S.C.C. (Pt. 1) 144 at 165:

> "We must approach all the Native Court cases from the stand point that there are no written pleadings or other technical rules of procedure in Native Courts. It is the substance and not the form that ought to be regarded in each case."

By granting the order to permit the respondent to remove her enumerated properties from the house of the appellant, the trial court impliedly made a finding believing the testimony of the respondent that she left the said items in the house of the appellant.

Such a finding of fact by a trial court can only be set aside on appeal if it is shown to be perverse. See the following decisions:

1. Abidoye v Alawode (2001) 85 LRCN 736;
2. Agbeje v Ajikola (2002) 93 LRCN 1

3. Okwejiminor v Gbakeji & Anor (2008) 5 NWLR (Pt. 1079)172 at 81

The appellant has not convinced us that the finding of fact of the trial court in this regard was perverse.

Accordingly, we find no reason to set aside the order of the trial court. We therefore resolve issue three in favour of the respondent.

Arguing issue four, the appellant's counsel submitted that it is an elementary principle of law that a party cannot be awarded what was not claimed. He maintained that the respondent's claim at the trial court was bereft of the claim for the sum of ₦6,150.00, which the respondent allegedly expended on the treatment of one of their children named Endurance. He urged the Court to set aside the award of the trial court for the said amount which was not claimed although it was introduced in evidence by the respondent.

In his reply, the respondent's counsel maintained that since the respondent led evidence to prove the said expenditure, the court was empowered to order a refund of the money by the appellant to the respondent by virtue of the provisions of Order XI (1) of the Customary Court Rules, 1978.

It is now settled law that while considering proceedings from customary courts, an appellate court is entitled and expected to go beyond the claim as framed at the trial court, to ascertain from the entire evidence what precisely is the subject matter of the dispute. See the cases of:

Chief Karimu Ajagunjeun and others v Sobo Osho of Yeku Village and 13 others (1977) 5 S.C. 89;(2002) 1 Q.C.L.R.N 1

Ben Ikpang &Ors v Chief Sam Edoho (1978) 6-7 S.C. 221;

Ajayi v Aina 16 N.L.R. 67

There is no doubt that the claim as worded and framed at the trial court did not include the sum of N6,150.00 which was awarded in favour of the respondent for hospital expenses incurred in respect of Endurance Irabor.

However looking at the entire evidence adduced at the trial, it was abundantly clear that the respondent was making a claim for the refund of the sum of ₦6,150.00 being expenses which she incurred in the course of treating their son. At the trial, the respondent was cross-examined on the issue. Surprisingly, when the appellant testified, he did not deny the claim relating to the said sum. The failure of the appellant to deny that aspect of the claim is a tacit admission of same.

It is settled law that where evidence is adduced before a court to prove a point in issue and such evidence is unchallenged and uncontroverted, the court is bound to accept the evidence as conclusive proof of that point. See the following cases:

1. W.A.S.A. v Kalla (1978) 3 S.C. 21;
2. Ijale v Ajadi (1967) F.N.L.R. 300;
3. Akhionbare v Omoregie (1976) 12 S.C. 11.

In the event, we affirm the decision of the trial court on the award of the sum of ₦6,150.00 and resolve issue four in favour of the respondent.

On the whole, this appeal succeeds in part. Accordingly, we affirm the judgment of the Benin City District Customary Court, Benin City, delivered in this case on the 12th day of February, 2007, except as regards the payment of the sum of ₦3,000.00 per child, for monthly upkeep which we have held should be ₦1,000.00 per month per child.

There shall be no order as to costs in this appeal.

Hon. Justice Joseph Otabor Olubor
(PRESIDENT)

Hon. Justice Peter Osaretinmwen Isibor

Hon. Justice Peter Akhimie Akhihiero

Chief M. I. Ukpebor … … Counsel for the Appellant

Okuns Aihie Esq. … … Counsel for the Respondent