IN THE HIGH COURT OF JUSTICE
IN THE UROMI JUDICIAL DIVISION
HOLDEN AT UROMI
BEFORE HIS LORDSHIP,
HON.JUSTICE P.A.AKHIHIERO,JUDGE
ON TUESDAY THE
12TH DAY OF MARCH, 2019.

BETWEEN: SUIT NO: HCU/7D/2016

MR. SYLVESTER AMAIZEMEN ……..…… PETITIONER

AND

MRS. LYDIA AMAIZEMEN ……..……... RESPONDENT

J U D G M E N T

This Judgment is in respect of a Petition for the dissolution of marriage filed on behalf of the Petitioner, Mr. Sylvester Amaizemen against his wife, Mrs. Lydia Amaizemen, the Respondent herein.

The orders sought by the Petitioner in paragraph 11 of the Petition are as follows:

a. A decree of dissolution of Marriage on the ground of cruelty;
b. That the Marriage has broken down irretrievably: both parties having lived apart for over 4 years; and
c. That custody of the children of the Marriage be granted to the Petitioner.

In response to the Petition, the Respondent filed an Answer under Protest and pursuant to same, sought the following reliefs from the Court:

(i) An Order of the Honourable Court dismissing the Petitioner's Petition with substantial cost for being frivolous, vexatious and an abuse of Court process.

(ii) A Declaration of the Honourable Court that any other Marriage of the Petitioner to any other person is unlawful, *null* and *voidab initio* in the light of the Petitioner's subsisting

Marriage with the Respondent as evidenced in Marriage Certificate Number 79945 with LG REG CODE 1205 issued at the Esan South East Registry, Ubiaja, Edo State, and dated the 13th Day of November, 2007.

(iii) An Order of Perpetual Injunction of the Honourable Court restraining the Petitioner by himself, or acting through his mother, siblings, agents, servants or other representatives in interest by whatsoever name so called from contracting any Marriage with any other person during the lifetime of the Marriage of the Petitioner with the Respondent as evidenced in Marriage Certificate Number 79945 with LG REG CODE 1205 issued at the Esan South East Registry, Ubiaja, Edo State, and dated the 13th Day of November, 2007.

(iv) An Order of the Honourable Court directing the Petitioner to provide maintenance and welfare for the Respondent and all the children of the Marriage in their agreed Matrimonial Home in Ubiaja, Edo State.

(v) An Order of the Honourable Court granting the Respondent the sum of ₦ 5,000,000.00 (five million naira) only as General Damages from the Petitioner for the irreversible emotional torture, pain, injury and trauma caused the Respondent as adumbrated above and for the Petitioner's act of Adultery during the subsistence of the marriage which is the subject matter of this petition.

In the Course of the Proceedings, prayer 2 was abandoned due to absence of a Cross Petition on the part of the Respondent.

At the hearing, the Petitioner testified and called two witnesses. The Respondent also testified and called one witness.

The Petitioner's case is that he got married to the Respondent on the 13th of November, 2007 at the Esan South East Marriage Registry in Ubiaja and was issued a Marriage Certificate which was admitted in evidence as Exhibit "A".

Before the Marriage the Petitioner was living in Uromi while the Respondent was living in Ubiaja. After the marriage, the Respondent came to live with the Petitioner in Uromi at No. 5 Ebhebe quarters in Uromi.

They lived there for the whole of 2007 and movedto No. 85 New Agbor road, Uromi sometime in 2008. He explained that in 2007 the Respondent lived with him for only three months and went back to Ubiaja.

That from 2009 to 2010 he relocated to a house at No. 2 Okojie Street off Okhen road, Uromi where he lived alone until 2010 when he moved to Lagos to reside at No. 8 Adeyon Street in Alagbado quarters, Lagos. According to him, the Respondent livedwith him in his Lagos apartment for just two months and returned to Ubiaja. He said that from 2011 till date she has not lived with him but has been living in Ubiaja because she wanted to continue working at Ubiaja. He said that he tried to convince her to come and reside with him but she refused.

He alleged that the Respondent has continuously denied him of sex. That she does not want to see the Petitioner's mother and his siblings. That their marriage was blessed with three children as follows: Sharon born on 10/10/07; Stephanie born on 24/4/09; and Sheriff born on 26/9/11.

He said that he had no previous marital proceedings with the Respondent. That she has denied him access to his children all this while. That their marriage broke down eight years ago and they have since moved on with their lives.

The Petitioner alleged that in 2017, the Respondent wrote to the American Embassy requesting them to refuse him visa to the United States and he was denied the visa. That for that reason, he cannot reconcile with her because he is struggling hard for his children.

That he is seeking divorce and custody of his two daughters. He said that his son can remain with the Respondent.

He said that the Respondent is not entitled to the sum of N5,000,000.00 (five million naira) as general damages because he has been taking care of the children by sending money for their feeding and school fees.

He denied being married to any other woman apart from the Respondent.

Under cross examination the Petitioner alleged that between 2009 and 2012 he was in Dubai. He denied going to reside in his mother's house after his wedding. He said that he rented the house himself. That when he was in Dubai he sent money to the Respondent for the maintenance of the children.

He denied marrying one Diane Uwadiale in Dubai. He said that she was just a friend. He said that at the instance of the Respondent, he was arrested and charged to Court for Bigamy at the Ubiaja Magistrate Court, for an alleged marriage to the said Diane Uwadiale who is now based in New Jersey in the United States.

The Petitioner's mother, Madam Christianah Amaizemen testified as the P.W.2. She maintained that the Petitioner seeks to divorce the Respondent because she is not ready to marry. According to her, when the Respondent arrested the Petitioner at the Area Command for bigamy, she took some prominent people to plead with her to come back to live with the Petitioner but she refused and insisted that the Petitioner must move into her house to reside with her own mother. She said that this is not permissible in Esan land.

The witness narrated how she tried to reconcile them without success. She said that she can no longer broker any reconciliation between them because she tried it before without any success.

One Oshio Akhiwu, a friend of the Petitioner testified as the P.W.2. He said that sometime in 2016, he accompanied the Petitioner to visit the Respondent and their children at Ubiaja. During the visit, the Petitioner gave them some items such as school fees, books, phones, wrist watches, toys etc, etc. That after that visit, they went to see them on two other occasions and the Petitioner discussed with the Respondent and gave some things to her. He said that on the third visit he pleaded with them to reconcile because of their children but the Respondent maintained that she cannot come to Uromi to live with the Petitioner.

