

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

BEFORE: HON. JUSTICE O. C. AGBAZA

COURT CLERKS: UKONU KALU, GODSPOWER EBAHOR & ORS

COURT NO: 6

SUIT NO: FCT/HC/PET/039/2019

BETWEEN:

RAPHAEL OZOEMENAM ONYEDIBE.....PETITIONER

VS

CHIDIOGO NWANNEKA ONYEDIBE.....RESPONDENT

JUDGMENT

By a Notice of Petition dated 5/11/2019 and filed same day, the Petitioner herein Raphael Ozoemenam Onyedibe seeks the court, the reliefs set out in Paragraph 13 of the Petition as;

- (1) A decree for the dissolution of the marriage celebrated between the parties on 9th January, 2015 on the ground that the marriage has broken down irretrievably.
- (2) An Order awarding joint custody of the only child of the union to both parties.
- (3) And the Omnibus relief.

The ground upon which the Petitioner relies on for court to dissolve the marriage is premised on those facts contained in Section 15(2) (c) of the Matrimonial Causes Act.

The Petition was served on the Respondent and by her Amended Answer to Petition dated 16/11/2020 but deemed properly filed and served on 19/11/2020, Respondent seeks the court to dissolve the marriage on the ground of desertion by the Petitioner and also seek the reliefs set out in Paragraph 33, 34, 35, 36 and 37 of the said Amended Answer to the Petition that is;

- 33 - A decree/Order of this Honourable Court dissolving the marriage between the Petitioner and Respondent but on grounds that the Petitioner deserted the Respondent for a continuous period of one year (ie) April 2018 – May 2020 immediately preceding the presentation of the Answer. Order Vii Rule 1 (3) of the Matrimonial Causes Rules.
- 34 - An Order granting sole custody of the only child of the marriage Kairaluchukwu Onyedibe who is an infant female to the Respondent and granting the Petitioner unfettered access until the child turns 12 when both parties can share joint custody.
- 35 - The Respondent shall be responsible for the costs of education (including school fees and other incidental costs) healthcare, clothing and shelter for the child.

- 36 - An Order of this Court directing the Petitioner to pay a monthly sum of ₦100,000.00 (One Hundred Thousand Naira) as maintenance for the child to cover her feeding and general welfare.
- 37 - Both parties shall be jointly responsible for moral upbringing of the child.

Upon receipt of Respondent's Answer to the Petitioner, Petitioner filed a Reply to Amended Answer to Petition on 12/1/2021.

The parties having joined issues the case went into trial with Petitioner testifying as PW1. And recalled to testify on 31/1/2022, PW1 adopted the Witness Statement on Oath dated 1/6/2020 and another dated 12/1/2021 as oral testimony in proof of his case on 5/6/2020 and 3/1/2022 respectively.

In the course of the Examination-In-Chief of PW1 – Petitioner, the marriage certificate – Form E evidencing marriage contracted between the Petitioner and the Respondent on 9/1/2015 at the Abuja Municipal Area Council Registry, Abuja was tendered and admitted as Exhibit "A".

During Cross-Examination by Respondent's counsel, PW1 – Petitioner confirmed to court that the parties have lived apart for a period of two (2) years and admitted praying for sole custody of the only child of the marriage to be given to the Respondent in his verifying, in 2019 as the child was barely a year and six months old. But now wants the child to

remain with the Respondent until the child turns 6 (Six) years as stated in his Additional Witness Statement on Oath.

PW1 also admitted that he deliberately abandoned their matrimonial home when the child was barely three months and visited the child in October. He stated that he has been providing maintenance for the child and made bank transfer of funds to her the last time in December.

PW1 further informed the court during Cross-Examination that the cost of maintaining a child is verifiable and he is capable of taking care of the child when she turns six years; and will not hand her over to his mother. PW1 knew that the child has speech problem, but Respondent has refused to allow his offer to handle it and he is unaware that the child is asthmatic the child needs medical attention when must be administered respectively if he is allowed by the Respondent.

There was no re-examination of PW1.

At the close of the evidence of the Petitioner, the case was adjourned for the Respondent to defend the Petition on the adjournment date, Respondent Counsel declined to open their defence and informed the court that the Respondent would rest her case on the evidence of the Petitioner and will not call any evidence. The court then adjourned for adoption of Final Address by the parties.

Written Addresses were filed and exchanged between the Petitioner and Respondent. The Written Address of the Respondent dated 5th May 2022

and deemed filed and served on 4/7/2022. While that of the Petitioner dated 16/3/2022 was filed on 16/3/2022.

