IN THE HIGH COURT OF JUSTICE
IN THE UROMI JUDICIAL DIVISION
HOLDEN AT UROMI
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON THURSDAY THE
20TH DAY OF DECEMBER, 2018.

BETWEEN: SUIT NO: HCU/3D/2015

MRS. HELEN OMAGBON í í í í í í í í í í í í ..í í ..PETITIONER

AND

MR. HAPPY OMAGBON í í í í í í í í í í í í ..í í í .RESPONDENT

J U D G M E N T

This Judgment is in respect of a Petition for the dissolution of marriage filedon behalf of the Petitioner, Mrs. Helen Omagbon by her Counsel, D.T. AchiEsq., on the 25th day of August, 2015.

The Petition is against her husband Mr. Happy Omagbon the Respondent herein.

The orders sought by the Petitioner in paragraph 18 of the Petition are as follows:

a) A Decree Of Dissolution Of Marriage on the ground of desertion (actual and constructive) by the Respondent and his other matrimonial wrongs of misconduct including, lack of commitment to the success of the marriage; denial of conjugal rights to Petitioner; irretrievable break down of the marriage and Respondentøs dealing in diabolical matters
b) Custody of the only child of the marriage (Master Joshua EghosaEromonseleOmaghon);
c) The sum of N80,000.00 (Eighty Thousand Naira) per month as feeding, accommodation, medicals; and maintenance allowance for the only child of the marriage;
d) An Order compelling the Respondent to pay the educational fees inclusive of school materials for the only child of the marriage through the Petitioner before the beginning of each school term.

The Grounds for the Dissolution of the Marriage as contained in paragraph 17 of the Petition are as follows:

(a) Irretrievable break down of the marriage
(b) Desertion of the Petitioner
(c) Incompatibility;
(d) Cruelty/Denial of conjugal rights to the Petitioner;
(e) Irreconcilable Differences;
(f) Lack of Commitment to the Success of the Marriage.

In response to the Petition, with the leave of the Court, the Respondent filed an Answer to the Petition dated 10th January, 2017.

Thereafter, the Petitioner filed a Reply to the Respondentøs Answer dated 7/3/2017 and the Respondent filed a Rejoinder dated 30th March, 2017 but filed on the 31st March, 2017.

The Petitioner testified and tendered some documents which were admitted as exhibits as follows: ***Exhibit "A" (School Calendar), Exhibit "B" (Birth Certificate), Exhibit "C-C5" (Receipts for payment of bills), Exhibit "D" (photocopy of a Marriage Certificate) and Exhibit "E" (photograph).***

The Respondent also gave his evidence and tendered the following documents which were admitted as Exhibits: ***Exhibit "F" (Admission Letter), Exhibit "G" (Notification of Result) and Exhibit "H" which is a Certificate of Birth.***

The Petitionerøs case is that on the 8th of December 2012 she got married to the Respondent in the Redeemed Christian Church of God, Mount Zion Area Headquarters, LuckyWay, Ikpoba Hill, Benin City and was issued a Marriage Certificate which was kept by the Respondent.

After the marriage the parties lived together at No. 3 Igbinedion Street, off old Benin Lagos road Isihor quarters, Benin City. During their cohabitation, on the 28th 0f November, 2013, the Petition gave birth to a son for the Respondent named Joshua EromoseleOmagbon. The childøs birth certificate was admitted as Exhibit õBö.

Cohabitation between the parties ceased sometime in April, 2015.According to the Petitioner, soon after their marriage, the Respondent told her to be providing food for the house. At that time, her salary was regular.

Sometime in 2013 her salary became irregular so she was unable to carry on with the feeding arrangement and eventually, the Respondent drove her out of the house with four months pregnancy.She said that while pregnant, the Respondent did not provide for her antenatal care such and upon her delivery, it was her parents who paid the medical bills.

When the problem was on, the Petitioner called the Respondentøs elder sister Mrs. Oghogho Charity and explained to her. Sheallegedly called the Respondent to talk to him but he did not change.

She maintained that the Respondent has never provided for the upkeep of his child. That from the childøs birth till now she has been providing for the childøs feeding,medical bills and school fees.

That the Respondent told her that he was no longer interested in the marriage. That she has two aged parents and six siblings that she is supporting and needs support from him to take care of the only child.

She is asking for N80, 000.00 monthly from the Respondent to cover the childøs accommodation, feeding, clothing and school fees. She said that she has been paying the school fees ever since and she tendered the school fees receipts as Exhibits õCö to õC5ö.

She stated that the Respondent is the Proprietor of a school and tendered Exhibit õAö which is the school almanac.

Photocopy of the Marriage Certificate was admitted in evidence as Exhibit õDö.

The Respondent testified in defence of the Petition and called no witness.
He said that he is the Director of Decency Education Center, Benin City and a part time student of the University of Benin.

That he is not against the divorce but was opposed to the claim for N120, 000 for rent and N80, 000 for maintenance,

That he met the petitioner three months before their wedding and a month after the wedding, he saw arrogance and pride in her character and he cut off from her. A month after their wedding, she went to her work in Uromi and was coming home every two weeks. During this period, he was cooking for himself for five months.

When she relocated to Uromi, she stopped picking hiscalls. She remained in Uromi until she gave birth to our son whose name is OmagbonOkuomose Joshua Eghosa. He tendered a photocopy of his Birth Certificate as Exhibit õHö. He said that he did not drive the Petitioner out of her matrimonial home.

He said that ever since they have been quarrelling, he tried to settle the matter. Both parents tried to reconcile them to no avail.

Eventually, the Petitioner came to the house to remove her things by herself. Ever since, the Petitioner has denied him access to their son.

He said that the school that he is running belongs to his family. That he cannot afford to pay N120, 000 for accommodation for the Petitioner because he has a responsibility to his mother who is deaf, dumb and diabetic.

He said that he cannot afford to pay N80,000 per month for the childøs upkeep and offered to pay the sum of N7,000 as monthly maintenance apart from the school fees which should be moderate. That he would want to be paying the school fees to the school account as long as he is given access to his child.

He promised to take good care of the child within his income.

