IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT MAITAMA ABUJA

DATE: 9TH DECEMBER, 2021
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 5
SUIT NO: PET/397/2017

BETWEEN:

GRACE EHIMEN OMORUAN ------ PETITIONER

AND
MURPHY SAMSON OMORUAN ------ RESPONDENT

JUDGMENT

The Petitioner by an amended Notice of Petition dated 19/11/2018 instituted this action for dissolution of her marriage to the Respondent celebrated on the 14/12/2007 at the Abuja Municipal Area Council (AMAC) Marriage Registry. The Petitioner is also praying for custody of the only child of the marriage, Ohiomare Torah Omoruan (Male) born on the 15/10/2009.

The Petitioner averred that she left the matrimonial home on the 17/9/2016 when it became obvious to her that her life was at risk. She said during the course of the marriage, the Respondent has grown to become cruel,

inhuman, having developed and exhibited deep seated hatred towards her. He even went as far as informing her and her brother, one Segun Ehiwere that one day he will kill her by poisoning. That he has physically abused her by hitting her severally. Even after leaving the matrimonial home, the Respondent called her and threatened her to return the child or else he will kill her.

She accused the Respondent of infidelity, and lack of fatherly love towards their only son, and she has been solely responsible for the only child of the marriage. She made concerted efforts to salvage the marriage but to no avail. Intervention from family members also proved abortive. She also said the Respondent has continued to threaten her life even after leaving the matrimonial home. The Petitioner further testified that she took care of the bills during the pendency of the marriage. Regarding the child, the Petitioner said the Respondent only paid school fees once. That she catered for every need of the child and therefore is in a better position to be granted

custody. She said she has never denied the Respondent access to the child but his behaviour is such that she cannot continue to live with him.

Two Exhibits were tendered through the Petitioner; the marriage certificate as Exhibit A and receipts for school fees from Standtall Academy marked as Exhibit A1.

Under cross examination, the Petitioner testified that she and the Respondent both work in the same organisation at Transcorp Hilton Hotel. While the Respondent is a Supervisor in the organisation, earning higher salary, she works in IT Section. The witness went on to say that she reported a case of threat to life to the Police and National Human Rights Commission against the Respondent, but she did not tender any Police Report. However she stated that settlement was reached at the National Human Rights Commission and records of same tendered through her as Exhibit A2.

The Respondent upon receipt of the Notice of Amended Petition filed an Answer on 3/4/2019. However upon the conclusion of the Petitioner's testimony, **F.S. Onifade Esq** of counsel for the Respondent informed this Court that the Respondent was not leading any evidence and rested his case on that of the Petitioner. The case was then adjourned for adoption of written addresses.

In his written submission, learned counsel for the Petitioner **Caleb Echoga Esq** formulated two issues for determination:

"1. Whether from the facts and circumstances of this case it can be alluded that the marriage of the parties has broken down irretrievably.

2. Whether from the facts and circumstances of this case it is appropriate to grant the custody of the child of the marriage to the Petitioner."

In the final written address of the Respondent dated 6/7/2021, a sole issue was formulated therein as follows:

"Whether having regards to the facts and circumstances of this case the Petitioner is entitled to sole custody of the only child of the marriage."

The Petitioner filed a reply on points of law dated 7/9/2021.

I have considered the evidence led before me and the written submissions of learned counsel on all sides. The issues raised by the Petitioner when answered will sufficiently determine this matter. The issues are:

1. *Whether from the facts and circumstances of this case it can be alluded that the marriage of the parties has broken down irretrievably.*
2. *Whether from the facts and circumstances of this case it is appropriate to grant the custody of the child of the marriage to the Petitioner.*

I shall consider the issues together. Section 82(1) of the Matrimonial Causes Act provides that:

"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."

The standard of proof therefore is no more than that of a preponderance of evidence. The Petitioner relied on facts in Section in Section 15(2)(c) of the Matrimonial Causes Act 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 fact, the Petitioner must prove that the Respondent behaved in a particular way, then on the basis of the facts so proved, that the Petitioner cannot reasonably be expected to live with the Respondent. The Court in <u>Nanna vs. Nanna (2006) 3 NWLR (part 966) page 1 at 30, Damulak vs. Damulak (2004) 8 NWLR (part 874) page 151</u> have held that the Petitioner must prove:

a) The sickening and detestable or condemnable conduct of the Respondent; and

b) The fact that the Petitioner finds it intolerable to continue to live with the Respondent.

The two facts are separate and distinct from each other and therefore must be proved. In the case of Katz vs. Katz (1972) 1 WLR 955 at 960, cited in **E.I. Nwogugu Family Law in Nigeria pp 166 – 167**, the Court gave a guide as to what will constitute 'behaviour' as follows:

> *"Behaviour is something more than a state of affairs or a state of mind, such as for example, a repugnance to sexual intercourse or a feeling that the wife is not being as demonstrative as he thinks she should be. Behaviour in this context may either take the form of acts or omissions or may be a course of conduct and in my view, it may have some reference to the marriage."*

Now it is correct to say that examples of behaviour listed in Section 16(1) of the Matrimonial Causes Act are not exhaustive, the conduct complained of outside this

list must be grave and weighty in nature as to make cohabitation virtually impossible. The test as to whether the Petitioner can or cannot reasonably be expected to live with the Respondent is objective. Therefore it is not sufficient that the Petitioner alleged that she cannot live with the Respondent because of the behaviour. The behaviour must be such that a reasonable man cannot endure.