The Respondent testified in defence of the Petition and called one witness. In her testimony she stated that when she married the Petitioner on 13/11/07, they both agreed to rent an apartment at N0. 64 old IIushi road, Ubiaja. She tendered the original Marriage Certificate which was admitted in evidence as Exhibit "A1".

She emphasised that their marriage has not broken down irretrievably. That she has not denied the Petitioner his right to consortium. She is not living with her parents, neither is she trying to force the Petitioner to come and live with her parents. She does not disrespect her husband's parents.

According to her, in 2011, she was one month pregnant with their last child when the Petitioner told her that he was travelling to Lagos to return soon. She said that she did not hear from him until several months later when she got to know that he had travelled to Dubai.

In 2014, he came back and met her and the children in their house at Uokha. Thereafter, the Petitioner, the Respondent and the children moved to a better apartment. She said that they started living together unknown to her that the Petitioner had contracted a marriage in Dubai with one Diane Uwadiale Amaizemen.

She said that she discovered this marriage when she looked into the Petitioner'sFace book profile on the social media. There, she sawthe marriage pictures of the Petitioner and the said Dianne along with some other romantic pictures. She downloaded the pictures and an affidavit of compliance with the provisions of Section 84 of the Evidence Act together with the digital photographs were tendered at the trial as Exhibits B, C, C1, C2, C3, C4, C5, C6, C7 and C8 respectively.

The Respondentsaid that when she saw the pictures, she called for some explanations from the Petitioner but he reacted negatively and informed her that he had a set of twin children (girls) from the marriage. She thereafter briefed a lawyer to take steps to try to save her marriage.

She said that a complaint was lodged at the Area Command of the Nigeria Police Force in Irrua in Edo State. The Police interviewed them and the Petitioner admitted that he contracted the marriage. He was charged with bigamy but she later withdrew her complaint after the intervention of some Pastors.

She maintained that she has always respected and adored the Petitioner and has never been cruel to him. She said that the Petitioner should not have custody of the children because they have always been with her and she has been responsible for their feeding, clothing, school fees etc.

She wants the Court to dismiss this petition and to grant her custody of the children to enable her bring up the children in the fear of God.She said that the eldest child is in JSS 1 in Saint Francis College in Ubiaja and the other two are in Mount Zion Group of Schools also in Ubiaja. That she pays for their school fees, their medications when they are sick, their clothing and housing. She denied writing any petition to the American Embassy to prevent the Petitioner from travelling abroad.

She insisted that she still wants to marry the Petitioner. That she is asking for N5 million naira from the Petitioner as relief for all she has gone through, the trauma andthe depression. She said that she is not aware that the Petitioner has ever worked.

One Ehigianwon Evaristus Isegulan testified in support of the Respondent. He stated that the Petitioner and the Respondent are his brother in law and sister respectively. He maintained that their disagreement started when the Petitioner allegedly married another woman.

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, S.E.Okoh Esq. formulated two Issues for Determination as follows:

1. ***Whether in view of the fact that the Petitioner and the Respondent cohabited at their residence in Uokha, Ubiaja, Edo State till the date of Petitioner's unannounced departure to Dubai and Bigamy thereat, the Respondent could be held liable for deserting the Petitioner by withdrawing from cohabitation at the aforesaid address?***
2. ***Whether the Petitioner has sufficiently proved his Petition to necessitate a grant of Dissolution of Marriage and the other reliefs sought?***

Thereafter, learned counsel argued the issues together

He submitted that a Marriage does not just break down irretrievably by the mere fact of a party living apart for over 4 years. He said that under our law for a Petitioner to establish desertion, he must prove an involuntary physical separation on the part of the Respondent or one which is induced by the Respondent, which separation is intended to be permanent in the absence of any justification.

He submitted that in view of the facts and circumstances of this case, the Petitioner and the Respondent in this case have cohabited at their residence at Uokha Quarters, Ubiaja, Edo State, and raised their children thereat before the date of the Petitioner's unannounced departure to Dubai in 2009.

That upon the Petitioner's temporary return in 2012, the said address remains the Matrimonial home of the Petitioner and the Respondent's family; the same place he took his friend (the P.W. 2) to visit the Respondent and children without a guide. He referred to the evidence of the Petitioner and the PW2.

Counsel further submitted that the evidence of the Petitioner is to the effect that he cohabited and consummated his marriage with the Respondent at Ubiaja, Edo State, between 2007 when they got married, and 2011 when he left Nigeria, and that he returned in 2013 to meet his family in Ubiaja, Edo State. He urged the Court to look at its records where it will find that the Respondent was served at their residence at Uokha Quarters, Ubiaja, Edo State (an unnumbered address very well known to the Petitioner). He therefore urged the Court to hold that Uokha Quarters, Ubiaja, Edo State, is the matrimonial home of the Petitioner and Respondent.

Again, he submitted that it is the Petitioner that should be held liable for separating from his family at their matrimonial home at Uokha Quarters, Ubiaja, Edo State, as against the Respondent. He said that the evidence before the Court is to the effect that the Petitioner is trying to foist a *fait accompli* on the Respondent by evincing all the 4 (four) ingredients of desertion against the marital fate of the Respondent by his conduct.

He urged the Court to take a clinical look at the evidence before it and decide whether it is not the Petitioner that is liable for deserting the Respondent and the 3 children of the marriage by withdrawing from cohabitation from the aforesaid address.

Learned counsel submitted that it is trite law that there are 4 essential elements of desertion, to wit:

(i) Physical separation;
(ii) Intention to remain permanently separated;
(iii) Absence of the other spouse's consent; and
(iv) Absence of any justification

He contended that the 4 elements mentioned above are concomitant and must coexist in the conduct of a party against whom desertion is alleged before the court can find in favour of the party

alleging the desertion. That it is also trite law that he who asserts must prove and that in the absence of any evidence to prove desertion in this case, the Petitioner stands estopped from laying claim to being deserted. For this view, he relied on Section 169 of the Evidence Act, 2011 and the decision of the Supreme Court in the case of: ***Eyo v. Onuoha& Anor (2011) 195 LRCN 38 at 45 Ratios 2, 3 and 4.***

He also relied on the following cases: ***Imana v. Robinson (1979) 3-4 SC 1; Achibong v. Ita (2004) 2 NWLR (858) 590; Elias v. Disu (1962) 1 All NLR 214; Ihenacho v. Chigere (2004) 17 NWLR (901) 130; Akinola v. Oluwo (1962) 1 All NLR 224 and Ihekoronye v. Hart (2000) 15NWLR (692) 840***.