Under cross Examination, he maintained that he is the father of the only child of this marriage. That he named the child OmagbonOkuomose, Joshua and Eghosa. That he did not mislead the Court in paragraph 9 of the Answer to the Petition where he omitted the name: Okuomose.

He said that Exhibit H was issued on 28/11/13 by the National Population Commission in Obeidu Primary Health Center on the day the child was born.
That the said Exhibit H was given to him by the Petitioner. He said that he does not know the origin of Exhibit B which was issued in 2016. That the name Eromonsele on Exhibit B is an Ishan name and they did not give any Ishan name on the day of the naming ceremony.

He said that his monthly salary is N27, 000 and being a private school, he does not have any pay slip or anything to show. He admitted that he has not paid any school fees for his son because the Petitioner denied him access. He agreed that it was his duty to provide shelter and other needs of his son. That his son also needs other things like books, uniform etc. That occasionally he needs medical attention but that his wife is a nurse. He maintained that the upkeep of children is a shared responsibility.

He said that every month he spends approximately N10, 000 for his motherøs upkeep.

At the close of the evidence, both counsel filed their Written Addresses which they adopted as their arguments on the day of final addresses.

In his Written Address dated and filed on the 3rd of August, 2018, the learned counsel for the Respondent, F.T.Odebata Esq. formulated four Issues for Determination as follows:

1) ***Whether the marriage between him and the Petitioner in this suit has not broken down irretrievably;***
2) ***Whether the Petitioner in this case is entitled to the custody of the only child of the marriage as could be gleaned from the totality of her evidence before court;***
3) ***Whether the Petitioner is entitled to the reliefs sought especially as captured by paragraph 18 (c) and (d) of her Petition; and***
4) ***Whether the evidence of the Petitioner in this case is credible enough as to be worthy of any consideration by this Honourable Court.***

Thereafter, learned counsel argued the Issues *seriatim*.

ISSUE NO. 1:

Whether the Marriage between him and the Petitioner in this suit has not broken down irretrievably.

Very succinctly, learned counsel submitted that from the totality of the evidence led in this case, the marriage between them has broken down irretrievably and he urged the Court to so hold. He said that the Respondent told the court repeatedly, in his pleadings and in his oral evidence that he is not opposed to the dissolution of the marriage.

ISSUE NO. 2:

Whether the Petitioner in this suit is entitled to the custody of the only child of the Marriage.

Counsel referred the Court to paragraph 18(b) the Petition where the Petitioner is seeking the custody of the only child of the Marriage. Hesubmitted that the Petitioner has not furnished this Court with sufficient, compelling and credible evidence/materials that will make this Honourable Court grant her the said relief.

On the meaning of custody of children, learned counsel referred the Court to the case of:***ALABI V. ALABI (2008) ALL FWLR (PART 418), PG 245 @ 257, RATIO 9***, where the Court of Appeal (Ilorin Division) stated thus:

"Custody of a child connotes not only the control of the child, but carries withit the concomitant implication of the preservation and adequate care of the child's personality, physically, mentally and morally. In other words, this responsibility includes his/her needs in terms of food, shelter, clothing and the likes".

On the principles governing the grant of custody of children in Matrimonial Causes, he referred to the same above cited case of:***ALABI V. ALABI @ pg 258, Ratio 12*** where the court of Appeal had this to say:-

"Award of custody of the children of a Marriage that has broken down irretrievably is governed by Section 71(1) of the Matrimonial Causes Act, 1990 which enjoins the court in proceedings relating to custody, guardianship, welfare advancement or education of children of the Marriage, to take the interest of the children as paramount consideration and the court in this regard is given wide discretionary powers which it can exercise according to the peculiar circumstances of each case. The welfare of the infant is not only a paramount consideration, but a condition precedent. The award of custody should therefore not be granted as a punitive measure on a party guilty of matrimonial offences nor as a reward for the rival party."

Counsel submitted that it is a settled principle of law that there is no settled rule that a child of tender years should remain in the custody of the mother. See the case of:***OTTI V. OTTI (1992) 7 NWLR (PT. 252) 187 @ 210.***

Relying on the above cited judicial authorities, he submitted that the Petitioner in this case does not have a suitable accommodation for herself and the only child of the Marriage, hence, she is asking the Respondent to provide her with N120,000 (One hundred and twenty thousand Naira) yearly to provide accommodation/shelter for the only child of the Marriage even though she belongs to the working class. He further submitted that there is nothing before the court to show that the said amount is what she has been paying to house herself and the only child of the marriage.

He said that the Petitioner through Exhibit õAö told court that the Respondent is a proprietor of a school. That in response to this claim, the Respondent told court that though his name appears as the proprietor of the said school, in the actual sense, it is a family business of which he is a Director.

He said that this fact coming from both the Petitioner and the Respondent buttresses the fact that the only child of the Marriage will be better and adequately taken care of educationally if allowed to live with his father.

Counsel posited that the Petitioner is not asking for the maintenance of herself but maintenance of the only child of the marriage. He wondered why the Petitioner is asking the Respondent to pay her the sum of N120,000 (One hundred and twenty thousand Naira) yearly being cost for the accommodation of the only child of the Marriage when she has failed to tell court or state in her pleadings that she and her child would live in separate apartments.

He said that the Respondent when confronted during cross examination-in-chief, whether he could afford N120,000 (One hundred and twenty thousand Naira) as accommodation cost for his child answered in the negative. He said that the implication of the Petitionerøs request for N120,000 (One hundred and twenty thousand Naira) yearly from the Respondent as cost of accommodation is that she presently cannot provide a suitable accommodation for the child.

Consequently counsel urged the Court to use its wide discretionary powers to refuse this ambit of the Petitionerøs relief before court. In the alternative, he urged the Court to grant

custody of the only child of the Marriage to the Respondent in the overriding interest of the welfare of the only child of the marriage.

He said that if the Court is not minded to grant the custody of the child to the Respondent, the Respondent should be granted unrestrained access to his child.

ISSUE NO. 3:

"Whether the Petitioner is entitled to the reliefs sought, especially as captioned by paragraph (c) and (d) of her Petition".