In Williams vs. Williams (1966) 1 All NLR 36 at page 41 Idigbe JSC stated thus:

> *"The court should consider the entire evidence before it, and although no specific instance of actual violence is given in evidence it should be able, on objective appraisal of the evidence before it, to say whether or not the conduct of the respondent is of such a character as is likely to cause, or produce reasonable apprehension of, danger to life, limb or health (bodily or mental) on the part of the petitioner."*

In Akinbuwa vs. Akinbuwa (1998) 7 NWLR (part 559) page 661, the Court held:

> "…*Cruelty is not a ground set out in grounds of divorce. The facts can be used to show the conduct of the Respondent in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. Thus, a marriage can properly be held to have broken down irretrievably on the ground that one spouse has been proved to be guilty of cruelty to the other…"*

As noted earlier, the evidence of the Petitioner is that the Respondent had consistently threatened to kill her and attempted to strangle her sometime in 2016. The Respondent did not have an answer to these grave and weighty allegations leveled against him by the Petitioner. I watched and heard the Petitioner, I believe her evidence on the condemnable behaviour of the Respondent. As I earlier stated the Respondent had nothing to offer in

response to the Petitioners evidence against his detestable conduct. He therefore left her case unchallenged.

It is pertinent to state that the Petitioner also testified that parties had lived apart since 17/9/2016 and this fact was also not controverted and not challenged. By Section 15(2)(e) of the Act, a Court shall hold that a marriage has broken down irretrievably where it is shown that parties have lived apart for two years immediately preceding the presentation of the petition without objection. The Respondent did not lead evidence in rebuttal of the Petitioner's case. The Respondent did not object on the grant of dissolution. In fact, learned counsel to the Respondent urged the Court to dissolve the marriage on the grounds presented by the Petitioner.

I find and hold that the marriage has broken down irretrievably pursuant to the provisions of Section 15(2)(c) and (e) of the Matrimonial Causes Act.

I therefore order a decree nisi dissolving the marriage between the Petitioner and Respondent contracted at the Abuja Municipal Area Council (AMAC) Marriage Registry on the 14/12/2007. The decree nisi become absolute upon the expiration of three months from today.

The Petitioner has prayed for custody of the only child of the marriage Ohiomare Torah Omoruan (male) born on the 15/10/2009. It is trite that custody of a child is never awarded as a reward for good conduct or is it ever denied as a punishment for bad conduct. The overriding and only condition for the award of custody is the best interest of the child of the marriage. See Williams vs. Williams (1987) 4 SC at 32, Afonja vs. Afonja 1 ULR page 105.

It is pertinent to state that only the Petitioner led evidence while the pleadings of the Respondent was deemed abandoned. However, learned counsel to the Respondent submitted that the conduct of the parties

would be of utmost consideration to the Court when deciding whether to award custody of a child to either parent. He said the Petitioner on her own volition absconded from the matrimonial home unprovoked. In the reply on points of law, learned counsel to the Petitioner submitted that the Respondent has not furnished the Court with any credible evidence as to why he is the party suitably fit to have custody and unfettered access to the child. He said the Respondent who filed his pleadings challenging custody opted to abandon same having not led evidence in support.

Custody of a child connotes not only the control of the child, but carries with it the concomitant implication of the preservation and adequate care of the child's personality, physically, mentally and morally. In other words, this responsibility includes his/her needs in terms of food, shelter, clothing and the like. See Alabi vs. Alabi (2008) All FWLR (part 418) page 245, Odogwu vs. Odogwu (1992) 2 SCNJ page 357.

In any event, under Section 1 of the Child's Right Act and Section 71(1) of the Matrimonial Causes Act, the Court is enjoined in matters of custody of children of the marriage to give paramount consideration to their best interest, and pursuant thereto, make such order as it deems fit. The only child of the marriage is currently in the custody of the Petitioner.

When the Court is faced with a claim for custody of a child, the paramount consideration is always the interest of the child, rather than that of the parties involved. In considering the interest of the child, common sense will also be applied.

In this instance, a bond has already been created between the Petitioner and the child and it will not be in the best interest of the child to break that bond. The Respondent has not placed any evidence before the Court to persuade the Court to uproot the child from his familiar surrounding (with his mother) and hand him over to the Respondent. In the circumstance, I have no

hesitation in holding that the interest of the child will be better served and preserved, if left in the custody of the Petitioner, his mother. I award the custody of the only child of the marriage to the Petitioner.

To attain wholesome and balanced development, children of every marriage need the father and mother figure presence around them. Neither parent can all alone provide that. In line with this, the Court considers that it will be a proper exercise of discretion if an order is made allowing the Respondent unhindered access to the child of the marriage within reasonable hours of the day. This is bearing in mind that access is a basic right of the child rather than that of the parent. I so find and hold.

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Hon. Justice M.A. Nasir

Appearances:

C.N. Echoga Esq – for the Petitioner

F.S. Onifade Esq – for the Respondent