

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT HIGH COURT MAITAMA – ABUJA**

**BEFORE: HIS LORDSHIP HON. JUSTICE SAMIRAH UMAR BATURE**

<b>COURT CLERKS:</b>	<b>JAMILA OMEKE &amp; ORS</b>
<b>COURT NUMBER:</b>	<b>HIGH COURT NO. 24</b>
<b>CASE NUMBER:</b>	<b>SUIT NO. FCT/HC/PET/261/2021</b>
<b>DATE:</b>	<b>24/3/2022</b>

**BETWEEN:**

TOYO DAMILOLA ESTHER.....PETITIONER

**AND**

TOYO OLUWANISOLA FESTUS.....RESPONDENT

**APPEARANCES:**

Petitioner in Court

Charity C. Ebezim Esq

Respondent absent and unrepresented.

**JUDGMENT**

The Petitioner filed this petition on the 15<sup>th</sup> July, 2021, seeking for the following reliefs:

***“(1). A DECREE OF DISSOLUTION OF THE MARRIAGE held at the Marriage Registry at Olorunda Local Government, at Igbona, Osogbo, Osun State on 26<sup>th</sup> May, 2012 between the Petitioner and the Respondent be granted on the ground that the marriage has broken down irretrievably by reason that:***

- a. ***That since the marriage the Respondent has behaved in such a way that the Petitioner finds it intolerable to live with him as there is no more love between the Petitioner and the Respondent and the marriage between the Petitioner and the Respondent has broken down irretrievably.***
2. ***AN ORDER awarding the custody of the child of the marriage who is 9 years old and still a minor to the Petitioner in order for the Petitioner to continue to love, care, nurture and protect his future and make him beneficial to himself and the society.***
3. ***AN ORDER directing the Respondent to pay the sum of Two Hundred Thousand Naira (N200, 000.00) monthly to the Petitioner for the maintenance, payment of medical bill, all the bills and school fees of the child of the marriage.***
4. ***Cost of N500, 000.00 (Five Hundred Thousand Naira) only as cost of this suit.***
5. ***AN ORDER OF PERPETUAL INJUNCTION restraining the Respondent, his agents, privies from coming around the Petitioner and further acts of battery, threats, assaults, violence, harm against the Petitioner.”***

The particulars as stated in the Notice of Petition are thus:

- a. ***The parties got married at the Marriage Registry of Olorunda Local Government, at Igbona, Osun State on 26<sup>th</sup> May, 2012. The Marriage Certificate issued to the parties is hereby pleaded and shall be relied upon at the trial.***
- b. ***The marriage produced a son named Master Toyo Oluwadamisola Daniel, born on 6<sup>th</sup> July, 2012 thereby he is 9 years old now (a minor) in Redeem Christian Church of God Camp, Jesus Only Maternity, Mowe, Ogun State. The***

***Birth Certificate is hereby pleaded and shall be relied upon at the trial.***

- 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. The parties to the marriage have lived apart for a continuous period of at least one year immediately preceding the presentation of the Petition.***
- e. Few months into the marriage, the Petitioner realised that the Respondent's mother has been the one supporting him financially because the Respondent was jobless and has refused to engage himself with a job or business even after the mother and the Petitioner advised him to get a job as he is now married and expecting a baby as the Petitioner was pregnant but he refused and chose to live a reckless life style. His mother subsequently stopped supporting him financially at that point thereby making the true position of his status obvious.***
- f. The Petitioner further realised that the Respondent is a habitual drunkard, chain-smoker of different substances.***
- g. the Petitioner further states that the Respondent committed adultery during the pendency of the marriage which resulted in him impregnating one of his mistresses who has delivered a child (son) for him named Jason Toluwalase Toyo, who is 3 to 4 years old not. A printout of the Respondent Mother's Funeral Magazine showing the group picture of the Respondent, his mother, his mistress, the son and some family members is pleaded and shall be relied upon at trial. The Respondent is hereby put on notice to produce the child's birth certificate at trial.***
- h. The Respondent in fact started acting irritable, nonchalant, non-interested in the welfare of the Petitioner, lost all respect and regard for her and treated her with disdain and ridiculed her at any given opportunities.***

- i. The Petitioner in fact solicited for the Respondent's support during the most crucial and critical point of the early pregnancy, but never received any, instead he left her to face the ordeal alone, day and night concentrating his attention on his mistresses.***
- j. The Petitioner survived and sustained the pregnancy all alone until the baby was born.***
- k. The Respondent is very abusive and has a violence disposition which has led to several altercations and at times physically abusing the Petitioner.***
- l. The Respondent has threatened the Petitioner severally to leave their matrimonial home else he will kill her and that he is not ready to take care of the Petitioner and their son.***
- m. The Petitioner found it intolerable to continue to live with the Respondent, since the Respondent made it known to her that he would not cater for the needs of the Petitioner and their son, the Petitioner had to take up maintenance, payment of all the bills and school fees of their son which cost her Two Hundred Thousand Naira (N200, 000.00) per month. Some of the receipts of payment of Master Toyo Oluwadamisola Daniel's school fees are hereby pleaded and shall be relied upon at trial.***
- n. The Petitioner was compelled by the threats, maltreatment and violence disposition of the Respondent as well as her desire to avoid the occurrence of further humiliations which may be irreversible, regrettably left the matrimonial home with their son Daniel on 24<sup>th</sup> March, 2015.***
- o. The parties have since 24<sup>th</sup> March 2015 lived apart till the time of presenting this Petition."***