Addressing the court on 4/7/2022, Learned Silk for the Petitioner adopted the submission in the Petitioner's Final Written Address, where a sole issue was formulated for determination that is;

“Whether it can be held from the evidence adduced, that the marriage between the petitioner and the Respondent has broken down irretrievably on the grounds contained in the Petitioner's Petition”.

And submits that Petitioner discharged the burden of proof which lies on him, by his testimony however, Respondent neglected or refused to adopt her Witness Statement on oath thereby failing to lead any evidence in support of her case. Thus failed to discharge the evidential burden to prove the facts in support of her case. Therefore the evidence of the Petitioner remained unchallenged and uncontroverted commend court to Section 131 (1) (2) of the Evidence Act 2011, the cases of Okoye Vs Nwankwo (2014) 15 NWLR (PT.1429) 93, Ezemba Vs Ibeneme (2004) 14 NWLR (PT.894) 617, Nduuul Vs Wayo (2018) 16 NWLR (PT. 1640) 548. GE International Operatives Ltd Vs Q – Oil Gas Services (2015) 1 NWLR (PT. 1440) 244, Aregbe-sola Vs Oyinlola (2011) 9 NWLR (PT. 1253) 458, Funtua Vs Tijjani (2011) 7 NWLR (PT. 1245) 130, Ukpo Vs Imoke (2008) 1 NWLR (PT. 1121) 90; Dura Vs Nwosu (1989) 4 NWLR (PT. 113) 24 and Balogun Vs U.B.A. Ltd (1992) 6 NWLR (PT. 247) 33.

Submit further that the Petitioner relies on the facts contained in Section 15 (2) (c) of the Matrimonial Causes Act for this Petition and by his evidence has proved the intolerable behaviour of the Respondent and also proven that Petitioner cannot reasonably be expected to live with the Respondent. Refer to Nnana Vs Nnana (2008) 3 NWLR (PT. 966) 1, Bibilari Vs Babilari (2011) 13 NWLR (PT. 1264) 207 @ 228 Paras D – E; O’Neil Vs Neil (1976) 1 WLR 118, Anioke Vs Anioke (2011) LPELR 3774 (CA) @ 27 Paras D – A; Tabansi Vs Tabansi (2018) 18 NWLR (PT.1651) 229 Omo Vs JSC Delta State (2000) 12 NWLR (PT.682) 444; Omotunde Vs Omotunde (2001) 9 NWLR (PT. 718) 252 @ 284 Paras B – C and Section 18 of the Matrimonial Causes Act.

On the ancillary relief that is custody of the only child of the marriage, submits that the interest of the child is paramount and by his evidence, Petitioner has shown to court his willingness to adequately arrange for the sound education physical and mental welfare of the child. Refer to paragraphs 4, 5 and 6 of Petitioner’s Additional Witness Statement and the cases of Damulak Vs Damulak (2004) 8 NWLR (PT. 874) 151 and Nnana Vs Nnana (Supra), urge court to grant the reliefs as prayed.

By way of adumbration, submit that failure of Respondent to lead any evidence in support of her pleadings implies that her pleading is deemed abandoned. And as the evidence of the Petitioner’s establishes that the marriage has broken down irretrievably. Urge court to so hold.

Respondent’s counsel Princess Okofu Esq adopted the submission in the Written Address settled by Vershima Adaguusu Esq. In the said Written

Address, Respondent's counsel formulated three (3) issues for determination namely;

- (1) Whether considering the totality of evidence adduced, the Petitioner is entitled to a dissolution of marriage on the grounds presented?
- (2) Whether oral evidence must be consistent with pleadings?
- (3) Whether the best interest of the child is best adhered with custody remaining with the Respondent?

On issue one, submits that Respondent rest her case on the evidence of the Petitioner and must be dealt with on that basis as Petitioner's case must survive on its own merit. Refer to (Toriola Vs Williams (1982) NSCC (Vol 13) 187, 199, NEPA Vs Olagunju & Anos (2005) 3 NWLR (PT. 913) 602 @ 632, Trans Saharan Air Ltd & Anor Vs FCMB Plc & Anor (2019) LPELR – 50963 (CA), Martchem Industries (Nig) Ltd Vs M.F. Kent West Africa Ltd (2005) LPELR – 1842 (SC).