He referred to***Sections 132 to 135 of the Evidence Act, 2011*** and submitted that the Petitioner has not discharged the evidential burden of proving the existence of any of the legal elements constituting desertion under our law to necessitate the Honourable Court granting any of the Petitioner's reliefs as prayed in that the Petitioner has not shown by any iota of evidence that the Respondent ever separated from him in their matrimonial home without his consent and with intent never to return to him without any justification.

Addressing the Court on the first element of desertion which is ***Physical Separation***, counsel contended that it is the Petitioner that is liable for deserting the Respondent because the evidence of the Petitioner is to the effect that he left the Respondent and the children at Ubiaja, travelled to Dubai and stayed there for several years before returning to Nigeria, but not to Uokha, Ubiaja, Edo State, where he had left them. He said that this piece of evidence which is unchallenged and un-contradicted leaves no doubt in mind that the first element of physical separation which grounds desertion under Section 15 (2)(d) of the Matrimonial Causes Act, 1970, is found in the unsolicited movement of the Petitioner against the marital interest of the Respondent in addition to his refusal to communicate with her throughout his long stay in Dubai.

He therefore urged the Court to hold that it was the Petitioner that withdrew from his matrimonial home, thereby abandoning the Respondent and the children.

He said that the testimony of the Petitioner revealed that Diane Uwadiale now lives in New Jersey, United States of America, and the Petitioner is desirous of joining her there hence his annoyance that the American Embassy refused his visa application. He referred the Court to the bigamous relationship between the Petitioner and Diane Uwadiale as evidenced in theFace book pictures already admitted as ***Exhibits B, C1 to C8*** at the trial. He said that the Petitioner is insisting on divorce in order to clear the coast for his unlawful conduct.

Counsel referred to the testimony of the 1st Respondent's Witness which he said corroborated the Petitioner's bigamy. He said that the entire evidence of the RW1 was not cross-examined by the Petitioner. He said that such evidence stands unchallenged and un-contradicted and the Court is enjoined to rely on it as true and correct. He referred to the cases of: ***Oforlete v State (2000) 12 NWLR (681) 415; Kpokpo v Uko (1997) 11 NWLR (527) 94; Onuaha v State (1989) 2 NWLR (101) 23*** and the provisions of ***Sections 123, 165, 166 and167 of the Evidence Act, 2011***.

He also referred to the case of: ***Uwangwu v Apanda (2004) 4 EDO/HCLR 252 Ratio 1*** where the Court held ***inter alia***thus:

> ***Whenever an issue of evidence comes from one side and is unchallenged and un-contradicted it ought to be accepted on the principle that there is nothing to be put on the other side of the balance….***
> ***Thus, when evidence goes one way the onus of proof is discharged on a minimal proof.***

On the second element of desertion which is ***an intention to remain permanently separated***, Counsel submitted that besides the element of *de facto* separation evidenced on the part of the Petitioner as above adumbrated, the Petitioner's conduct is tainted with the *turpis* of *animus deserendi* as evident in his unlawful marriage with Diane Uwadiale. For this view, he relied on the following authorities: ***Beeken v Beeken (1959) WNLR 314; Sowande v Sowande (1969) 1 All NLR 482; Atilade v Atilade (1968) 1 All NLR 27; Tinubu v Tinubu (1959) WNLR 314.***

On the third and fourth elements of desertion which are ***absence of the other spouse's consent, and absence of any justification***, he submitted that throughout the hearing of this case the Petitioner did not evince any consent on the part of the Respondent for his travelling abroad and leaving her with the children, nor did he show any evidence of any just cause which made his continuance of matrimonial cohabitation virtually impossible with the Respondent to necessitate deserting his spouse and leaving for Dubai at the time he did. He said that Nigeria was not at war and the Respondent was neither imprisoned nor unemployed or even terminally ill. He referred to the case of: ***Glenister v Glenister (1941) P 30*** and ***Section 15 (2)(c) of the Matrimonial Causes Act, 1970***.

He further submitted that throughout the hearing of this case the Petitioner did not evince any evidence to show that the Respondent consented to his separating from her in their matrimonial home or that she connived with him in his bigamy with Diane Uwadiale at Dubai or his going to join her in New Jersey, United States of America. He referred to the cases of: ***Ikpi v Ikpi (1957) WNLR 59;*** and ***Holroyd v Holroyd (1920) 36 TLR 479***.

He reiterated that the object of this Petition is to facilitate the severance of the marital bonds between the Petitioner and the Respondent to enable him move to the United States to join Diane Uwadiale.

Counsel implored the Court to consider whether the Petitioner can be aided by this Petition to perfect an illegality, to wit, bigamy?

He urged the Court not to support such illegality. He maintained that the bigamy of the Petitioner is in contravention of ***Section 370 of the Criminal Code Law of Edo State***, as well as a marital fraud under the law from which the Petitioner should not be allowed to benefit with the

dissolution of his valid marriage in favour of his *void* marriage to Diana Uwadiale in Dubai. He relied on the Latin maxim: ***ex dolo malo non oritur actio*** (an action does not arise from fraud).

Counsel submitted that an Order for Dissolution of Marriage should not be the trophy for a woman who evidentially stood by our nation's family values by demonstrating love and concern for her husband even when he was going astray; a woman who manned their matrimonial home and took good care of their 3 children by providing their needs and privileges even in the Petitioner's long absence. He said that such a woman should not be separated from her children in favour of a father who was never there for them and who is still desirous of leaving his entire family for one Diane Uwadiale in faraway New Jersey, in the United States of America.

He submitted that, an order for custody in favour of the Petitioner would not be in the best interest of the children and the entire family. He relied on Section 71 (1) of the Matrimonial Causes Act, 1970 and submitted that it is in the best interest of the 3 children to stay with the Respondent in the matrimonial home which they have always known. That this Court has a duty arising from law, equity and the Constitution to keep families together, FOR BETTER FOR WORSE, FOR RICHER FOR POORER, IN SICKNESS AND IN HEALTH, TILL DEATH DO THEM PART according to their marital vows.

He therefore urged the Court to keep this family together, particularly since the Respondent is strongly opposed to the dissolution of the Marriage.

He urged the Court to resolve issues 1 & 2 in favour of the Respondent and hold that the Petitioner has failed to prove his case on the standard of proof required by the law for matrimonial causes, wherefore the Petition should be dismissed with substantial costs.

In his Written Address, the learned counsel for the Petitioner, F.O.Ebadan Esq. identified a sole issue for determination as follows:

> ***Whether the petitioner has established before this honourable Court that this marriage has broken down irretrievably.***

Arguing the sole issue, learned counsel submitted that this marriage has broken down irretrievably and ought to be dissolved by this Court. He contended that a marriage is said to have broken down irretrievably if the petitioner satisfies the court of one or more of the provisions of ***Section 15 (2) of the Matrimonial Causes Decree 1970***.