The proposed arrangement for the child of the marriage are as follows:

- “a. The Petitioner is to continue with the custody of the child of the marriage.***
- b. The child shall continue to be enrolled in standard schools and will be given a benefiting educational life till graduation and beyond.***
- c. The child shall have access to standard medical care and facilities.***
- d. Access to sporting, recreational, supervised religious activities shall be maintained and other palliatives geared at the development of the child.***
- e. The Respondent shall undertake responsibility for the financial welfare, education, medical bills, maintenance and other palliatives geared at the upbringing of the child of marriage.***
- f. A supervised access of the Respondent to the child is conceded on reasonable notice.”***

The Petition is supported by a Verifying Affidavit of 3 paragraphs deposed to by the Petitioner herself, some Exhibits as well as a Witness Statement on Oath of the Petitioner.

The Respondent despite being duly served with the Notice of Petition as well as hearing notices throughout the trial, did not put up any appearance nor file any response to the Petition.

In effect, this Petition is unchallenged.

During trial the Petitioner testified as Pw1, adopted her Witness Statement on Oath and tendered several Exhibits which were admitted in evidence and marked as follows: -

- (1). Marriage Certificate dated 26<sup>th</sup> May 2012 marked Exhibit A.
- (2). A Recognition of birth dated 6<sup>th</sup> July 2017 marked Exhibit B.
- (3). A booklet of a funeral programme marked Exhibit C.

- (4). A Certificate of Compliance pursuant to Section 84 of the Evidence Act marked Exhibit C1.
- (5). 6 Receipts issued by Roseful International School marked Exhibits D1 – D6.
- (6). 5 Receipts issued by Wisdom International School marked Exhibits D7 – D11 respectively.

Now, under and by virtue of Section 15(1)(2) of the Matrimonial Causes Act Cap M7 LFN, 2004, a Court hearing a Petition for dissolution of marriage shall hold the marriage to have broken down irretrievably, if and only if the Petitioner proves one of the grounds highlighted under Section 15(2) a-h thereof.

In the instant case the Petitioner alleges intolerable behaviour as one of the grounds for bringing this Petition.

She alleges physical violence, neglect and even adultery.

To prove intolerable behaviour, under Section 15(2)(c) of Matrimonial Causes Act a Petitioner is required to come under any of the grounds highlighted under section 16(1) of the Matrimonial Causes Act, failure of which the Court cannot grant a decree of dissolution of marriage.

Please see Section 16(1) of the Matrimonial Causes Act Cap M7 LFN 2004.

In paragraph (e) of her particulars attached to her Witness Statement on Oath, the Petitioner alleges that the Respondent is a habitual drunkard, chain smoker of different substances, among other allegations.

In paragraph m thereof, Petitioner states thus:

***“That I was compelled by the threats, maltreatment and violent disposition of the Respondent as well as my desire to avoid the occurrence of further humiliations which may be irreversible. I regrettably left our matrimonial home with our son Toyo O. Daniel on 24<sup>th</sup> March, 2015.”***

Now, it is observed from the above paragraphs that there are two possible grounds for dissolution of the marriage.

The first is intolerable behaviour, in this case Respondent being a habitual drunkard. This comes under the provision of Section 16(1)(b)(i) of the Matrimonial Causes Act.

The section provides thus: -

***“That since the marriage, the Respondent has for a period of not less than two years;***

***“(i) been a habitual drunkard”***

The Petitioner in her Witness Statement on Oath has deposed to that fact in her paragraph (e) of her particulars.

Secondly, in her paragraph (m), Petitioner clearly deposed that the parties in this Petition have lived apart since 24<sup>th</sup> of March 2015.

Section 15, (2)(f) of the Matrimonial Causes Act provides: -

***“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.”***

This Petition was filed on 15<sup>th</sup> July, 2021, this means the parties having lived apart since 24<sup>th</sup> of March 2015, have now lived apart for a continuous period of at least three years immediately preceding the presentation of this Petition. Thereby proving the ground highlighted under Section 15(2)(f) of the Act earlier reproduced.

Although Petitioner has tendered photographs and other evidence to prove adultery, it is trite that the alleged co-adulterer must be joined as a party in the Petition, without which the Petitioner cannot prove adultery.