On this issue, Counsel submitted that the Petitioner is not entitled to the said reliefs as captured by paragraphs (c) and (d) of her Petition.

He said that the Petitioner is asking for an order of this Honourable Court compelling the Respondent to pay to her the sum of N80, 000 (Eighty thousand Naira) monthly as feeding, medicals and maintenance for the only child whereas she failed to show that her child is a sickler to justify her request for such high medical bills for the child.

Furthermore, he said that the Petitioner failed to provide documentary evidence to substantiate her alleged expenses on her child, her aged parents and siblings from her monthly income of N65, 000 (Sixty-five thousand Naira) as a qualified Nurse with Edo State Government. That under cross-examination she told the court that she does not have any other source of income, other than her monthly salary or income of N65,000 (Sixty-five thousand Naira) and that she is being owed salary arrears by her employer.

He said that the sum total or legal implication of the evidence of the Petitioner as captured above is that she is not a witness of truth. She is hiding material facts from the Court. He said that it is now settled principle of law that ***"he that comes to equity must come with clean hands"***. He submitted that the Petitioner has not done equity and as such equity should not aid her and he urged the Court to so hold.

He posited that the mere fact that the Respondent is a school proprietor does not make him a rich man. He said that the Petitioner failed to furnish court with materials to show the financial status or capacity of the Respondent.

He urged the Court to refuse this ambit of the Petitionerøs reliefs and award as maintenance for the child, what accords with fairness, equity and substantial justice.

Learned Counsel submitted that maintenance of children of a Marriage that has irretrievably broken down is not the sole responsibility of the man. It is now a shared responsibility of both the man and the woman especially when the woman belongs to the working class as it is in the present case. For this proposition on shared responsibility of maintenance, Counsel relied on the case of:***IDOWU V. IDOWU (2016) ALL FWLR (PART 863) 1688 @ 1700, RATIO 10.***

He pointed out that the Petitioner is not asking maintenance for herself but for the only child of the marriage and that parties are bound by their pleadings before court.

Counsel referred to paragraph 13 of his Rejoinder filed on the 31st day of March, 2017 where they pleaded that the Respondent is ready and willing to pay the sum of N7,000 (Seven thousand Naira) monthly for the upkeep of the child. That in paragraph 14 of the said Rejoinder, he stated that he is also ready and willing to take over the educational needs of his child but that such payments for the educational needs of his child would be paid directly to the school which his child attend provided it is affordable.

ISSUE NO. 4:

"Whether the evidence of the Petitioner in this case is credible enough as to be worthy of any consideration by this Honourable Court".

Counsel submitted that from the totality of evidence led in this case, the Petitionerøs evidence is not worthy of consideration. He urged the Court to take the evidence of the Petitioner with a pinch of salt because it has been totally discredited during the course of Cross-Examination by the Respondentøs Counsel.

He pointed out that one of the inconsistencies and illogicalities in the evidence of the petitioner before court has to do with her earnings vis-vis her spending. The Petitionerøs monthly income is N65,000 (Sixty-five thousand Naira). Yet, she claims she spends N80,000 (Eighty thousand Naira) monthly on the only child of the marriage; yet, she claims she maintains herself, her aged parents and her siblings without telling the court how she gets the sufferance.

He submitted that the Petitioner is not a witness of truth and urged the Court to so hold.

Learned counsel also queried Exhibits õBö and õHö which are birth Certificates of the same child. He said that whereas Exhibit õBö was tendered by the Petitioner, Exhibit õHö was tendered by the Respondent. That the Respondent under Cross-Examination told the court that Exhibit õHö was obtained by the Petitioner and given to him. That this piece of evidence was never contradicted in any way by the Petitioner and it is deemed admitted in law. He therefore urged the Court to reject Exhibit õBö being fraudulent and questionable and accord great probative value to Exhibit õHö.

He maintained that Exhibit õBö is an afterthought. That the child in question is Benin by paternity and the Petitioner was being clever by half by tendering Exhibit õBö. He urge the Court not to attach any weight to Exhibit õBö.

Learned Counsel also urged the Court to attach no weight to Exhibits õCö ó õC5ö which are cash receipts of Destiny Shapers Academy. He said that a critical look at the said cash receipts will show that the address where the said Academy is situated is not indicated. That the town or city or phone number(s) of the said Academy are not indicated for the purpose of authenticating their genuineness or otherwise.

He submitted that the absence of these vital information on the face of the said cash receipts belonging to Destiny Shapersø Academy creates doubts in the mind of the Court which should be resolved in favour of the Respondent. He also urged the Court to attach no

weight to Exhibits õBö and õCö ó õC5ö respectively because they have been so discredited that no reasonable Court will rely on them. He submitted that a document may be admissible in evidence but the weight to be attached to it is another matter. See:***OMEGA BANK (NIG) PLC V. O.B. (LTD) (2005)ALL FWLR (PT. 249) 17 1964 @ 1973, Ratio 12***.

In conclusion, learned Counsel urged the Court to hold that although the Marriage has broken down irretrievably, the Petitioner has failed to prove her reliefs as contained in paragraph 18(b), (c) and (d) of her Petition.

Alternatively, he urged the Court to award maintenance for the only child of the Marriage in an amount which is within the means and income of the Respondent as contained in paragraph 13 of the Respondentøs Rejoinder of 31st March, 2017. He said that the Respondent is also ready and willing to cater for the educational needs of his child insofar as they are within his means and income as contained in paragraph 14 of his Rejoinder of 31st March, 2017. That the Respondent should be granted unrestrained access to his child.

He submitted that the Respondent in is not guilty of any Matrimonial wrongs. That he was not the one that drove away the Petitioner out of the Matrimonial home, rather, it was the Petitioner that packed her belongings and left the Matrimonial home on her own volition.

In his Written Address dated and filed on the 25th of September, 2018, the learned counsel for the Respondent, D.T.Achi Esq. formulated three Issues for Determination as follows:

I. ***Whether on the basis of the pleadings and evidence from the parties herein, the marriage between the Petitioner and the Respondent has not broken down irretrievably.***
II. ***Whether on the weight of evidence adduced, the Petitioner is not entitled to a Decree of Dissolution of the Marriage between her and the Respondent.***
III. ***Whether from the evidence adduced, the Petitioner is not entitled to the prayers sought in her Petition including custody of the only child of the marriage as well as to maintenance for the said child***.