Submits that Respondent hinged it case on the grounds of Section 15 (2) (C) of the Matrimonial Causes Act but failed to lead credible evidence in proof of the ground. Refer to GTB Plc Vs Solomon (2016) LPELR 40342 (CA) Vandighi Vs Hale (2014) LPELR 24196 (CA) Ajide Vs Kelani (1985) 3 NWLR (PT.12) 248 @ 269, Gabida Vs Marcus (2003) FWLR (PT. 139) 1 Obahaya Vs Obahaya (2022) LPELR – 57141 (CA) Menakaya Vs Menakaya (2001) 8 MJSC 50 @ 75.

Submits that Respondent elicited evidence during cross-examination in support of her case notwithstanding the fact that Respondent rests her case on that of the Petitioner. Refer to *Beverly Development & Realities Ltd Vs TEC Engineering Co (Nig) Ltd* (2000) LPELR – 52023 (CA). Submits further that the evidence of the Respondent satisfies the provision of Section 15 (2) (e) of the Matrimonial Causes Act which Respondent relies on in her supplementary Answer. Urge court to resolve the issue in favour of Respondent.

On issue two, submits that the latter oral testimony of the Petitioner in respect of custody of the only child of the marriage are inconsistent with the pleading of the Petitioner, therefore goes to no issue. Refer to *Aminu Vs Hassan* (2014) 5 NWLR (PT. 1400) 287, *Mbanefo Vs Molokwu* (2014) 6 NWLR (PT. 1403) 377, *Odum & Ors Vs PDP & Ors* (2015) LPELR – 24351 (SC), *Obi Vs Okongwu* (2020) LPELR – 51809 (CA). And Court cannot set up a different case from the request of the Petitioner. Refer to *Ibeachu & Ors Vs Ozorgwu & Orsa* (2021) LPELR – 55027 CA *Oke-bola Vs Molake* (1975) 1 SC 61. *George Vs Dominion Floor Mills Ltd* (1063) 1 ALL NLR 71. Urge court to resolve this issue in favour of Respondent.

On issue three, submits that Section 71 (1) of the Matrimonial Causes Act guides the grant of custody of a child in a matrimonial proceedings and in awarding custody, the court is mindful of the interest of the child, which is paramount as well as the conduct of the parties, the Respondent has been solely responsible for the welfare and maintenance of the child since Petitioner abandoned their matrimonial home as evidence elicited from the Petitioner during cross-examination proves. Refer to *Obahaya Vs Obahaya*

(Supra), Lafun Vs Lafun (1967) NWLR 401, Alabi Vs Alabi (2007) 9 NWLR (1039) 297 and Afronja vs Afonja (1971) 1 U.H.R. 105. Also urge court to consider the age of the child in the grant of custody. Refer to Davidson Vs Davidson& Anor (2021) LPELR 56109 (CA).

Submits finally that court can only wrest custody of a mother when it is proven that the mother is of immoral nature, has an infectious disease, insane and/or being cruel to the child. Refer to Odogwu Vs Odogwu (1992) LPELR – 2229 (CA) and Tabansi Vs Tabansi (2009) 12 NWLR (1155) 415 @ 432 Petitioner is unable to prove any of those facts therefore, urge court to resolve this issue in favour of Respondent.

In conclusion urge to grant a decree of dissolution of marriage between the parties on the grounds that they have lived apart for over two years.

I have carefully considered the evidence adduced in this matter and the written submissions of the learned counsel and I find that the issue which calls for determination;

“Whether the Petitioner has established his case by credible evidence, thus entitling him to judgment as claimed”.

Firstly Respondent filed her Answer to the Petition and Cross-Petition asking the court to dissolve the marriage on her terms, but on her part elected not to lead evidence and rested on the case of the Petitioner. Respondent, however, elicited evidence during Cross-Examination of the Petitioner, but whether evidence so elicited is sufficient to ground her Cross-Petition the court will ultimately decide. Since Respondent rested

her case on that of the Petitioner, Respondent is bound by the evidence called by the Petitioner and the case must be dealt with on the evidence as it stands. See *Toriola Vs Williams* (1982) 2 ALL NLR 188 @ 205, See also *Abdullahi Vs Military Administration Kaduna State* (2003) 28 WRN 50 @ 67. The facts that the Respondent did not lead evidence and rested on the case of the Petitioner does not necessary mean that the Petitioner's case will succeed. The evidence adduced by the Petitioner may have been thoroughly challenged and discredited by Cross-Examination that it has become bereft of probative value and essence. See *Oforlete Vs State* (2000) LPELR i.e 34 in *Haruna Vs Salau* (1998) 7 NWLR (PT. 559) 653 @ 659 *Oguntade JCA* (as he then was had) this to say;

“The argument that because the Plaintiff's evidence was unchallenged Judgment should be given in his favour is patently unsound. It is trite in an action, the evidence of a Plaintiff may be so weak and or so discredited under Cross-Examination that it is unnecessary for the Defendant to testify. It is also trite that the evidence given by the Plaintiff, even if unchallenged may still be insufficient to sustain the claim made by the Plaintiff”.