On this premise, I refer to the case of EIGBE V EIGBE (supra) cited by the Respondent’s Counsel, where the Court per Bage, J.S.C. held at PP. 11-12, Paras F – C as follows:

***“The provision of Section 32 of MCA, Cap M7 is very clear on a person alleged to have committed adultery with a partner in marriage. The law mandatorily requires he must be joined in the Petition to afford him the opportunity of defence to such allegation where such a person is not joined, adultery per se, cannot constitute a ground for a decree for dissolution of such marriage. Joinder of adulterers is a must requirement of the law. Where such adulterers are not joined, the petitioner cannot use any legal process for dissolution of the marriage on that ground....”***

Therefore in the instant case, since the alleged Co-adulterer was not joined as Co-Respondent in this petition, this Honourable Court cannot employ it as ground for dissolution of marriage. I so hold.

See also the cases of ***OKE V OKE (2006) 4 NWLR (Pt. 1008) 224 at 242, C-D; ODUBEKO V FOWLER (1993) 7 NWLR (Pt. 308) 637.***

On the issue of custody and maintenance of the only child of the marriage Master Toyo Oluwadamisola Daniel (9 years old at the time of filing this Petition), the Court shall be guided by the primary consideration which is the best interest of the child.

I refer to Section 71(1) of the Matrimonial Causes Act (supra) which provides thus: -

***“In proceedings with respect to the custody, guardianship, welfare, advancement or education of children of a marriage, the Court shall regard the interest of those children as the paramount consideration; and subject thereto, the Court may make such order in respect of those matters as it thinks proper.”***

I equally refer to the case of ***MRS. LYDIA OJUOLA OLOWUNFOYEKU V MR. JAMES OLUSOJI OLOWUNFOUEKUN (2011) NWLR (PT. 227) 177 AT 203, Paras E – F*** where the Court of Appeal held thus:-

***“In every action concerning a child, whether undertaken by an individual, public or private body, institutions or service, Court of law, or administrative or legislative authority, the best interest of the child of the marriage shall be the primary***



***consideration....custody is never awarded for good conduct, nor is it ever denied as punishment for the guilty party in matrimonial offences. The welfare of the child of the marriage that has broken down irretrievably is not only paramount consideration but a condition precedent for the award of custody.”***

See also sections 70 of the Matrimonial Causes Act and the case of ***ODUSOTE V ODUSOTE (2012) 3 NWLR (PT. 1288) 478.***

Again, in the consideration of what constitutes the welfare and interest of the child, the Court in ***ALABI V ALABI (2007) 9 NWLR (Pt. 1039) 279***, set out the criteria as follows:

- “1. The degree of familiarity of the child with each of the parents (parties).***
- 2. The amount of affection by the child for each of a the parents.***
- 3. The respective incomes of the parties.***
- 4. The education of the child***
- 5. The facts that one of the parties now lives with a third party as either man or woman, and***
- 6. The fact that in the case of tender age, custody should normally be awarded to the mother unless other considerations makes it undesirable etc.”***

In her paragraph M in the particulars contained in the Notice of Petition, Petitioner states that Respondent refused to cater for the needs of the Petitioner and their son and that Petitioner had to take up maintenance, payment of all the bills and school fees of their son which cost her Two Hundred Thousand Naira (N200, 000.00) per month.

I have also considered the Proposals made by Petitioner for the child of the marriage. Her evidence shows that she is quite attached to her child and is likewise a fit and responsible mother.

In my humble view, the best interest of the child is that Petitioner shall retain sole custody of the child of the marriage.

Likewise, Petitioner has presented credible and unchallenged evidence including Exhibits to show that she's been solely responsible for her own upkeep as well as the only child of the marriage. I so hold.

On the whole, I am satisfied that the Petitioner has proved her case based on the reasons given earlier that the marriage in this case has broken down irretrievably on two grounds.

Accordingly, it is hereby ordered as follows: -

- (1). I hereby grant a Decree Nisi dissolving the marriage between the Petitioner Toyo Damilola Esther and the Respondent Toyo Oluwanisola Festus celebrated on the 26<sup>th</sup> of May 2012 at the Marriage Registry Olarunda Local Government at Igbona, Osogbo, Osun State. The Decree shall become absolute if nothing intervenes within a period of three months from this date.
- (2). The Petitioner is granted sole custody of Toyo Oluwadamisola Daniel, the only child of the marriage.
- (3). The Respondent shall have supervised visitation rights on reasonable notice.
- (4). The Respondent is directed to pay the sum of N200, 000.00 monthly to the Petitioner for maintenance, payment of medical bills, all the bills and school fees of the child of the marriage.
- (5). An Order of Perpetual Injunction is granted restraining the Respondent his agents, privies from coming around the Petitioner and further acts of battery, threats, assaults, violence, harm against the Petitioner.
6. No order as to cost.

**Signed:**

**Hon. Justice S. U. Bature  
24/3/2022.**