

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA- ABUJA

DATED THIS FRIDAY 2ND NOVEMBER, 2023

BEFORE HIS LORDSHIP: HON. JUSTICE ALIYU YUNUSA SHAFI

SUIT NO: FCT/HC/PET/512/2022

BETWEEN:

CHERISH EHIKIOYA..... PETITIONER

AND

MONDAY EHIKIOYA ITAMAH..... RESPONDENT

JUDGMENT

By a notice of petition dated 21st September, 2022, the petitioner claims the following reliefs against the respondents as follows:

- 1. A decree of dissolution of the marriage between the parties on the grounds that the respondent has behaved in such a way and also committed adultery that the petitioner cannot reasonably be expected to live with him and thus the marriage has broken down irretrievably due to incompatibility of parties.**
- 2. An order of the honourable court granting custody of the two children of the marriage to the petitioner and that when they attain the age of 18 (eighteen) years to be free to choose which of the parties to live with.**
- 3. The arrangement of maintenance of the children and access as stated in the body of this petition.**

4. An order of damages for adultery in the sum of N5, 000,000.00 (five million naira only).

Attached to the petition are the petitioners witness statement on oath deposed to by Cherish Ehikioya of opposite General Hospital, Kubwa, Abuja, FCT. Of 3 paragraphs, verifying affidavit of 4 paragraphs, certificate relating to reconciliation, certificate of marriage as exhibit A and birth certificates of the two children of the marriage as exhibit B and C respectively.

The respondent on being served filed the respondent in answer to the petition of 3 pages dated the 25th October, 2022. Attached to the respondent in in answer to the petitions are the witness statement on oath of 18 paragraphs deposed to by Monday Ehikioya of No 45 Toni Adokwu Avenue Extension 111 FOI Kubwa, FCT, Abuja, and annexure marked exhibits DDI attached with certificate of compliance/certificate of optima production as exhibit D&E.

This matter proceeded to trial. The petitioner testified in person as PW, who the Respondent equally testified in person as dw1, both were cross-examined and re-examined by their respective counsels.

The facts leading to this petitions are as follows.

- 1. That the respondent after the marriage has been very abusive and cruel to the petitioner, both verbally and physically. That he abuses her and usually beats her causing grievous bodily injuries. Constantly holding her by the neck with intention to strangle her, general wicked/cruel treatment and uncaring attitude to matters concerning her wellbeing and welfare.**
- 2. That due to his cruel/treatment of her and threatening often he thrown her out of the living house and taking the children away from her the petitioner state that she always lives in fear of this threat, which the Respondent takes advantage of and further worsen the situation.**
- 3. That the Respondent is in the habit of watching and having nude pictures and partaking in online sex with different ladies as well as dating any lady without much ado about the feelings of the petitioners.**
- 4. That there was a time he started dating a girl she knew in Kaduna after the Respondent showed her the lady's number and she pleaded with him not to date her and embarrass the petition but he did and this led to him beating her up, holding her neck to the wall.**

- 5. The Respondent also leaves the house and travels at any time he so please without informing the petitioner or making provision for the feeding and welfare of the children, making the petitioner live on the goodwill of neighbour and her mother in such situation that the.**
- 6. Respondent when he decides to step at home or does not travel, as in the habit of coming home late as from 11pm upwards, and often drunk, most times to a state of unconsciousness and sleeping anywhere, mostly at the sitting room.**
- 7. That due to the behaviour attitude of the respondent, the petitioner got tired and moved out of the matrimonial home some few days before filing this petition.**

The petitioner in her evidence before this court testified on the 4th May, 2023 where she identified the witness statement on oath, and pray the court to adopt it as it's oral testimony before the court, she equally identified the photocopies of the birth record of the two children, the document with text message, from the petitioner phone. All these document were tendered and admitted in evident and exhibited as exhibit A, B, C & D respectively.

Under cross-examination that she has been married for years, and has been complete house wife before she opened her boutique. That the two children are presently in the school and it is the Respondent that is paying their school fees, the school bus and equally engage the two children in extra moral lessons and pays for the extra moral lesson & and has paid their school fees.