Therefore for the Petition to be entitled to Judgment he must succeed on the strength of his evidence in support of the ground relied on for this Petition. See Section 82 (1) of the Evidence Act which reads;

For the purpose of the Act a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the court.

In the determination of a Petition for a dissolution of marriage under the Matrimonial Causes Act, it is competent for a marriage to be dissolved once a court is satisfied that the marriage has broken down irretrievably and to come to that conclusion, the Petitioner must satisfy the court of any of the facts laid down in Section 15 (2) of the Matrimonial Causes Act categorized under sub-Section (a) – (h).

In this instant case, Petitioner relies on Section 15 (2) (c) of the Matrimonial Causes Act which reads;

“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 succeed under this ground a Petitioner must lead evidence to the reasonable satisfaction of the court to such particular acts or conduct of the Respondent which would warrant the grant of the relief sought, and such act must be weighty and grave in nature to make further as habitation virtually impossible. See the case of Ibrahim Vs Ibrahim (2007) ALL FWLR (PT. 346) @ 489 Paras H – B. See also the English Case of Katz Vs Katz (1972) ALL E.R 219.

In proof of these grounds Petitioner testify as PW1 informed the court in his Witness Statement on oath filed on 1/6/2020 that;

“There exist no love between me and the Respondent and we are unable to relate as husband and wife as the Respondent is violent to

me and every member of my immediate household, housemaids inclusive”.

The Respondent is very weird, disrespectful to me and exhibited conducts and characters which clearly show she has neither love nor regard for me and my entire family”.

Petitioner also told the court that;

“The Respondent has continually kept me uncomfortable in our matrimonial home to the point that I was a stranger in my own home as she, the Respondent scarcely afforded me marital privilege and rights which led to my seldom return to our home for peace sake.

The Respondent is naturally a violent and aggressive person even before she put to bed and became a nursing mother as she sought our domestic guard barely weeks of arrival in our matrimonial home”.

Petitioner narrating the conduct of the Respondent he finds he cannot tolerate stated that Respondent lack proper marital compartment, unsupportive and continuously denied him of the title earning for frivolous extravagant ends and the cumulative of the intolerable conduct of the Respondent occasioned his leaving their matrimonial home in 2018 as Respondent became extremely vicious than ever and upon realization that he was being pushed to the brink of losing his sanity and since that day in June 2018 both parties ceased further cohabitation.

These pieces of evidence were not controverted nor challenged, by the Respondent but submitted through counsel that Petitioner merely stated

generic acts of the Respondent without mentioning any specific act of the Respondent which he finds not reasonably expected to live with. It is trite that no matter how brilliant the submissions of counsel cannot take the place of evidence. See *Suleiman & Ors Vs Ukana & Ors* (2019) LPELR – 46827 (CA). Therefore the evidence of the Petitioner is deemed admitted as evidence not challenged is deemed so. See *Nwokolo Vs Nwakolo* (2018) LPELR-45035 (CA).

The evidence led by the Petitioner in proof of the ground relied on for this Petition is cruelty as gleaned from his evidence, and on what may constitute cruelty in a Matrimonial Causes Act, the court in *Damulak Vs Damulak* (2004) 8 NWLR (PT. 874) 151 @ 167 – 168 Paras E – F held.

“Cruelty is regarded as a conduct which is grave and weighty as to make cohabitation virtually impossible coupled with injury or a reasonable apprehension of injury physical or mental to health. The accumulation of minor acts of ill-treatment causing or likely to cause the suffering spouse to break down under strain constitutes the offence of cruelty”.

From the evidence of the Petitioner, which remained unchallenged, the court holds that the behaviour or conduct of the Respondent as stated by the Petitioner are grave and weighty enough, to hold that this ground relied upon for the dissolution of marriage having been proven availsthe Petitioner. I therefore hold that the marriage has broken down irretrievably.

On the other hand, the Respondent in her Cross-Petition, relied on the grounds of Section 15 (2) (d) of the Matrimonial Causes Act which reads;

“That the Respondent has deserted the Petitioner for a continuous period of at least one year immediately preceding the presentation of the Petition.

