IN THE CUSTOMARY COURT OF APPEAL
EDO STATE OF NIGERIA
HOLDEN AT AUCHI

ON MONDAY, THE 26TH DAY OF JULY, 2010

BEFORE THEIR LORDSHIPS

JOSEPH OTABOR OLUBOR	…	…	…	PRESIDENT (PRESIDED)
PETER OSARETINMWEN ISIBOR	…	…		JUDGE
TIMOTHY UKPEBOR OBOH	…	…	…	JUDGE
PETER AKHIMIE AKHIHIERO	…	…	…	JUDGE
OHIMAI OVBIAGELE	…	…	…	JUDGE

APPEAL NO. CCA/7A/2009

BETWEEN:

SHEGUN PETER	…	…	…	APPELLANT
AND				
CHRISTIANA S. PETER	…	…	…	RESPONDENT

JUDGMENT
DELIVERED BY PETER AKHIMIE AKHIHIERO (JCCA)

This is an appeal against the judgment of the District Customary Court, Okpella, delivered on the 17th day of February, 2009, in Suit No. UDCC/3/2009.

In the said suit, the appellant (as petitioner), sought for an order for the dissolution of his marriage to the respondent (as respondent) and a refund of the sum of N3,000.00 (three thousand naira) bride price, on the following grounds:

(1) Respondent packed all the appellant's properties away from their matrimonial home.

(2) Respondent doesn't want any of the appellant's relations to stay with them in their matrimonial home.

(3) The appellant is not controlling the respondent any longer.

Furthermore, the appellant sought an order of the court for the custody of their two children, to wit: Master Nathaniel S. Peter, aged six years and Master Bonaventure S. Peter, aged four years.

In a nutshell, the appellant's case at the trial court was that he could no longer tolerate the respondent as a wife. He accused her of rudeness, stealing his properties, refusal to welcome any of his relations in their matrimonial home, distributing his money to her friends and collecting money from the personnel manager of his office resulting in monthly deductions from his salary. He also asked for the custody of his two children who were then living with the respondent, namely: Nathaniel Shegun, aged 6½ years old and Bonaventure Shegun, aged 4½ years old.

On the other hand, the respondent's case was that the appellant abandoned the children and herself for about three and half years without any reason. Her family pleaded with him to come back but he refused. She pleaded with him to assist her by paying part of the children's school fees but still no response from him, until she was summoned to court for divorce.

The appellant never visited them during the period of desertion.

The respondent maintained that she would agree to continue the marriage if the appellant is willing to take her back. She urged the court to direct the appellant to assist her with the care of the children. Finally, she asked for the custody of the two children on the ground that they are too young. She stated their ages as follows: Nathaniel Shegun, aged 6 years and Bonaventure Shegun, aged 3 years.

The trial court reviewed the evidence, and in a considered judgment, made the following orders:

(1) The marriage was dissolved forthwith;

(2) Custody of the two children was granted to the respondent;

(3) The appellant is to pay the sum of ₦2,000.00 (two thousand naira) as monthly maintenance for each child.

(4) The appellant may visit the children and the children may spend holidays with the appellant, subject to the consent of the respondent.

(5) The appellant may apply for custody of the children when both of them attain the age of six. That is when Bonaventure Shegun who is three years attains the age of six.

Dissatisfied with the judgment, the appellant filed a notice of appeal containing the omnibus ground of appeal. Thereafter, with the leave of this, he filed three additional grounds of appeal. All the grounds of appeal are reproduced as follows:

GROUNDS OF APPEAL

"1. The judgment is against the weight of evidence, adduced at the trial.

2. The trial court erred in customary law when it granted custody of the two children of the marriage to the respondent who had no visible means of income.

PARTICULARS OF ERROR

(1) There is evidence from the respondent that she always depend on the petitioner for money.

(2) There is also evidence that the respondent comes to the petitioner's office to take money from his manager.

(3) The petitioner has visible means of livelihood to take proper care of the two children.

(4) The trial court erred in customary law when it refused to consider the welfare of the children before granting custody to the respondent

PARTICULARS OF ERROR

(1) There is no reason advanced by the trial court for preferring the respondent to the petitioner for purpose of welfare.

(2) Welfare of the children is the first consideration for any divorce.

(3) The petitioner was in a better position to be granted custody of the children.

(4) The trial court erred in law when it ordered that the petitioner may apply for the custody of the children when both are six years old that is when Bonaventure Shegun Peter who is just three years attains the age of six years without stating the date the said Bonaventure Shegun was born and the date he would attain.