He submitted that in proof of his case the petitioner gave uncontroverted evidence of the following:

(i) How the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with her;

(ii) How she deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of this petition; and

(iii) That the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of this petition.

Counsel submittedthat the term "***behaviour"***in the context of ***Section 15 (2) (c) of the Act*** means something more than a state of affairs or a state of mind. He said that it has been construed to import "action or conduct by one spouse which affects the other".For this view, he cited the case of:***Katz v Katz 1 WLR 955 at 959-60***.

He further submitted that the right test here is to consider whether it is reasonable to expect the petitioner to put up with the behaviour of the respondent. He said that the petitioner gave uncontroverted evidence of how the respondent continually disrespected him, his siblings and mother, refused to eat the petitioner's mother's food and denied him sex.He referred the Court to the case of: ***Richard Ekundare v A.O. Ekundare (1983 FNLR) 520*** where it was held that the expression ***"that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent" is in the same category as constructive desertion, that it is 'grave and weighty conduct-serious conduct- which reasonably results in the party leaving the other... it may broadly be said to be cruelty without injury to health'.***

He said that the petitioner further gave uncontroverted evidence of how the respondent always behaved as if she was afraid to live with him, his mother and his siblings. He maintained that the respondent's conduct became an embarrassment to the petitioner as he was the eldest child of his parents and had a responsibility to show good example to his siblings.

Counsel urged the Court to take judicial notice of the fact that the eldest son of a home has a serious role to play in his father's house for his siblings to follow: a role the respondent was bent on making impossible for the petitioner to play. He urged the Court to deprecate the respondent's conduct and hold same as anti-family and un-African. He submitted that in the African context a woman is not only married to her husband but to the husband's family.

Again, counsel submitted that the respondent's conduct of denying the petitioner sex amounted to cruelty. He said that the petitioner gave uncontroverted evidence of how the respondent consistently turned down his advances for sexual intercourse after they had their last baby.

He contended that the determining factor in deciding to grant the prayers sought in this petition is whether the petitioner has led evidence to prove that the marriage has broken down irretrievably and separation is undoubtedly the best option. For this preposition of law he referred to the case of: ***Catherine Arowoselu v Ayodele Arowoselu (1980) FNR at p. 172***

Counsel also referred to the case of:***Johnson v Johnson (1963) 2 All ER 962 at 992***where it was held that refusal of sexual intercourse , nagging , habitual intemperate drinking etc were weighty and unreasonable acts for the petitioner to endure. He submitted that this act of continuous refusal of sex which was not denied by the respondent was a sort of punishment which could portend danger to both spouse and the children of the marriage and that the only way out at this point is to dissolve the marriage.

On the reason the petitioner left his wife when she chose to reside at Ubiaja, counsel referred to the case of: ***Christian Ogunleye v Felix Ogunleye (1970) FNL) 12 where*** the Court held thus:

1. ***Any conduct which makes the continuation of cohabitation virtually or totally impossible is a good excuse for a spouse to leave the matrimonial home.***
2. ***If a spouse is compelled by the conduct of the other spouse, which amounts to just cause or excuse for living apart to do so, the deserter is the spouse whose conduct caused the cessation.***

He submitted that the uncontroverted facts presented by the petitioner are that the respondent left him for over four years, denying him consortium and fellowship amounting to desertion. He thus urged the Court to dissolve this marriage in the interest of all the parties concerned. He referred to the Australian case of: ***Mannings v Mannings (1961) 2FLR 259 at 261***whereit was held that it is not necessarily the party who lives separately or apart from the matrimonial home that is the deserter. The court must look to see if the party was compelled by the conduct of the other spouse to live apart.

He urged the Court to hold that the deserter in this case is the respondent who has bluntly refused to join her husband in the place chosen by him for the family and cited the case of: ***Beales v Beales (1972) 2WLR 972.*** He maintained that in Africa, it is where a husband decides to live with his wife that is the matrimonial home. That a wife cannot leave with her parents or in her rented apartment apart from the husband and call such a place her matrimonial home.

He urged the Court to grant all the prayers sought by the petitioner in the interest of justice, as the petitioner has never minced words in affirming his love for his children all through the trial of this case and his intention to carter for them. He referred the Court to the case of: ***Justina Olebuike v***

Godson Olebuike (1978) IMSLR 433 where the Court held that on the issue of custody and maintenance of children the paramount consideration is the welfare of the children.

He submitted that the children of this marriage will be better catered for if left in the custody of the petitioner and urged the Court to so hold.

I have carefully considered the Petition, the evidence in proof of it and the Answer to the Petition. I have also considered the Written Addresses of Counsel for the Petitioner and the Respondent 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. However, I will condense the issues into two as follows:

1. ***Whether the marriage between the Petitioner and the Respondent has broken down irretrievably; and***
2. ***Whether the Parties are entitled to the reliefs sought in this Petition.***

I will now resolve the issues*seriatim*.

ISSUE 1:

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

In the first place, the burden of proof in a matrimonial proceeding is on the petitioner as ordained by ***sections 135 and 136 of the Evidence Act***. See also the following decisions: ***Damulak vs. Damulak (2004) 8 NWLR (Pt.874) 151; Nanna v. Nanna (2006) 3 NWLR (Pt.966) 1; Ibrahim v. Ibrahim (2007) 1 NWLR (Pt.1015) 383; Mueller v. Mueller (2006) 6 NWLR (pt. 977) 627; and Erhahon v. Erhahon (1997) 6 NWLR (pt.510) 667***.

As for the standard of proof in matrimonial actions, it is as decreed by the provision of ***section 82 of the Matrimonial Causes Act*** which provides thus:

"82 (1) for the purposes of this Act, a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court.

(2) Where a provision of this Act requires the Court to be satisfied of the existence of any ground or fact or as to any other matter, it shall be sufficient ifthe Court is reasonably satisfied of the existence of that ground or fact, oras to that other matter."

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 therespondent 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.***

In essence, a court cannot dissolve a marriage or declare a marriage to have broken down irretrievably unless one of the aforementioned grounds 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.

For the avoidance of doubt, this Petition is based on just two grounds to wit:***on the ground of the alleged cruelty of the Respondent to the Petitioner*** and ***on the ground that both parties have lived apart for over 4 years.***

Upon a careful examination of the aforesaid provisions of Section 15(2) of the Matrimonial Causes Act, it does not appear that there is any concept known as matrimonial cruelty under the Act. In the case of: ***BIBILARI V. BIBILARI (2011) LPELR-4443(CA)*** the Court of Appeal ***per Nwodo JCA*** (of blessed memory) observed thus:

"Cruelty is not one of the grounds set out under S.15 (2) of the Matrimonial Causes Act for divorce; it remains however, one of the old grounds of divorce. A Court can hold that a marriage has broken down irretrievably on the ground that one spouse has been proved to be guilty of cruelty to the other. Damulak v. Damulak (2004) 8 NWLR Pt. 874 C.A. 151."