Thereafter learned Counsel argued the Issues seriatim.

ISSUE 1:

Whether on the basis of the pleadings and evidence from the parties herein, the marriage between the Petitioner and the Respondent has not broken down irretrievably.

Arguing this issue, learned counsel submitted that both the Petitioner and the Respondent are agreed though for different reasons that the marriage between them has broken down irretrievably. He said that the Petitioner gave copious evidence of the circumstances which informed her decision to seek for dissolution of her marriage to the Respondent.

He posited that the Respondent in his Answer to the Petition, his evidence in court and in his counseløs address unequivocally admitted that the marriage between him and the Petitioner be dissolved. He said that although the Respondent failed to file a cross-petition, his admission is nevertheless material and the Court can rely on same.

He submitted that what is admitted needs no further proof and referred to the cases of:***MOSES v ONU [2013] All FWLR (Pt. 674) p. 153 at p. 187 paras. E – F; and KANO v MAIKAJI [2013] All FWLR (Pt. 673) p. 1850 at p. 1877, paras. B – C.***

Counsel therefore urged the Court to hold that the marriage has broken down irretrievably and to resolve Issue 1 in favour of the Petitioner.

ISSUE 2:

Whether on the weight of evidence adduced, the Petitioner is not entitled to a Decree of Dissolution of the Marriage between her and the Respondent.

On Issue 2, learned Counsel submitted that the Petitioner has satisfied the onus of proof placed upon her to be entitled to a Decree of Dissolution of the Marriage between her and the Respondent. That the Petitioner tendered Exhibits õDö and õEö to prove that she was married to the Respondent under the Act.

He submitted that the Petitioner pleaded in paragraph 12 of her petition and led evidence to the effect that the Respondent forcefully sent her away from the matrimonial home in April, 2013 when she was already pregnant with their only child and he (Respondent) was in the habit of denying Petitioner her conjugal rights especially sex.

That the Respondent for no just reasons did not provide food, money and other essentials for the Petitioner or in the matrimonial home; that the Respondent throughout the period of her pregnancy failed, refused and/or omitted to pay her antenatal fees, failed to purchase baby things or pay the delivery bill which was paid by her father. That the Petitioner was never showed love and did not experience conjugal bliss as it ought to be between a husband and wife; instead she constantly experienced neglect, scorn and insults from the Respondentøs family. Also that after Respondent sent her packing from the matrimonial home, she tried in vain to get back and visited Respondent to make him see reasons with her to no avail and went severally to Respondentøs sister Mrs. Charity Oghogho and other relations accompanied by her relations also to no avail.

He submitted that the Petitioner led evidence to show that the Respondent does not show concern even for the only child of the marriage including at times when he is sick leaving his care and welfare (both moral and financial) to the Petitioner; and because she is a nurse, she manages the child as best as she possibly can. That all these conducts lead irresistibly to the only conclusion that Petitioner has successfully proved that her marriage to the Respondent has broken down irretrievably.

He maintained that the above weighty evidence were not countered, controverted or challenged by the Respondent in any material manner. That they are deemed correct. See: ***GABRIEL JIM-JAJA v COP RIVERS STATE & ORS. [2013] MRSCJ Vol. 11 p. 29 at p. 41, paras. G – I; and***

OKORO v OKORO [2011] All FWLR (Pt. 572) p. 1749 at p. 1787, paras. E – F.

Addressing the Court on Exhibit õHö, Counsel submitted that it is a forged document. That the Respondent under cross-examination claimed that the Petitioner obtained Exhibit õHö and gave it to him. He said that Exhibit H was issued atUromion the same day that the Petitioner put to bed and was still on admission and in pains at Stella Obasanjo Hospital in Benin City! He maintained that it is preposterous to suggest that the Petitioner left Stella Obasanjo Hospital in Benin City soon after delivery to travel to Uromi where she procured Exhibit õHö before the naming of the child and returned with it to give to the Respondent.

He said that this piece of evidence from the Respondent flies in the face of reason especially when the Respondent admitted under cross-examination that the Petitioner was discharged from Stella Obasanjo Hospital, Benin City two days after she delivered the only child of the marriage and that a naming ceremony for the child was held after Petitioner was discharged and came back with the child from the hospital.

He urged the Court to discountenance Exhibit õHö totally and instead place reliance on Exhibit õBö which is the original and actual birth certificate of the only child of the marriage issued by the relevant agency.

He said that instances where the Court can hold that a marriage has broken down irretrievably are laid down in Section 15(2) (c) of the Marriage Act.

That in the present petition, from the totality of the evidence of the Petitioner, she has established in accordance with the law on the subject not only the detestable acts/behavior of the Respondent but also the fact that she finds such acts/behavior intolerable to continue to live with the Respondent. See the case of ***NANNA v NANNA [2006] 3 NWLR (Pt. 966) p.1 at p. 25, paras. A – G; 30, paras. A – B.***

He urged the Court to hold that the marriage between the Petitioner and the Respondent has broken down irretrievably on account of the evidence of the Petitioner which shows that she and the Respondent are irreconcilable, incompatible, incongruous and implacable. He urged the Court to discountenance the arguments of the Respondentøs counsel in their Issue 4 and instead resolve this Issue in favour of the Petitioner and accordingly grant her prayer for dissolution of the marriage between her and the Respondent.

ISSUE 3:

Whether from the evidence adduced, the Petitioner is not entitled to the prayers sought in her Petition including custody of the only child of the marriage as well as to maintenance for the said child

In support of this issue, learned counsel relied on his on submissions on Issue 2 above and further submitted that the Petitioner is entitled to the prayers sought in her Petition

including custody of the only child of the marriage as well as to maintenance for the only child of the marriage.

