

IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON. JUSTICE P.A. AKHIHIERO,
ON TUESDAY THE
8TH DAY OF OCTOBER, 2024.

BETWEEN:

SUIT NO. B/434^D/2021

**MRS. JOY OWOWANRE IYENGUNMENA ----- PETITIONER/CROSS
RESPONDENT**

AND

**MR. LEWIS OSARENTIN IYENGUNMWENA -----RESPONDENT/
CROSS PETITIONER**

JUDGMENT

This Judgment is in respect of a Petition for the dissolution of marriage filed on the 20th day of May, 2021. The Petition was subsequently amended vide a motion dated 17th December, 2021. In her amended Petition, the Petitioner is seeking the following reliefs:

- i. A Decree of Dissolution of the Marriage between the Petitioner and the Respondent on the grounds that the marriage has broken down irretrievably;*

- ii. An order giving complete Custody of the child of the marriage i.e Gabriella Iyengunmwena (female) 3 years old to the Petitioner with only access right to the child upon reasonable notice;*
- iii. An order directing the Respondent to jointly contribute 60% with the Petitioner for her education and the upkeep of the child of the marriage at every given time till her university education and until she attains maturity and majority;*
- iv. An order of perpetual injunction restraining the Respondent, his agents, privies and/or anybody acting through the Respondent from entry into the work place of the Petitioner or any other place to embarrass the Petitioner and/or disrupt her activities and that of her colleagues on the basis of the marital issues forthwith.*

AND FOR such further or other orders as this Honourable Court may deem fit to make in the circumstances of this case.

When the Petition was served on the Respondent, he filed a Cross-Petition and participated in the trial up to a point after which he abandoned the proceedings.

In support of her Petition, the Petitioner testified that she got married to the Respondent at the Oredo Marriage Registry on the 6th of April, 2018 and she tendered their Marriage certificate which was admitted in evidence as Exhibit “A”.

She alleged that immediately after their wedding, they lived together at No, 19 Lucky Street, Ugbowo Benin City and they later moved to No. 25, Otaghobodie Street, Benin City where she gave birth to their daughter named Eghosasere Gabriella Iyengunmwena who is now four years old.

She said that her daughter attends Our Lady of Perpetual Help Education Center, Benin City. She tendered the receipts for the payment of her daughter’s school fees for two terms and they were admitted in evidence as Exhibits “B” and “B1” respectively.

She informed the Court that immediately after their wedding she started to notice some unusual behavior by the Respondent such as refusal to provide funds to run the house, having affairs with other women, spending long hours on the phone and exchanging nude pictures with other women.

She said that she pleaded with the Respondent to stop these activities but he became violent, and refused to stop his misbehavior. She said that when she became pregnant, he refused to provide money for her anti-natal care. She said that when their house rent expired for six months, he refused to pay the rent and she eventually paid for it. She said that after the expiration of six months, they moved to a bigger apartment and one day, the Respondent left the house and relocated to start working in Lagos.

She alleged that the Respondent stopped calling her when he relocated to Lagos and he only called her when he requested to borrow some money from her. She said that the Respondent hardly sent her money for feeding while he was in Lagos and he only visited Benin twice.

She alleged that when she paid him a visit in Lagos sometime in 2019 against his wish, he admitted that he was having affairs with other women so she came back to Benin.

She said that in December 2019, he refused to come home for Christmas or send money to buy clothes for their baby. She said that when their rent expired in March, 2020, the Respondent told her to move into a smaller apartment and she did and from March 2020 till now he has not visited them.

She alleged that in August 2020 the Respondent lost his job in Lagos and in September, 2020 he told her that when she gets tired of waiting for him, she will know what to do.

She said that in September, 2020 the Respondent came to Benin for his elder brother's birthday celebration but he did not come to their house. She said that the Respondent picked their daughter from her office and took her out and he paid another visit in October and again took her daughter out.

The Petitioner requested the Court to grant her a divorce with full custody of their daughter with visitation rights to the Respondent. She is also requesting for the sum of N100, 000 for the monthly up-keep of their daughter to cover her medical, clothing and feeding expenses. She said that the Respondent should be paying their daughter's school fees directly to the school.

After the Petitioner testified in chief, the Respondent's counsel cross examined the Petitioner, the Petitioner closed her case and the case was adjourned for the Respondent to open his defence.

Despite several opportunities given to the Respondent to open his defence, he virtually abandoned the case and the suit was adjourned for final address.

It was only the Petitioner's counsel who filed a final written address in this Petition.