That she went to the hospital after the assault on her by the Respondent. But have no pictures of being in the hospital. That since she left the house the Respondent have being bending money for the children's feeding and has been taken care of her health.

The DW1 on it's side testified as follows.

That on the 25-10-2022 he deposed to witness statement on oath, same identified through his name and signature and pray the court to adopt same as it's oral testimony before the court, and the court to accept the Bank statement attached thereto in support of its case, tendered an admitted as exhibit D1.

He went further to started that he is arguing for divorce but as it is known thing are very light as he has been the one paying the medical bills of the children, there school fees, lessons fees and want the court to see how he can be paying N50,000.00 every mouth for their feeding outside their medical bills and school fees.

Under cross examination that he is in to business of buying and selling cars and live home around 9am and come back around 930 pm, that he drops children in the school 4 times a week and that represent exhibit DD1, which are transaction from Itamah Monday to Chukwuma Vs Ginya, Monday to Cherish Ehikioya.

That any other transaction apart from exhibit marked DD1 Lick with blue biro all other transaction wise made by the write through his bank.

After the close of the evidence parties file their final written address.

The respondent final written address was file dated 21-6-2023 and in the said written address formulated a sole assure for determination to wit;

“Whether the petitioner has successfully proved her case as to warrant the relief sought;

On the side of the petitioner, the final written address dated 10th July, 2023 was filed dated the same dates in it is final written address formulated a sole issue covering all the relieves sought by the petitioner for determination, to wit.

“Whether the petitioner has successfully proved and her case as to warrant the relieves sought.

A carefully reading the issues so formulated by both the petitioner and the respondent in the same, hence this court will adopt them as mine,

Which will form the basis of the decision in this suit.

The respondent in it is final written address in the issue of dissolution of marriage, argued that it is trite law that consent is required from two (2) adult's male and female to come together in marriage. Therefore, this consent is not obtained from either party such marriage is void, ibi-nita.

This he referred the court to the case of Chukwuma VS Chukwuma [1976] NWLR (pt426) 543. that by the testimony by both parties of the marriage, is that the has broken down irretrievable and that both parties are in agreement concordance that the marriage be dissolved.

On the issue of custody of children. That the petitioner prays the court to grant her custody of the children until they attain the age of 19 years.

On this submitted that it is the law that the court in granting custody of children will take into cognizance. The interest of the children first. That in this case, the (2) children of the marriage are makes without still very tender.

Furthermore, that in granting custody of these children the court should put the following into consideration.

1. The sex of the children i.e. that they are males who require the care and attention of their Father from time to time in moulding them as good males of the society, and that if the court in it's wisdom decides to grant custody of the children to the petitioner urge the court to make an order of unfettered access of the Respondent to the two (2) children of the marriage.

The petitioner on the issue of dissolution of marriage and custody of the children avert as follows:

In paragraph 1 of her petition stated that the Respondent and her were married at the Ubaiya Marriage Registry of Edo State on the 6th Day of October, 2018 tendered a certificate of marriage marked exhibit A. and in paragraph 6-10 testified that the Respondent has been very abusive, maltreats her by leaving the house for days, physically abuse her of which she tendered picture showing the petitioner with bruises and blood stained face crying which pictures were tendered and marked as exhibit E. that the Respondent did not denied in his answer of having been beating or physically abusing the petitioner. He averts further that she was tired of his physical abuses, uncaring attitude and intolerable adulterous nature, the petitioner moved out of the matrimonial home. the learned counsel to the petitioner submitted that, the Respondent merely denied these claims by the Petitioner not leading any evidence to controvert the physical abuses especially, he also agreed in his oral testimony that he is insupport of a divorce

Hold that the petitioner has proved that the marriage has broken down irretrievably and that since the marriage the Respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the Respondent by his physical abuses and cruelty on the person of the Petitioner. This are all in line with section 15(2) (c) of the MCA which is a good ground for a dissolution of marriage and urge the court to dissolve the marriage between the parties.