He submitted that the Petitioner has satisfied the onus of proof expected of her to be entitled to the prayers sought in her petition. He said that the Petitioner pleaded and led evidence to the effect that she spends the sum of N30, 000.00 (Thirty Thousand Naira) monthly now for the welfare and upkeep of the only child of the marriage from her modest income as a nurse which amount does not include accommodation and other expenses. That the only child of the marriage is now in school at Destiny Shaperøs Academy, Uromi and that she has been the one paying school and other fees. She tendered Exhibits õCö and õC1ö to õC5ö without objection to prove this fact.

He said that the Petitioner gave evidence that her present income as a nurse is N65,000.00 (Sixty-five Thousand Naira) as an employee of Esan North-East Local Government Area. That she has no other income but from this amount she supports her aged parents and six (6) younger siblings apart from the only child of this marriage. That she needs financial support as her salary cannot sustain the growing needs of the child and her own.

He said that the Petitioner established that contrary to her financial status, the Respondent is the owner/proprietor of Decency Education Centre in Isihor, Benin City which school brings him a handsome income. That he is into commercial transportation and buys and sells vehicles as well. She tendered Exhibit õAö to support this.

He urged the Court to reject the Respondentøs weak defence that the school is a family business.

Counsel submitted that a man has a duty under the law to maintain his wife and children and such a wife and children have a right to be so maintained. See:***Section 70(1) of the Matrimonial Causes Act*** as well to the case of ***NANNA v NANNA (Supra) at p. 41, paras. B – C. See also OKAOME v OKAOME [2017] All FWLR (Pt.900) p.456 at p.471, para. G where the Court of Appeal, per Anyanwu JCA held that "In Nigeria, the husband is supposed to take care of his wife."***

Counsel submitted that the order of maintenance is not like a claim for special damages where the claimant must strictly prove his/her entitlement to such award, as canvassed by counsel to the Respondent, before the same can be awarded by the court. See:***NANNA v NANNA (Supra) at p. 41, paras. C – D.***

He posited that the grant of an order for maintenance of a spouse or children is discretionary though subject to the following factors:

a. ***the parties' income;***
b. ***earning capacity and by implication, properties owned by each party;***
c. ***financial resources;***
d. ***financial needs and responsibilities;***
e. ***standard of life of the parties before the dissolution of the marriage, their respective ages and the length of time they were husband and wife.***

See:***OKAOME v OKAOME (Supra) at Pp. 471 – 472, paras. H – B. In OBAJIMI v OBAJIMI [2012] All FWLR (Pt.649) p. 1168 at 1180, paras. F – G,*** the Court of Appeal held that an order for maintenance of a party can be made by a court notwithstanding that a decree is, or has been made against that party. In fact, that maintenance of a wife may be claimed by her from the husband even if there is no suit for divorce or separation. In other words, the wife of a marriage under the MCA is entitled to claim maintenance in the High Court if her husband willfully neglected to maintain her, as in this case, without instituting a matrimonial case.

He contended that in assessing the amount to be ordered as maintenance, the court is to be guided by the following principles:

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

See the cases of:***ODUSOTE v ODUSOTE [2013] All FWLR (Pt. 668) p.867 at p.892, paras G – H; and TABANSI v TABANSI [2017] All FWLR (Pt.891) p. 784 at p. 807, paras. E – F.***

Counsel referred to the decision of the Court of Appeal per ***Kekere-Ekun JCA*** (as he then was) where he interpreted ***"means" of the parties*** in ***OKORO v OKORO (Supra) at p.1777, para. F*** to refer to ***the respective capital assets of the parties including contingent and prospective assets***. He said that the Petitioner gave evidence that she is nothing more than a nurse in the employment of the Esan North-East Local Government Area (not Edo State Government as erroneously submitted by Respondent) on a salary of N65,000.00 unlike the Respondent who is a co-owner, according to him, of a viable private educational institution in Benin City and thus has assets.

Counsel referred to the case of:***OPARISON v OPARISON [2013] All FWLR (Pt.666) p.523 at Pp.533 – 534, paras. H – F***, where it was held that

A party who has an obligation to maintain his children is under an obligation to order his financial affairs with due regard to his responsibilities to pay reasonable maintenance for them and to meet his reasonable financial obligations.

He submitted that on the basis of the above authorities, that not only is the Petitioner and the child of the marriage eminently entitled to maintenance by the Respondent, the Respondent owes them the responsibility to pay same.

He said that it has been established that Respondent has never paid any of the childøs bills whether for school or other bills even though he is under an obligation to do so.

He urged the Court to grant the reliefs of the Petitioner regarding maintenance of the child of this marriage or make an order for a sum sufficient in keeping with the times, for the welfare and upkeep of the only child of the marriage.

On the issue of custody of the only child of the marriage, Counselsubmitted first and foremost that Respondent did not file a cross-petition wherein he petitioned for and pleaded custody of the only child of the marriage. He maintained that his evidence on this

issue goes to no issue and his counsel's arguments and submissions asking for custody should therefore be discountenanced in their entirety. See the case of:***NBC PLC v ORESANYA [2009] 16 NWLR (Pt. 1168) p. 564 at p. 584, paras. A – B.***

He said that having not cross-petitioned on this issue, the Petitioner's evidence is deemed unchallenged, reliable and to be believed and relied upon by this Honourable Court in awarding custody of the only child of the marriage to the Petitioner. See OKORO v OKORO (Supra) at p. 1787, paras. E - F.

He submitted that ***Section 71(1) of the Matrimonial Causes Act*** enjoins the Court in proceedings relating to custody, guardianship, welfare, advancement or education of children of a marriage to take the interest of the children as paramount considerations. He said that the criteria for the grant of custody of children are well settled and include inter alia:

i. ***The degree of familiarity of the child with each of the parents;***
ii. The amount of affection by the child for each of the parents and vice versa;
iii. The respective incomes of the parents;
iv. Education of the child;
v. The fact that one of the parties now lives with a third party as either man or woman etc.