Also in the case of: ***NUBHAN V NUBHAN (1967) N.M.L.R 192*** it was held that during matrimonial proceedings, the word ***cruel*** is not to be used in any esoteric or divorce-Court sense. That the conduct of the Respondent complained of by the Petitioner must be that which an ordinary man would describe as cruel and it is only when evidence of cruelty in the ordinary, dictionary sense of the word is led and proved that the Court will find in favour of the Petitioner.

Again in the case of: ***SIYANBOLA V SIYANBOLA (1957) WRNLR 42***, the Court held that to constitute cruelty, there must be evidence that the cruelty complained of is of such a character as to cause danger to the life, limb or health (bodily or mental) or that it is such as to give rise to reasonable apprehension of such danger.

In ***OLUKOYA V OLUKOYA (1961) WRNLR 209*** the court held that mere abstention from sexual intercourse will not establish cruelty as a ground for divorce and that abstention from sexual intercourse will only constitute cruelty where it endangers the health of the Petitioner.

In respect of the ground of cruelty, the closest provision of the Act on it is the provision of Section 15(2) (c) of the Matrimonial Causes Act which states as follows:

"15(2) the Court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if, but only if, thepetitioner satisfies the Court of one or more of the following facts-

(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. "

To prove this ground, the law makes it incumbent on the petitioner to show: (a) the sickening and detestable behaviour of the respondent; and (b) that the petitioner finds it intolerable to live with the respondent. See:***Damulak v. Damilak (supra); Nanna v. Nanna (supra); Ibrahim v. Ibrahim (supra)***. It was also held in those cases that the test for intolerabilityis an objective one, not a subjective one.

In the case of:***Williams v. Williams (1996) 1 SCNLR 60 at 67 Idigbe, JSC*** exposited on the concept of cruelty thus:

"..... Cruelty is in its nature a cumulative charge and so an accumulation of minor acts of ill treatment causing or likely to cause the suffering spouse to break down under strain constitutes the offence; thus cruelty may consist in the aggregate of the acts alleged in a petition and each paragraph need not allege an independent act of cruelty sufficient in itself to warrant the relief sought."

The question that will naturally arise at this stage is: ***What is the evidence of cruelty on the part of the Respondent against the Petitioner?***

In a nutshell, the alleged acts of cruelty which the Petitioner complained about are that the Respondent continually disrespected him, his siblings and his mother, that she denied him sex, that she made a report of bigamy against him which led to his arrest, culminating in his being arraigned in Court before the charges were withdrawn. He also complained bitterly about how he was refused a visa to the United States, ostensibly as a result of the alleged petition written to the embassy by the Respondent.

In her defence, the Respondent denied most of these allegations. On the issue of arrest and trial for bigamy, the Respondent led evidence to show that there was a purported wedding ceremony between the Petitioner and his paramour, one Diane Uwadiale now based in the United States. The amorous relationship was established by the Face book pictures which were admitted as Exhibits B, C1 to C8 at the trial.

It is worthy of note that although the Petitioner vehemently denied any bigamous relationship with Diane Uwadiale, he did not deny the fact that they were lovers.As a matter of fact he did not make any attempt to explain the romantic wedding photographs admitted as Exhibits C1 to C8 at the trial.

If there should be any complaint of cruelty, I think it is the Petitioner who demonstrated cruelty by abandoning his wife and children to travel to Dubai to have an affair with a strange woman and to go further to post some indiscreet photographs with his lover on his Face Book page on the internet to inform the world that his marriage with the Respondent was on the brink of collapse. To add insult upon injury, he applied for a visa to relocate to America to join his mistress. This was the height of cruelty and callousness on the part of the Petitioner. In spite of all these, the Respondent is still willing to marry him. She explained that she resorted to making a report of bigamy in order to save her marriage.

The Petitioner alleged that the Respondent denied him sex. In the first place it is settled law that mere denial of sexual intercourse will not establish cruelty as a ground for divorce. In the case of: ***OLUKOYA V OLUKOYA (1961) WRNLR 209*** the court held that mere abstention from sexual intercourse will not establish cruelty as a ground for divorce and that abstention from sexual intercourse will only constitute cruelty where it endangers the health of the Petitioner.

In the instant case, there is no evidence to establish any denial of sex by the Respondent. Rather, the evidence before me shows that the Petitioner consummated his marriage with the Respondent and the marriage produced three lovely children to wit:***Sharon; Stephanie;*** and ***Sheriff.***At the trial, the Respondent testified that even sometime in 2015, the Petitioner came and slept with her.

In any case, from the available evidence, the Petitioner was hardly ever available for his wife. So he cannot complain of being denied sex. Furthermore, there is no evidence to establish any danger to the health of the Petitioner as a result of the alleged denial of sex.

Thus, I am of the view that the Petitioner has woefully failed to lead any credible evidence to sustain the ground of cruelty or intolerable behavior by the Respondent.

As I earlier pointed out, this Petition is based on two grounds to wit: on the ground of the alleged cruelty of the Respondent to the Petitioner and on the ground that both parties have lived apart for over 4 years.

I will now consider the second ground of the petition which is based on the parties having allegedly lived apart for over 4 years. As a matter of law, the provisions of the Act only requires the Petitioner to establish that the parties have lived apart for just three years.

Section 15(2) (f) of the Matrimonial Causes Act, stipulates that the Court shall hold that the marriage has broken down irretrievably if the petitioner satisfies the Court that the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition.

On the requirement of Section 15(2)(f), in the case of: ***OMOTUNDE V.OMOTUNDE Vol.1 (2002) SELECTED MATRIMONIAL CASES PAGE 255 at PAGE 291***, the Court of Appeal held that the law behind this section ***"as far as living apart is concerned is not interested in right or wrong or guilt or innocence of the parties. Once the parties have lived apart the Court is bound to grant a Decree"***.