In his final written address, the learned counsel for the Petitioner *U.F. Amadasun Esq.* formulated two issues for determination as follows:

- i. *Whether the Petitioner has proved that the marriage has broken down irretrievably? And*
- ii. *Whether the Petitioner is entitled to be granted custody of the only child of the marriage?*

Thereafter, the learned counsel argued the two issues seriatim.

ISSUE ONE:

Whether the Petitioner has proved that the marriage has broken down irretrievably?

Arguing this first issue, the learned counsel submitted that from the evidence of the Petitioner before this Court, the Petitioner has made out a case entitling her to the relief of dissolution of her marriage with the Respondent same haven broken down irretrievably.

He substantially reproduced the evidence of the Petitioner which was never controverted by the Respondent and urged the Court to rely on the credible and unchallenged evidence of the Petitioner and grant her reliefs.

He submitted that by virtue of *Section 15(2) of the Matrimonial Causes Act*, the court upon hearing a petition for the dissolution of a marriage shall hold that the marriage has broken down irretrievably if the Petitioner satisfies the court of one or more of the facts stated in *Section 15(2)(a) to (h) of the Matrimonial Causes Act*. He submitted that in the instant case, going by the evidence led, the Petitioner has

established two of the grounds to prove that her marriage with the Respondent has broken down irretrievably. To wit: the two grounds contained in *section 15(2) (c) and (d) of the Matrimonial Causes Act* which provides thus:

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 least one year immediately preceding the presentation of the petition;

He said that from the evidence of the Petitioner, it is clear that the last time the Respondent visited his matrimonial home in Benin City was in January, 2020 when he came to spend three days with his family and then went back to Lagos and cut off communication with the Petitioner. He said that his coming in October, 2020 was only to take his daughter out and he did not even go to the Petitioner's house but to her place of work, with the sole aim of taking his daughter out. He said that the Respondent obviously abandoned or deserted his matrimonial home since January, 2020 without caring about the emotional feelings and wellbeing of the Petitioner and he urged the court to so hold.

He further submitted that from the evidence before the court, the Petitioner has also established the fact that since the marriage, the Respondent has behaved in such a way that she (Petitioner) cannot reasonably be expected to live with the Respondent. He referred the Court to the relevant parts of the evidence and relied on the case of *Nanna v. Nanna (2006) 3 NWLR Pt.966 Pg. 1*, where the Court of Appeal opined that the accumulation of minor acts of ill-treatment causing or likely to cause the suffering spouse to break down under strain is enough to constitute sickening and detestable conduct of the respondent the fact of which the petitioner finds intolerable to continue to live with.

ISSUE TWO:

Whether the Petitioner is entitled to be granted custody of the only child of the marriage?

Arguing this second issue, learned counsel submitted that in matrimonial proceedings, the welfare of the child is the paramount consideration. He posited that the Court must exercise its discretion to determine what is in the best interest

of the child taking into consideration the provisions of the *Matrimonial Causes Act 1990*. He maintained that in the exercise of its discretion, the Court will take the following factors into consideration:

- a) The ages of the children of the marriage;*
- b) The education, welfare and general upbringing of the children;*
- c) The arrangement made for their accommodation;*
- d) The conduct of the parties to the marriage etc.*

On this point, he relied on the following cases: *Nana v. Nana (2006) 3 NWLR Pt. 966 Pg.1; Williams v. Williams (1987) 2 NWLR Pt.54 Pg.66;* and *Odogwu v. Odogwu (1992) 2 NWLR Pt.225 Pg.539.*

Counsel posited that in this case, the only child of the marriage has been staying with the Petitioner and she is still with the Petitioner till date. She posited that the child is of tender age and is more familiar with the Petitioner who has been taking care of her.

Finally, he urged the Court resolve the two issues in favour of the Petitioner and grant legal custody of the child of the marriage to the Petitioner.

I have carefully gone through the evidence adduced at the trial together with the address of the learned counsel for the Petitioner. From the record of proceedings in this case, the Respondent and his counsel abandoned the trial after the cross examination of the Petitioner.

The Respondent never gave any evidence to contradict the evidence of the Petitioner.