See:***ALABI v ALABI [2007] 9 NWLR (Pt.1039) p. 297 at Pp. 347 – 348, paras. D – A.***

He submitted that the Petitioner has substantially met the criteria outlined above and ought to be granted custody of the only child of the marriage. That since the birth of the only child of the marriage, the Respondent has not shown any interest in him or his welfare and neither does he visit or call the child including at times when he is sick. That the Petitioner has been the one playing the role of both mother and father and the Respondent has not demonstrated any overarching reason to be granted custody of the child.

However, he said that the Petitioner is not averse to the Respondent visiting the child or trying to bond with his son. He urged the Court to hold that the interest of the only child of the marriage herein will be best served with custody being granted to the Petitioner.

In conclusion, he submitted that the Petitioner has met the onus of proof required of her in law to be entitled to a Decree of Dissolution of Marriage between her and the Respondent and to also be entitled to a grant of custody of the only child of the marriage as well as to her prayer for maintenance. On the contrary, he urged the Court to discountenance the authorities cited by the Respondent as they are not applicable to the facts of this case and resolve all issues herein in favour of the Petitioner. He asked for costs of N150,000.00.

Upon receiving the Petitioner's Written Address of Counsel, the learned Counsel for the Respondent filed a Reply on Point of Law dated 17th of October, 2018.

In the said Reply on Points of Law, he submitted as follows:-

That in response to issue 2, paragraphs 3 and 4 of the said Final Written Address that it does not lie in the mouth of the Petitioner's Counsel to contend that the Petitioner's evidence as contained in her pleadings has not been materially countered. That it is the

exclusive function and responsibility of this HonourableCourt. He urged the Court to look into his records in doing justice to this issue raised by the Petitionerøs Counsel.

He submitted that the said piece of evidence was credibly controverted by the Respondent both in his pleadings and oral evidence in court. On the power of the Court to look into his records, he relied on the case of:***DAGGASH V. BULAMA (2004) ALL FWLR (PART 212), 1666, RATIO 27***.

Consequently, he submitted that the cases of: ***GABRIEL JIM-JAJA V. COP. RIVERS STATE & ORS AND OKORO V. OKORO*** relied on by the Petitionerøs Counsel were cited out of context.

In response to issue No. 3, particularly paragraph 2 of the Petitionerøs Final Address, he submitted that the said address of Counsel is a calculated attempt to mislead the Court and it is trite law that parties are bound by their pleadings. He referred to paragraph 12(xiv) a, (b), (c) and (d) and 18 of the Petitionerøs Petition.

In reply to paragraph 4 of the Counseløs address under Issue 3 wherein he referred to the case of ***OKAOME V. OKAOME***, he submitted that the said case was cited out of context as it is not applicable in this case.

He said that throughout the length and breadth of the Petitionerøs pleadings and evidence before this Honourable Court, she never asked the Respondent to maintain her. Rather the maintenance she asked from the Respondent is essentially in respect of the only child of the marriage. He said that Counsel has imported an un-pleaded fact into his address. That in any case, Alimony or Spousal Support for an ex-wife (when a marriage between the parties has been legally dissolved) is alien to our jurisprudence and are even awarded in special circumstances in other Climes or Jurisdictions.

He submitted that such an argument/importation at this stage is not allowed in Law. That it is now settled principle of law that a Counseløs address, no matter how beautifully written cannot take the place of evidence. In support of this position of law, he relied on the case of ***SALZGITTER STABI, GMB V. TUNJI DOSUMU IND. LTD (2010) ALL FWLR (PART 529) RATIO 7.***

In further response to the Petitioner Counseløs address under Issue No.3, he submitted that the authorities of ***NANA V. NANA, OKAOME V. OKAOME AND OBAJIMI V. OBAJIMI*** referred to were cited out of context as they are not applicable to the present suit. They are distinguishable from the present case because, whereas in the said cases cited by the Counsel to the Petitioner, there were specific claim made by the spouses for maintenance, but in the present case, the Petitioner did not ask for maintenance for herself but for the only child of the marriage.

Secondly, he said that another distinguishing factor is that whereas the cases cited by the Petitionerøs Counsel involved separation (and not judicial divorce), the present case involves judicial divorce. He said that during the course of Cross-Examination of the Petitioner by the Respondent÷s Counsel, she told Court that she is not asking for maintenance for herself but for the only child of the Marriage. That this evidence is relevant and operates

as a total bar against her Counseløs request during address for her maintenance. That it is settled law that evidence elicited during the course of Cross-examination is admissible in law. He urged the Court to so hold.

He submitted that this Court cannot grant a relief not sought. That the Petitioner in her pleadings and evidence before court did not specifically ask for maintenance for herself (and she is not entitled to it, anyway) but for the only child of the Marriage. That it is too late in the day for her Counsel to seek to smuggle it into his address. That in a good number of cases, it has been held that a court cannot grant reliefs not sought by parties. See: the cases of ***TOCHUKWU V. F.R.N. (2005) ALL FWLR (PART 278), PAGE 1048 AT 1056, RATIO 9;SOBOYEDE V. MINISTER OF LANDS AND HOUSING WESTERN NIGERIA (1974)1 ALL NLR, 369, EKPENYOUNG V. NYONG (1975) 9, NSCC, 28, MENAKAYA V. MENAKAYA (2001)FWLR (PART 76), 742***

I have carefully considered the Petition, the evidence in proof of it, the Answer to the Petition and the Reply. I have also considered the Written Address of both Counsel for the Petitioner andRespondent and the Issues for Determination as formulated by each of them. I am of the view that the issues are quite germane to the just determination of this Petition. I will adopt the Issues as formulated by the Petitioner with slight modifications as follows:

I. Whether the marriage between the Petitioner and the Respondent has broken down irretrievably.
II. Whether the Petitioner is entitled to a Decree of Dissolution of the Marriage between her and the Respondent.
III.Whether the Petitioner is entitled to the reliefs sought in her Petition.

I will now resolve them *seriatim*.

ISSUE 1:

WHETHER THE MARRIAGE BETWEEN THE PETITIONER AND THE RESPONDENT HAS BROKEN DOWN IRRETRIEVABLY.