Thus, I will not belabour myself to attempt to make a finding on which of the parties is guilty of desertion whether actual or constructive. All that is unnecessary under Section 15(2) (f) of the Act. My duty is to make a finding on the actual period of separation. That is: ***Whether it was for a continuous period of at least three years immediately preceding the presentation of the petition?***

From the Court records, this Petition was filed in this Court on the 29th of December, 2016 and from the uncontroverted evidence before me, the Petitioner and the Respondent have been living apart since 2011. That is a period of more than five years before the presentation of the petition.This is notwithstanding the fact that the Respondent alleged that they slept together in the same house, sometime in 2015. The mere fact that the Petitioner came to sleep with the Respondent sometime in 2015 is not prove of resumption of cohabitation. In the case of: ***Rosanwo vs. Rosanwo (1961) W.R.N.L.R 297 at 299, Duffus J***. explained the position thus: ***"…the mere acts of sexual intercourse between a deserted and a deserting spouse, not accompanied by any setting up of a matrimonial home together or by any intention on the part of the deserting spouse to do so, do not terminate or interrupt the state of desertion."***

The period of living apart is sufficient to sustain the ground. The parties having lived apart for a continuous period of over three years immediately preceding the presentation of the petition, I hereby hold that the marriage has broken down irretrievably under Section 15(2) (f) of the Matrimonial Causes Act Cap M7 Laws of the Federation 2004.

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

ISSUE 2:

WHETHER THE PARTIES ARE ENTITLED TO THE RELIEFS SOUGHT IN THIS PETITION.

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

a. A decree of dissolution of Marriage on the ground of cruelty;

b. That the Marriage has broken down irretrievably: both parties having lived apart for over 4 years; and

c. That custody of the children of the Marriage be granted to the Petitioner.

From my findings on Issue 1 it is evident that Relief (a) on dissolution of the Marriage on the ground of cruelty has failed. However Relief (b) has succeeded. That is on dissolution of the Marriage on the groundthat the Marriage has broken down irretrievably, both parties having lived apart for over 4 years. We are now left with Relief (c) where the Petitioner is seeking custody of the children.

On Relief (c) which is on custody of the children, ***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 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,

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 among some to be considered 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 Odowgu (supra).***

Applying the foregoing principles to this case, I must observe that the Petitioner did not lead any satisfactory evidence of how he has been providing for the welfare and upkeep of the three children of the marriage. In the matter of custody of children, a party's financial position cannot be ignored. As a matter of fact, the Petitioner did not lead any evidence of his sources of income or his means of livelihood. The Respondent categorically stated that she is not aware that the Petitioner has ever worked.

On the other hand the evidence before me is to the effect that from the outset of this marriage, the Respondent has been a working class woman who has consistently labored to provide for her house hold. She gave evidence of how she has been paying the children’s school fees, their medications when they are sick, their clothing and house rent. The Petitioner only testified of some few occasions when he supported her with some money for school fees, some toys and other items.

The amount of time and energy that a parent can devote to the children's care and upbringing is also of considerable importance. This may mean that a mother who can spend the whole of her time with her children will necessarily have an advantage over a father who has a track record of travelling across the globe.

Furthermore, the fact that the children have lived for sometime with one parent may in itself be a good reason for not moving them. It is important that theyshould have as stable a home as possible. Theages of the three children of the marriage are as follows: Sharon aged 10 years plus; Stephanie aged 9 years old; and Sheriff aged just 6 years plus. Thus, they are all between the ages of 6

and 10 years plus. To my mind, they are quite tender and they need the care and attention of a disciplined and diligent parent at this stage. The Petitioner does not appear ready to take custody of the children. He did not lead any evidence of how he intends to take care of the children if custody is granted to him. I think the Respondent is in a better position to continue to provide parental care, the children having lived with her all this while without any negative report about them.

It will be unreasonable and dangerous to disturb the bond between motherand children by granting custody to their estranged father at this stage. Granting custody to the Petitioner may have detrimental effect on the children which may cause a setback to them. They are now used to their routine with their mother who has risen up to the challenge of being a single parent. There is no evidence whatsoever from the Petitioner that the Respondent was cruel to the children or had exhibited any immoral conduct which might have any adverse effect on their upbringing.

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

I hold that the Petitioner has not met the criteria outlined above and cannot be granted custody of any of the children. The Respondent is in a better position to have custody of the three children.

As earlier stated in this judgment, in response to the Petition, the Respondent filed an Answer under Protest and pursuant to same, she sought the following reliefs from the Court:

(i) An Order of the Honourable Court dismissing the Petitioner's Petition with substantial cost for being frivolous, vexatious and an abuse of Court process;

(ii) A Declaration of the Honourable Court that any other Marriage of the Petitioner to any other person is unlawful, null and void ab initio in the light of the Petitioner's subsisting Marriage with the Respondent as evidenced in Marriage Certificate Number 79945 with LG REG CODE 1205 issued at the Esan South East Registry Ubiaja, Edo State, and dated the 13th Day of November, 2007;

(iii) An Order of Perpetual Injunction of the Honourable Court restraining the Petitioner by himself, or acting through his mother, siblings, agents, servants or other representatives in interest by whatsoever name so called from contracting any Marriage with any other person during the lifetime of the Marriage of the Petitioner

with the Respondent as evidenced in Marriage Certificate Number 79945 with LG REG CODE 1205 issued at the Esan South East Registry, Ubiaja, Edo State, and dated the 13th Day of November, 2007;

(iv) An Order of the Honourable Court directing the Petitioner to provide maintenance and welfare for the Respondent and all the children of the Marriage in their agreed Matrimonial Home in Ubiaja, Edo State; and

(v) An Order of the Honourable Court granting the Respondent the sum of N5,000,000.00 (five million naira) only as General Damages from the Petitioner for the irreversible emotional torture, pain, injury and trauma caused the Respondent as adumbrated above and for the Petitioner's act of Adultery during the subsistence of the marriage which is the subject matter of this petition.

In the course of resolving Issues 1 and 2 in this judgment, it is apparent that the Respondents Reliefs (i), (ii) and (iii) have been overtaken by events. We are only left with Reliefs (iv) and (v) which are claims for maintenance and general damages respectively.

In respect of the claim for maintenance, ***Section 70(1) & (3) of the Matrimonial Causes Act*** provide as follows:

"70. (1) Subject to this section, the court may, in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.

(3) The court may make an order for the maintenance of a party notwithstanding that a decree is or has been made against that party in the proceedings to which the proceedings with respect to maintenance are related."

It is settled law that it is the party asking for maintenance that 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, Aderemi JCA*** 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 a 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.

In the case of: ***Nanna v. Nanna (2006 3 NWLR Pt. 966 page 1 at 41 Abba Aji J.C.A.*** emphasized on the duty of a Husband to maintain his wife and children thus:-

"The law has clearly provided for the criteria to be followed. A man has a common law duty to maintain his wife and his children and such a wife and child or children have a right to be so maintained. The right of a wife and child to maintenance is not contractual in nature. The husband is obliged to maintain his wife and may by law be compelled to find them necessaries, as meat, drink, clothes et cetera, suitable to the husband's degree, estate or circumstance."