To succeed under this ground, the party must prove the four essential ingredient of desertion namely;

- (i) Physical separation.
- (ii) Intention to remain permanently separated.
- (iii) Absence of the other spouse’s consent and
- (iv) Absence of justification.

See Nigeria Family Law – Itse Sagay Malthouse Law Books 1999 Pg 290.

Respondent elicited evidence from the Petitioner/Cross-Respondent during Cross-examination that Petitioner abandoned their home in June 2018, but Petitioner provided justification on the facts that it was the intolerable conduct of the Respondent/Cross-Petitioner that propelled him to leave their home, this evidence was not rebutted by the Respondent/Cross-Petitioner, therefore the evidence relied on by the Respondent/Cross-Petitioner to prove the ground of Section 15 (2) (d) of the Matrimonial Causes Act is not sufficient as Petitioner/Cross-Respondent led unchallenged evidence in proof that there was a reasonable or justification

cause for leaving their matrimonial home. I therefore hold that this ground is unavailing to the Respondent. I so hold.

On the claim for custody of the child of the marriage, on this issue the court has held in the grant or otherwise of this relief the paramount consideration is the welfare of the child, see the case of *Damulak Vs Damulak* (Supra) 156, See also Section 71 (1) of the Matrimonial Causes Act. The Petitioner prays for an order awarding joint custody of the only child of the marriage to both parties and led evidence in support of the reliefs in that he will be responsible for the upkeep of the child jointly with the Respondent. And in his Additional Witness Statement filed on 12/1/2021 stated in response to Respondent's Cross Petition that he wants custody of the child granted to the Respondent shall subsist until the child turns 6 years old while undertaking to be responsible for the medical bill as well as the cost of education of the child. And pay the sum of ₦60,000.00 (Sixty Thousand Naira) monthly for the upkeep and maintenance of the child the marriage. On the other hand, Respondent pleaded for the reliefs stated in the course of this Judgment but did not support them with evidence, however evidence elicited from the Petitioner during Cross-Examination is that Petitioner has been providing for the maintenance of the child and is capable of taking care of the child who has speech problem, and which were not challenged. Section 71 of the Act stated above place a wide discretion on the court in the consideration of the issue of custody of a child of a marriage in the exercise of that discretion, the court must act on facts and not on sentiments. I have considered the evidence before me and I find that the interest and welfare of the child of

the marriage would be better served if the child remains in the joint custody of both Petitioner and the Respondent; I say so, in view of the health and physical status of the child as revealed by the parties in evidence. Moreso as the Petitioner undertakes to foot the medical cost for the care of the child.

On maintenance of the child, by virtue of Section 70 (2) of the Matrimonial Causes Act, in making of an order for maintenance, the court must always have regard to the means, earning capacity and other conduct of the parties to the marriage on the relevant circumstances. In this instant case, the Petitioner did not provide evidence to determine his earning capacity or means, neither did the Respondent provide evidence of these vital factors. However, Petitioner in his testimony undertakes to pay for the cost of education, medical bills and upkeep of the child as well as ₦60,000.00 monthly for the upkeep and maintenance of the child. In the absence of any contrary evidence, it is in the light of the circumstance, the court shall grant this relief in line with what is shall be deemed as just and equitable.

From all of these, having found that the marriage has broken down irretrievably on the grounds relied upon by the Petitioner, this Petition succeeds. Accordingly, Judgment is entered as follows;

- (1) The marriage celebrated at Abuja Municipal Area Council Registry Abuja under the Marriage Act on 9/1/2015, between Raphael Ozoemenam Onyedibe – the Petitioner and Chidiogo Nwanneka Onyedibe – Respondent has broken down

irretrievably and I hereby pronounce a Decree Nisi dissolving the marriage between the parties. The said Order shall become absolute after three months from the date of the Judgment.

- (2) Custody of Kanyraluchukwu Gabriella Onyedibe jointly to the parties, however shall be first with the Respondent, with unfettered access to the Petitioner until the child turns 8 years old, when she shall be with the Petitioner during school holidays, while being in the custody of the Respondent during school period.
- (3) The Respondent shall be responsible for the welfare, education and cost of medical care for the child of the marriage and shall pay a monthly sum of ₦60,000.00 (Sixty Thousand Naira) for the maintenance of the child.

Signed.

HON. JUSTICE C.O. AGBAZA

Presiding Judge.

4/10/2022

ALEX EJESIEME (SAN) FOR THE PETITIONER WITH CHIKE OBI ESQ
MATTHEW ATIKU ESQ.

PRINCESS OKOFU ESQ FOR THE RESPONDENT.