In every civil action, including a matrimonial petition, theburden of proof is on the Plaintiff or Petitioner, as he who asserts must prove. The standard of proof required is on the preponderance ofevidence or the balance of probabilities. See:***AGAGU V MIMIKO (2009) 7 NWLR(PT. 1140) 223.***

In the instant case, the Petitioner is seeking a Decree of Dissolution of Marriage on the ground *inter alia* that the marriage has broken down irretrievably.

By virtue of Section 15(2) of the Matrimonial Causes Act, the Court upon hearing a petition for dissolution of a marriage shall hold that the marriage has broken down irretrievably if, but only if the petitioner satisfies the Court of one or more of the following facts namely:

a) that the respondent has willfully and persistently refused to consummate the marriage;
b) that since the marriage the respondent had committed adultery and the
petitioner finds it intolerable to live with the respondent;
c) that since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
d) that the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;
e) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted;
f) that the parties to the marriage have lived apart for a continuous period of at least 3 years immediately preceding the presentation of the petition;
g) that the other party to the marriage has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made under the law; and
h) that the other party to the marriage has been absent from the petitioner for such a time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

In effect there are eight grounds for divorce and proof of one of these grounds or facts is in the eyes of the law, conclusive proof of irretrievable breakdown of the marriage. See ***Ibrahim v. Ibrahim (2007) 1 NWLR (Pt. 1015) 383.***

A Court cannot dissolve a marriage or declare a marriage to have broken down though it appears the marriage has broken down irretrievably unless one of the listed facts is established by the petitioner. The law requires that the petitioner should state clearly the specific ground or grounds for divorce as listed in Section 15(2) above***. See Ibrahim v. Ibrahim (supra) and Damulak v. Damulak (2004) 8 NWLR (Pt. 874) 151.***

The law provides that in matrimonial causes, a matter or fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court. Thus in divorce suits, a decree shall be pronounced if the Court is satisfied on the evidence that a case for the petition has been proved.

In the instant case, both the Petitioner and the Respondent are agreed though for different reasons that the marriage between them has broken down irretrievably.

The evidence adduced at the trial is to the effect that cohabitation between the parties ceased sometime in April, 2015. In other words for a period of well over three years the parties have lived apart.

By virtue of section 15(2) (e) & (f) of the Matrimonial Causes Act, that is sufficient proof that the marriage has broken down irretrievably.

The section provides as follows:

"Section 15-
e) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted;
f) that the parties to the marriage have lived apart for a continuous period of at least 3 years immediately preceding the presentation of the petition."

In essence, the Petitioner has established two of the conditions to prove the irretrievable breakdown of the marriage. As earlier stated, proof of one of these grounds or facts is in the eyes of the law, conclusive proof of irretrievable breakdown of the marriage. See ***Ibrahim v. Ibrahim (2007) 1 NWLR (Pt. 1015) 383.***

In the event Issue 1 is resolved in favour of the Petitioner.

ISSUE 2:

WHETHER THE PETITIONER IS ENTITLED TO A DECREE OF DISSOLUTION OF THE MARRIAGE BETWEEN HER AND THE RESPONDENT

As I observed under Issue 1 above in a divorce suit, a decree shall be pronounced if the Court is satisfied on the evidence that a case for the petition has been proved. Since two grounds have been established for the dissolution of the marriage, the Petitioner is entitled to a decree of dissolution.In the event Issue 2 is resolved in favour of the Petitioner.

ISSUE 3:

WHETHER THE PETITIONER IS ENTITLED TO THE RELIEFS SOUGHT IN HER PETITION.

In this Petition, the Petitioner is seeking the following Reliefs:

a) ***A Decree Of Dissolution Of Marriage on the ground of desertion (actual and constructive) by the Respondent and his other matrimonial wrongs of misconduct including, lack of commitment to the success of the marriage; denial of conjugal rights to Petitioner; irretrievable break down of the marriage and Respondent's dealing in diabolical matters***
b) Custody of the only child of the marriage (Master Joshua EghosaEromonseleOmaghon);
c) The sum of N80, 000.00 (Eighty Thousand Naira) per month as feeding, accommodation, medicals; and maintenance allowance for the only child of the marriage;
d) An Order compelling the Respondent to pay the educational fees inclusive of school materials for the only child of the marriage through the Petitioner before the beginning of each school term.

From my findings on Issues 1 and 2, it is evident that Relief (a) on the Dissolution of the marriage automatically succeeds. We are now left with Reliefs (b) to (d).

On Relief (b) which is on custody of the only child of the marriage, ***Section 71(1) of the Matrimonial Causes Act 1990*** provides as follows:
"In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the Court shall regard the interests of these children

as the paramount consideration; and subject thereto, the Court may make such order in respect of those matters as it thinks proper"

When deciding the issue of custody, the trial Court exercises a judicial discretion and in exercising that discretion the Court should take the following factors into consideration: These are the ages of the children, education, welfare and general upbringing, the arrangements made for their accommodation, the conduct of the parties to the marriage. Indeed the interest of the children at all times should be of paramount consideration. See the following cases: ***Otiti v Otiti (supra); Nana v Nana (2006) 3 NWLR (966)1; Williams v Williams (1987) 2 NWLR (54) 66; Odogwu v. Odogwu (1992) 2 NWLR (225) 539***

In deciding what the welfare of a child is, factors which have been considered relevant by the Courts include:-

a) ***degree of familiarity between the child and each of the parents respectively,***

b) the amount of affection between the child and each of the parents,

c) the respective income and position in life of each of the parents,

d) the arrangements made by the parties for the education of the child

e) the fact that one of the parents now lives as manand wife with a third party who may not welcome the presence of the child,

f) the fact that young children should as far as practicable, live and grow up together

g) the fact that in cases of children of tender ages should, unless other facts and circumstances make it undesirable, be put under the care of the mother,

h) the fact that one of the parents is still young and may wish to marry and the child may become animpediment.