In assessing maintenance, Section 70(a) of the Act gives the Court the discretionary power to order and assess maintenance of a party. However, it is not like a claim for special damages where the claimant must strictly prove his entitlement to such award before same can be awarded by the Court.

In the instant case, the Respondent's claim for maintenance appears rather vague. He is praying for an order***: "directing the Petitioner to provide maintenance and welfare for the Respondent and all the children of the Marriage in their agreed Matrimonial Home in Ubiaja, Edo State."*** The Respondent is not asking for any specified sum as maintenance and welfare of the Respondent and the children. What does she really want, is it money, food, shelter, clothing etc, etc. All these are in the realm of conjectures and speculations. If she needs financial support, how much is she asking for? The claim appears quite uncertain.

It is settled law that any relief sought in a court of law must be definite, precise and not subject to speculations. Where the claim is imprecise or uncertain, the party claiming will go home with an empty bag. A corollary to this is that a court, however benevolent or charitable, is not a Father Christmas. A court has no power to grant a party a relief not specifically claimed. See: ***Menakaya vs Menakaya (1996) 9 NWLR (Pt.472) 256 at 301; Lawal- Osula vs. Lawal- Osula (1993) 2 NWLR (Pt.274) 158.***

Again, in the case of: ***Akinboni V Akinboni (2002) 5 NWLR (Pt. 761) 564 at 578 - 9*** the Court held that: ***-" It is wrong or erroneous for a Court to grant an order or relief which is not***

claimed or brought by the party in whose favour the order was made, for in the same vein, the Court which is not a 'father Christmas or a social welfare institution should not grant to a party an order, or relief or declaration in excess of or outside what he claimed or sought for. The rationale of the rule, which forbids (sic) ..., award by the Court Contrary to the rule of practice and pleadings is to avoid surprises during proceedings and to ensure fair hearing to the parties without showing favour to one or the other…Although matrimonial causes are treated as different from ordinary civil matters and with a liberal approach to the technical rules of pleadings, the above rule against unsolicited or gratuitous awards by courts is of general application to all cases as it affects or robs the court of jurisdiction to make such awards."

Also on the same principle, in the case of: ***Lufthansa Airlines V Odiase 2006 7 NWLR (Pt. 978) p. 34at page 85***the Court stated thus:

"A Court gives only what is asked of it. From all deductions, and as it has been said times without number, a Court is not a father Christmas who in view of the festivities gives out gifts left right and center, without due consideration of whoever comes to him. Absence of a specific relief leaves room for uncertainty. It could also open a process to an abuse and thus placing the opponent at a disadvantage. Equal balancing and fairness should be the order of the day. The parties should be given clear and good notice, well advised and with specific knowledge of the nature of relief sought. Ambiguity leaves room for speculation and un-tardiness."

Under the ***Matrimonial Causes Rules***, a party seeking an order of maintenance is expected to plead some specific facts and lead evidence in proof of same.

Order XIV rule 4 of the Rules provides *inter alia* as follows:

"***Particulars to be included in application for ancillary relief. (1) A claimant shall, in his application for ancillary relief, state- (a) particulars of the order sought by him; and (b) the facts upon which the court will be asked to make that order. (2) Where a claimant is, by his application for ancillary relief, seeking an order with respect to the maintenance of the claimant or of children of the marriage, the application shall specify- (a) the persons in respect of whom maintenance is sought; (b) whether the order sought in respect of each of those persons is a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order; and (c) <u>the amount of the lump sum or the weekly, monthly, yearly or other periodic sum, as the case may be, sought in respect of each of those persons.</u>".***(Underlining is mine.)

In the instant case, by her failure to specify the amount of the lump sum or the weekly, monthly, yearly or other periodic sum, as the case may be, sought in respect of each of her children, the Respondent has failed to comply with the provisions of ***Order XIV rule 4 of the Matrimonial Causes Rules.***

In the recent case of: ***Tabansi vs. Tabansi (2018) 18 NWLR (Pt.1651) 279 at 287***, the Supreme Court held that non compliance by a respondent with the provisions of ***Order XIV rule 4 of the Matrimonial Causes Rules*** goes to the root of an order for maintenance and is fatal to the relief.

The consequences of the foregoing are that the relief for maintenance is vague, uncertain and fundamentally defective. Sadly, it cannot be granted.

Apart from maintenance, the Respondent is also claiming the sum of N5,000,000.00 (five million naira) only as general damages from the Petitioner for the irreversible emotional torture, pain; injury and trauma caused the Respondent and for the Petitioner's act of Adultery during the subsistence of the marriage which is the subject matter of this petition.

I will first address the aspect of damages for adultery. On the claim for damages for adultery, ***Section 31(1) to (4) of the Matrimonial Causes Act*** provides as follows:

"31. (1) A party to a marriage, whether husband or wife may, in a petition for a decree of dissolution of the marriage alleging that the other party to the marriage has committed adultery with a person or including that allegation, claim damages from that person on the ground that that person has committed adultery with the other party to the marriage and, subject to this section, the court may award damages accordingly.

(2) The court shall not award damages against a person where the adultery of the respondent with that person has been condoned, whether subsequently revived or not, or if a decree of dissolution of the marriage based on the fact of the adultery of the respondent with that person, or on facts including that fact, is not made.

(3) Damages shall not be awarded under this Act in respect of an act of adultery committed more than three years before the date of the petition.

(4) The court may direct in what manner the damages awarded shall be paid or applied and may, if it thinks fit, direct that they shall be settled for the benefit of the respondent or the children of the marriage."

It is settled law that he who alleges must prove. The burden of proof of adultery is on the Respondent who is alleging that the Petitioner has committed adultery.

In the case of: ***ALABI VS. ALABI (2007) LPELR-8203 (CA), Ignatius Agube JCA*** stated thus: ***"Since the Respondent was the one who alleged the commission of adultery against the Appellant and Aramide Babatunde, the onus was on her to prove to the reasonable satisfaction of the Court that the alleged parties actually committed adultery."***

Again in the case of: ***IN RE: OLAWALE ONILE ERE v. WILLIAMS & ANOR***

(1974) LPELR-3490(SC)(Pp. 14-15, paras. F-B, ATANDA FATAI-WILLIAMS, J.S.C posited thus:

"...the onus of proving the particular adultery relied upon by a Petitioner for his or her claim for damages under Section 31(1) lies squarely on such Petitioner and must be proved to the satisfaction of the court. In addition, because of the mandatory provisions of subsection (3), the court hearing the petition or cross-petition, as the case may be, must make a clear finding as to whether that adultery was or was not committed within a period of three years preceding the date of the petition for divorce."