PARTICULARS OF ERROR

(1) The exact age and/or date of birth of the children particularly Bonaventure Peter was in dispute at the trial.

(2) The petitioner on page 6 lines 20 – 21 gave the age of the children as follows:
   (i) Nathaniel Shegun, six and half years old;
   (ii) Bonaventure Shegun, four and half years old.

(3) While the respondent at page 7 lines 22 – 23 gave the age of the children as follows:
   (i) Nathaniel Shegun, six years old;
   (ii) Bonaventure Shegun, three years eight months old.

(4) Nathaniel Shegun Peter was already six years old at the time the trial court made the order"

The learned counsel for the parties filed their briefs of arguments in consonance with the rules of this Court.

The learned counsel for the appellant, A. O. Abu Esq., in his brief of argument, formulated two issues for determination as follows:

"1. whether the trial court was right in customary law in granting the custody of the two children of the marriage to the respondent in preference to the petitioner. This issue is distilled from grounds 2 and 3 of the Grounds of Appeal.

2. whether the trial court was right in customary law to have held that the petitioner may apply for the custody of the children when Bonaventure Shegun Peter who is just three years attains the age of six years without stating the date the said Bonaventure Shegun Peter was born and the date he would attain six years. This issue is distilled from Ground 4 of the Grounds of Appeal."

On his part, the learned counsel for the respondent, P. T. Braimoh Esq. of the Law Firm of F. A. Okanigbuan & Co., adopted the issues as formulated by the appellant's counsel.

Upon a careful consideration of the issues as formulated and adopted by counsel, we are of the view that the two issues as formulated are quite appropriate for the determination of this appeal. However, we

noticed that the original ground of appeal is not covered by any of the issues. Neither was any garment advanced in that regard. In the event, the appellant is deemed to have abandoned the original ground of appeal and it is accordingly struck out.

Arguing issue one, the learned counsel for the appellant submitted that while considering on an application for custody of the children, the welfare of the children is paramount. He referred to the case of Williams v Williams (1987) 2 NWLR (Pt. 54) p. 66, where the Supreme Court laid down the principles and the factors to be considered as follows:

(i) The degree of familiarity between the child and each part respectively.
(ii) The amount of affection between the child and each of the parties.
(iii) The respective income and position in life of the parties.
(iv) The respective accommodation of the parties
(v) The Arrangements made by the parties for the education of the children.

The learned counsel also referred to the case of Otti v Otti vol. 1 SMC (Selected Matrimonial Cases) p. 119, ratio 3, where the court enumerated the factors as follows:

1. The respective income and position in life of the parties;
2. Their accommodation;
3. The arrangement made by the parties for the education of the child; and

4. The opportunities for proper upbringing of the child.

The appellant's counsel submitted that in the case under consideration, the trial court did not take all these factors into consideration before awarding the custody of the children to the respondent.

On the issue of income and position in life of the parties, counsel submitted that the appellant is a Surveyor while the respondent is a petty trader. He argued that since there is no evidence of the monthly income of the respondent, the award of N2,000.00 as monthly maintenance per child cannot solve the problem. He submitted that the trial court should have ascertained the average monthly income of the respondent in order to determine what the appellant should pay in addition to adequately take care of the two children.

On the issue of accommodation of parties, counsel submitted that the respondent has no known address and that in an emergency it would be very difficult to locate her.

Furthermore, on the issue of the arrangement made by the parties for the education of the children, counsel submitted that from the record,

nothing can be urged in favour of the respondent. He pointed out that there is no evidence that the children are in school presently.

Finally, on the issue of opportunities for proper upbringing of the children, he submitted that from the records, there is nothing to urge in favour of the respondent.

Replying to the arguments canvassed under issue one, the learned counsel for the respondent, P. T. Braimoh Esq. conceded that the main factor to be considered in the grant of custody of children, is the welfare of the children. He adopted the principles enumerated by the appellant's counsel in the cases of Williams v Williams (supra) and Ottis v Ottis supra. He went further to cite the case of Kalejaiye v Kalejaiye (1986) 2 WLRN 163 at 175 and referred to sections 70(1), 71 and 72 of the Matrimonial Causes Act.

Arguing further, learned counsel maintained that the respondent gave evidence that she is a trader. He submitted further that the children have more affection for the respondent than the appellant who has long abandoned them. On the issue of income and position in life, he observed that although the appellant claimed to be a surveyor, there is no evidence of his monthly or yearly income to enable the court assess him.