These factors are only some to be considered and so each case is to be decided on the peculiar facts and circumstances placed before the Court in the proceedings. See ***Lafun v Lafun (1967) NMLR, 401;Williams v Williams (supra); Alabi v Alabi (2007) 9 NWLR [1039) 297; Afanja v Afanja (1971) 1 U.I.L.R. 105; Odogwu v Odowgu (supra).***

Applying the foregoing principles to this case, I must observe that the Petitioner led satisfactory evidence of how has s been providing for the welfare and upkeep of the only child of the marriage from her modest income as a nurse.That the only child of the marriage is now in school at Destiny Shaperøs Academy, Uromi and that she has been the one paying school and other fees. She tendered Exhibits õCö and õC1ö to õC5ö without objection to prove this fact.

From the evidence adduced, the Respondent has never paid any of the childøs bills whether for school or feeding or medicals. In essence, the child is more familiar with the Petitioner than the Respondent who has virtually abandoned both mother and child.

I also agree with the learned counsel for the Petitioner that the Respondent did not file a cross-petition where he requested for custody of the child of the marriage.

Furthermore, where the parents are separated and the child is of tender age, it is presumedthat the child will be happier with the mother and no order will be made against this presumption unless it is abundantly clear the contrary is the situation. See: ***ODOGWU v. ODOGWU (1992) LPELR-2229(SC)***

I hold that the Petitioner has substantially met the criteria outlined above and ought to be granted custody of the only child of the marriage. I therefore hold that the Petitioner is entitled to the custody of the child.

On Reliefs (c) and (d) which are for the sum of N80,000.00 (Eighty Thousand Naira) per month as feeding, accommodation, medicals; and maintenance allowance for the only child of the marriage and an order compelling the Respondent to pay the school fees of the child, I will regard these as maintenance for the Child.

It is settled law that it is the petitioner who has the onus to establish her entitlement to the maintenance she is claiming. See the case of: ***ONABOLU VS. ONABOLU SMC VOLUME 2 2005 Page 135***

Also in the case of: ***Hayes V Hayes (2000) 3 NWLR (Part 648) 276 at 293H to 294A,*** **AderemiJCA**articulated the factors to be taken into account in making an award of maintenance as follows:

I. The station in life of the parties and their lifestyle;
II. Their respective means;
III. The existence or non-existence of child or children; and
IV. The conduct of the parties.

At common law a man has a duty to maintain his wife and children. With respect to award in matrimonial causes, the court considers the economic trends as well as the standard of living that the parties were accustomed to before the matrimonial proceedings. See: ***Nanna v. Nanna (2006) 3 NWLR (Pt. 966) I***

An assessment of maintenance allowance in a divorce case is within the discretion of the court and as such earlier decision or precedent would not be of much help; there are however some guiding principles and factors which assist the trial court in its exercise of assessment. These include the means or earning capacity or income and assets of both parties, their conduct, the age of the children as well as all other relevant factors or circumstances***MOSES OLABIMI AKINBONI V SUSANAH BOLAJOKO AKINBONI (MRS.) SMC VOLUME 2 2005 Page 206***

The court making a decision on the maintenance of the child should determine the income of the Petitioner and Respondent. See:***Unegbu v. Unegbu(2004)11 NWLR (Pt. 884) 332***; and ***Nanna v. Nanna (supra).*** Perhaps the salient aspect to be noticed under Order

In the instant case, both parties have seriously disputed their respective incomes.

On the one hand, the Petitioner alleged that the Respondent is the Proprietor of a school,Decency Education Center in Benin City and tendered Exhibit õAö which is the school almanac.

But on the other hand, the Respond alleged that his monthly salary is just N27, 000 and being a private school, he does not have any pay slip or anything to show.He said that the school that he is running belongs to his family. That he cannot afford to pay N120, 000 for

accommodation for the Petitioner because he has a responsibility to his mother who is deaf, dumb and diabetic.

It is incumbent on me at this stage to make a finding on the income of the Petitioner and Respondent.

Going through the evidence, I am not satisfied that the Respondent is earning a paltry sum of N27, 000 as his monthly salary. In the almanac of Decency Education Center in Benin City which was tendered as Exhibit õAö, the Respondent was identified as the Proprietor/Director of the institution. The 2017 Microsoft Encarta English Dictionary defines a Proprietor as:

õ*owner of business: the owner of a commercial enterprise or establishment such as a store, hotel, or restaurant; legal owner: the legal owner of something."*

From the above definition, the Respondent is estopped from denying ownership of the Institution. The organogram of the School as displayed on the almanac gives the impression of a financially buoyant institution boasting of several viable facilities.

I think the Respondent is in a position to make substantial contributions towards the upkeep of his child.

However, I am in agreement with the learned counsel for the Respondent that maintenance of children of a Marriage that has irretrievably broken down is not the sole responsibility of the man. It should be a shared responsibility between the man and the woman especially when the woman belongs to the working class as in the present case. See the case of:***IDOWU V. IDOWU (2016) ALL FWLR (PART 863) 1688 @ 1700, RATIO 10.***

The Petitioner gave evidence that her present income as a nurse is N65, 000.00 (Sixty-five Thousand Naira) as an employee of Esan North-East Local Government Area.

In the event, I am of the view that the Petitioner should share in the burden of the upkeep of their child.

I therefore resolve Issue 3 partially in favour of the Petitioner.

On the whole, the orders sought by the Petitioner in paragraph 18 of the Petition are granted as follows:

a) A Decree Of Dissolution Of Marriage on the ground that the marriage has broken down irretrievably;
b) The Petitioner is granted custody of the only child of the marriage (Master Joshua EghosaEromonseleOmaghon);
c) The sum of N40,000.00 (forty thousand naira) per month as feeding, accommodation, medicals, and maintenance allowance for the only child of the marriage;
d) An Order compelling the Respondent to pay the educational fees inclusive of school materials for the only child of the marriage directlyto the school before the beginning of each school term;
e) The Petitioner shall grant the Respondent unrestricted access to the Child when he so desires.

I hereby Order a Decree Nisi which will be made a Decree Absolute afterthree months unless there is a cogent reason to vary same. I make no order as to costs.

P.A.AKHIHIERO

JUDGE

20/12/18

COUNSEL:

1. D.T.Achi Esqí í í ..í í í í í í í .í í í í .í í í í í í ..Petitioner
2. D.T.OdebataEsqí í í í í í í í í í í í í ..í í í í í ..Respondent