Thus, the evidence of the Petitioner remains unchallenged. The position of the law is that evidence that is neither challenged nor debunked remains good and credible evidence which should be relied upon by the trial court, which has a duty to ascribe probative value to it. See: *Monkom vs. Odili (2010) 2 NWLR (Pt.1179) 419 at 442;* and *Kopek Construction Ltd. vs. Ekisola (2010) 3 NWLR (Pt.1182) 618 at 663.*

Furthermore, where the Claimant has adduced admissible evidence which is satisfactory in the context of the case, and none is available from the Defendant, the burden on the Claimant is lighter as the case will be decided upon a minimum of proof. See: *Adeleke vs. Iyanda (2001) 13 NWLR (Pt.729) 1at 23-24.*

However, notwithstanding the fact that the suit is undefended, the Court would only be bound by unchallenged and uncontroverted evidence of the Claimant if it is cogent and credible. See: *Arewa Textiles Plc. vs. Finetex Ltd. (2003) 7 NWLR (Pt.819) 322 at 341.* Even where the evidence is unchallenged, the trial court has a duty to evaluate it and be satisfied that it is credible and sufficient to sustain the claim. See: *Gonzee (Nig.) Ltd. vs. Nigerian Educational Research and Development Council (2005) 13 NWLR (Pt.943) 634 at 650.*

Applying the foregoing principles, I will evaluate the evidence adduced by the Petitioner to ascertain whether they are credible and sufficient to sustain the Petition.

I am of the view that the two issues for determination in this Petition are as follows:

- 1. Whether the Petitioner has proved that the marriage has broken down irretrievably; and*
- 2. Whether the Petitioner is entitled to the custody of the only child of the marriage.*

I will now resolve the two issues for determination seriatim.

ISSUE 1:

Whether the Petitioner has proved that the marriage has broken down irretrievably?

In every civil action, including a matrimonial petition, the burden of proof is on the Claimant or Petitioner, as he who asserts must prove. Furthermore, the standard of proof required is on the preponderance of evidence 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 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 has 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 this case, the Petitioner adduced evidence that immediately after their wedding the Respondent refused to provide funds to run the house, started having affairs with other women, was spending long hours on the phone and exchanging nude pictures with other women.

Clearly, the conduct of the Respondent shortly after the wedding was such that the Petitioner cannot reasonably be expected to continue to live with the Respondent. By virtue of the provisions of *section 15 (2) (c) of the Matrimonial Causes Act* this is an indication that the marriage has broken down irretrievably.

Furthermore, in the instant case the evidence adduced at the trial is to the effect that the last time the Respondent visited his matrimonial home in Benin City was in January, 2020 when he came to spend three days with his family and then went back to Lagos and cut off communication with the Petitioner.

From the available evidence, the Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of this Petition.

By virtue of the provisions of *section 15(2) (d) of the Matrimonial Causes Act*, the evidence adduced is sufficient proof that the marriage has broken down irretrievably.

In essence, the Petitioner has established two of the grounds 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 the irretrievable

breakdown of the marriage. See *Ibrahim v. Ibrahim (2007) 1 NWLR (Pt. 1015) 383*.

I therefore resolve Issue 1 in favour of the Petitioner.

ISSUE 2:

Whether the Petitioner is entitled to the custody of the only child of the marriage?

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 and 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 man and 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; and

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

These are some of the factors only as 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 Odogwu (supra).*

Applying the foregoing principles to this case, I must observe that the Petitioner led satisfactory evidence of how she has been responsible for the upkeep of their daughter since the Respondent abandoned them. On the available evidence, I think it will be morally unconscionable to deprive the Petitioner of the custody of their child at this stage. The uncontroverted evidence is to the effect that Petitioner is taking good care of the child.

Again, from the evidence adduced at the trial, the child is more familiar with the Petitioner than the Respondent who has virtually abandoned both the Petitioner and their daughter.

From the foregoing, I hold that the Petitioner has substantially met the criteria outlined above and is entitled to the custody of the only child of the marriage. I therefore resolve Issue 2 in favour of the Petitioner.

Having resolved the two issues for determination in favour of the Petitioner, I hold that the petition succeeds and the Petitioner is granted the following reliefs:

- i. A Decree of Dissolution of the Marriage between the Petitioner and the Respondent on the grounds that the marriage has broken down irretrievably;*

- ii. *An order giving complete Custody of the child of the marriage i.e Gabriella Iyengunmwena (female) 3 years old to the Petitioner with only access right to the child upon reasonable notice;*
- iii. *An order directing the Respondent to jointly contribute 60% with the Petitioner for her education and the upkeep of the child of the marriage at every given time till her university education and until she attains maturity and majority;*
- iv. *An order of perpetual injunction restraining the Respondent, his agents, privies and/or anybody acting through the Respondent from entry into the work place of the Petitioner or any other place to embarrass the Petitioner and/or disrupt her activities and that of her colleagues on the basis of the marital issues forthwith.*

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

P.A.AKHIHIERO
JUDGE
08/10/2024

COUNSEL:

- 1. *U.F. Amadasun Esq.Petitioner*
- 2. *Unrepresented.....Respondent*