Learned counsel submitted that the argument of the appellant on the issue of accommodation is misconceiving. He maintained that the appellant never raised the issue of proper accommodation at the trial. Furthermore, he maintained that there is no evidence to prove that the appellant has a better accommodation than the respondent.

Finally on the issue of arrangement for the children's education and proper upbringing, counsel submitted that evidence was adduced to prove that the children are schooling. He maintained that there is nothing to show that the appellant plan for the children or that he has any plan at all for them in that regard.

We have considered the arguments of both counsel on this issue. It is settled law that in relation to the issue of custody in matrimonial proceedings, the welfare of the children concerned is of paramount consideration, see the following cases on the point:

(i) Afonja v Afonja (1971) 1 UILR, 105;

(ii) Williams v Williams (1987) 2 NWLR (Pt. 54), 66

(iii) Anyaso v Anyaso (1998) 9 NWLR (Pt. 564) 150.

In order to determine the custody that will be in the best interest of the children, the courts have consistently applied the factors already enumerated by both counsel in their briefs of arguments. We adopt all the

factors as enumerated by the learned counsel for the appellant in his Brief of Argument.

On the issues of the degree of familiarity and the amount of affection between the children and each of the parties, it is evident that the appellant who deserted his family for over three years cannot be said to be familiar with the would be towards their mother who alone, has been taking care of them all these years. Where a party has deserted or abandoned the children, this is a strong indication of his unfitness to have their custody. See the case of Ihonde v Ihonde Suit No. WD/85/70 (unreported), High Court, Lagos, 17 April, 1972.

Furthermore, on the issue of the income of the parties, we agree with the learned counsel for the respondent that although the appellant claimed to be a surveyor, there is no evidence of his income. Moreover, without any contributions from him since his desertion, the respondent has been providing for the children.

We also agree with the submissions of the learned counsel for the respondent that on the issues of accommodation and arrangements made for the education of the children there was no evidence adduced by the

appellant to prove that he had a better accommodation nor a better plan for the children's education.

From the foregoing, it is evident that the trial court was right when it granted custody of the two children to the respondent in preference to the appellant. We therefore resolve issue one in the affirmative.

Opening his arguments on issue two, the learned counsel for the appellant submitted that since the exact age of Bonaventure Shegun Peter was in dispute at the trial, the trial court ought to have settled the issue of his date of birth before making the order relating to his custody. Counsel maintained that whereas the appellant gave the age of the children as follows:

(i) Nathaniel Shegun, six and half years old; and

(ii) Bonaventure Shegun, four and half years old, and three years and eight months old respectively.

He further submitted that since the order in respect of Bonaventure can only take effect when he attains the age of six, it was imperative for the trial court to first determine the date of the birth before making the order. He maintained that the failure of the trial court will lead to another round of litigation to determine the effective date of the order. Counsel argued

that the second, third and fourth orders made by the trial court would cease to apply the moment the said Bonaventure attains the age of six, and the appellant exercises his right to apply for custody. According to him, this is why it was imperative for the court to have determined the exact age of Bonaventure.

In his response, the learned counsel for the respondent submitted that the trial court evaluated the evidence of both parties and the appellant did not challenge the ages of the children as stated by the respondent. He maintained that the burden of proof is on the party who is asserting a fact and he relied on section 137 of the Evidence Act, Cap. 112, LFN, 1990. Counsel argued that by his failure to cross-examine the respondent on the true ages of the children, the appellant is deemed to have accepted the version of the respondent.

Counsel submitted that contrary to the arguments of the appellant's counsel, the second, third and fourth orders will not cease to apply the moment Bonaventure attains the age of six but will cease only if the court grants the subsequent application for custody.

Finally, counsel submitted that since the trial court made the order for the payment of two thousand naira monthly as maintenance, the

appellant has refused to pay that amount even though there was no order for stay of execution of the judgment. He maintained that the appellant has flouted the maxims of equity that "He who seeks equity must do equity and "he who comes to equity must come with clean hands." He referred the Court to the case of Nana v Nana (2006) 3 NWLR (Pt. 966) 1 at 40, where it was stated that the courts have discretionary powers to order and assess maintenance of a party and the children of the marriage, based on the conduct of the parties. He also cited case of Kalejaiye v Kalejaiye (supra) atp.125on the point.