In the instant case, the Respondent gave evidence of how the Petitioner has been involved in an amorous relationship with one Diane Uwadiale. She tendered some compromising photographs of the Petitioner and the said Diane Uwadiale. The Respondent even alleged that the Petitioner confessed to her thatDiane Uwadiale has two children for him from the alleged adultery. The question therefore is:***whether the Respondent has discharged the burden of proof of adultery?***

However, it is worthy of note that the Petitioner never filed any ***Discretion Statement*** where he admitted committing adultery. Also at the trial, he never admitted committing adultery with anyone or having any child outside wedlock. Curiously, the learned Respondent's counsel never cross examined the Petitioner on these salient issues relating to adultery. He focused more on the aspect of bigamy and the Petitioner's attempt to elope to the United States to join his lover.

From experience, it is very difficult to adduce direct evidence to prove adultery. Adultery is usually done in secret places where it is almost impossible to apprehend the culprits ***in flagrante delicto*** (in the very act of transgression or as it is said:***red handed***). The classical pronouncement on this is by ***Lord Buck-Master*** when in: ***ROSS VS. ELLISON (1930) A.C. 1 at page 7*** he said:-

"Adultery is essentially an act which can rarely be proved by direct evidence. It is a matter of inference and circumstance. It is easy to suggest conditions which can leave no doubt that the adultery has been committed, but the mere fact that people are thrown together in an environment which lends itself to the commission of the offence is not enough unless it can be shown by

documents, e.g. letters or diaries or antecedent conduct that the association of the parties was so intimate and their mutual passion so clear that adultery might reasonably be assumed as the result of an opportunity for its occurrence."

In the case of: ***Ekrebe vs. Ekrebe (1999) 3 NWLR (Pt.596) 514 at 524, Mohammed JCA*** (as he then was) opined thus:

"The mere fact that the petitioner and the co-respondent were living in the same house, coupled with the change of name of the co-respondent is not enough in my view in the absence of proof of any marriage which had been consummated to prove adultery against the petitioner and the co-respondent to justify granting the appellant's claim for damages."

Again, in the case of: ***Ikpi vs. Ikpi (1957) W.N.L.R 59 at 63, Ademola, C.J.*** stated *inter alia* thus: ***"Suspicion, however high, is not necessarily a ground for adultery."***

From the totality of the evidence adduced in this case, I do not think the evidence proffered by the Respondent is sufficient to establish adultery on the part of the Petitioner.

Even if the evidence of adultery was cogent enough, the aspect of the claim for damages for adultery would still suffer a major setback because ***Section 31(3) of the Matrimonial Causes Act*** provides that:

Damages shall not be awarded under this Act in respect of an act of adultery committed more than three years before the date of the petition.

The Respondent did not lead any evidence to establish the date of the alleged adultery. Whether it was committed less than three years before the date of the petition. In the event, the claim for damages for adultery is bound to fail.

We are left with the aspect of general damages for the alleged irreversible emotional torture, pain, injury and trauma caused the Respondent during the subsistence of the marriage which is the subject matter of this petition.

By virtue of ***Section 73(1) (L) of the Matrimonial Causes Act***, the Court is vested with some general powers to ***make any other order which it thinks it is necessary to make to do justice***.

On the award of general damages, it is settled law that General Damages are presumed by law as the direct natural consequences of the acts complained of by a Claimant against a Defendant. The assessment of general damages is not predicated on any established legal principle. Thus, it usually depends on the peculiar circumstances of the case. See: ***Ukachukwu vs. Uzodinma (2007) 9 NWLR (Pt.1038) 167; and Inland Bank (Nig.) Plc vs. F & S Co. Ltd. (2010) 15 NWLR (Pt.1216) 395.***

The fundamental objective for the award of general damages is to compensate the Claimant for the harm and injury caused by the Defendant. See: ***Chevron (Nig.) Ltd. vs. Omoregha (2015) 16 NWLR (Pt.1485) 336 at 340.***

Thus, it is the duty of the Court to assess General Damages; taking into consideration the surrounding circumstances and the conduct of the parties. See: ***Olatunde Laja vs. Alhaji Isiba& Anor. (1979) 7 CA.***

The quantum of damages will however depend on the evidence of what the Claimant has suffered from the acts of the Defendant.

In the instant case, the Respondent adduced sufficientevidence to establish how she has been carrying the burden of the family without any support from the Petitioner. From the evidence, they only cohabited for a very short period after their wedding before serious disagreements set in culminating in the present divorce proceedings. By his conduct over the years, the Petitioner has subjected the Respondent to a life which is akin to widowhood. He has never been there for the Respondent and the Children. In his perennial search for greener pastures he found solace with a strange woman outside his matrimonial home. Thus, he became estranged from his family and was obsessed with his plans to elope to America to live with his paramour, one Diane Uwadiale a lady whose status remains uncertain. In a desperate bid to wreck his marriage, the Petitioner posted some near pornographic pictures of his paramour and himself on his Face Book page for the world to see. Thereby scandalizing his faithful wife, bringing her to public ridicule, shame and trauma. There was no justification for such callous and insensitive behavior by the Petitioner. It is a great wonder that despite such cruelty, the Respondent is still willing to continue with the marriage. All through the proceedings, she insisted that she was opposed to the divorce whereas, the Petitioner is vehementlydesirous of the divorce. This is quite a pathetic situation for the Respondent. However, it is crystal clear that the marriage has broken down irretrievably. The parties must be allowed to go their separate ways to allow them come out of this turbulent relationship. For all her anguish and trauma, I think the Respondent is entitled to compensation by way of general damages.

In the event, Issue 2 is partly resolved in favour of each party.

On the whole, the Petition partially succeeds and I make the following orders:

1. ***A Decree Of Dissolution Of the Marriage on the ground that the parties have lived apart for a period of more than three years before the filing of this Petition;***

2. ***The Respondent is granted custody of the three children of the marriage ;***
3. ***The Respondent shall grant the Petitioner unrestricted access to the children when he so desires; and***
4. ***An Order granting the Respondent the sum of N 2,000,000.00 (two million naira) only as general damages from the Petitioner for the irreversible emotional torture, pain, injury and trauma caused the Respondent during the subsistence of the marriage.***

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
12/03/19

COUNSEL:

1. F.O. Ebadan Esq……...Petitioner
2. S.E. Okoh Esq……...Respondent