On the issue of custody of the children the argued on this fact that custody is an important issue in divorce proceedings for obvious reasons that it implicates the children welfare and it is also a vital tool in determining the welfare and best interest the children of the marriage. Refers to section 1 of the children Right Act, 2003 and section 21 (1) of the MCA, provides thus:

“in the proceedings with respect to the custody guardianship, welfare advancement or education of children of the marriage the court shall regard in the interest of those children as the

paramount consideration and subject thereto the court may make such order in respect to those matters as it thinks proper.

Referred the court to the case of *Otti V Otti* (1992) 2 NWLR (pt. 252) page 2100 where the court of Appeal defines custody as “Essentially concerning control preservation and care of the Child’s person, physically mentally, it also includes responsibility for a child in regard to his needs food, clothing instruction and the like” also in *Nwosu V Nwosu* (2012) 8 NWLR (prt. 1301) 1 paragraph 32 paragraph F-G custody was defined as

“the care control and maintenance of a child awarded by a court to a Responsible Adult.

Custody involves legal custody (decision making authority and physical custody (care giving authority and an award of custody usually granted both right.

The petitioner counsel further submitted that it can be deduced from the various definition that the custody of a child goes beyond physically having control of a child as it covers the authority to make decision for the child wellbeing in all aspects. It is also settled fact that a child is not cattle which can be owned but a person who is legally recognised from birth as having rights and entitled to make claims although he/she may not be matured enough to take some responsibility. Therefore, the interest of a child is a paramount consideration in the issue of child custody.

In considering the case of *Nwosu v Nwosu* (supra) he submitted that, it will be proper to say that the party that the court should give custody of the children of the marriage must be A RESPONSIBLE ADULT. On this and in this present suit one of the facts relied upon by the petitioner as constituting the ground

For dissolution is seen in paragraph 9(c) of the petition, where the petitioner states that the respondent leaves the house and travels at any time that pleases him without informing the petitioner or making provisions for the feeding and welfare of the children.

This fact is not denied by the Respondent as it is trite law that more denied is not enough rebutted of a claim.

That the Respondent during cross-examination has agreed that he leaves the house by 9:am in the morning and returns 9:pm at night. This meant that, the Respondent is not at home when the children return from school and when they go to bed. This submission which I will not agree with the petitioner in its submission.

The petitioner went further to state that does this make the Respondent then a reasonable adult and is it in the interest of the children to grant custody of them to such a parent, this he answered in the negative.

On this I wish to state thus:

On this I wish to state this who is a reasonable adult? The answer to this in my mind is that “a reasonable adult means, an adult including but not limited to, an exceptional needs adults, who exercises average care, shell and judgment in conduct for a person of his or her age with his or her exceptional needs”

Also, a reasonable person also connotes.

“a fictional person with on ordinary degree of reason, prudence, care, foresight, or intelligence whose conduct, conclusion or expectation in relation to a particular circumstance or fact is used as an objective standard by which to measure or determine something (as the existence of Negligence)

In Blues Law Dictionary, defines (1293)8th Ed.

Reasonable as a fair, proper or moderate under the circumstance.

Therefore, reasonable adult means, a person of or over the age of eighteen (18) years who, in relation to the minor is a parent, step-parent guardian, legal spouse, or a person who for the time being has parental responsibility for the minor. This from the evidence this quality in the respondent.

Hence I shall not agree with the submission of the petitioner counsel in this regard as the submission if the Respondent the evidence given tells more who the Respondent is and how he do take care of the petitioner. This in cross-examination the following question and answered was asked.

Q where are the two children of the marriage?

A presently they are in School

Q what is the name of the School?

A Sure Start International school.

Q how long have they been in the School?

A that is where they started from.

Q who is paying there school fees?

A the Respondent.

Q does he drop them at School?

A they use the School bus.

Q who pays the School bus?

A the Respondent.

Q are they engage in any extra moral lesson?

A yes all of them.

Q who pays for their extra moral lesson?

A the Respondent.

Q have he paid their School fees this term?

A yes he has

Q since the beginning of this matter, in court has he been sending money for children feeding?

A yes very well.

Q since you left the house has he at any time taken care of the payment of your health?

A yes he has

Now by this Question and Answered can it be said that the Respondent is not a reasonable adult?

I say no. this the reason why this court will not agree to the submission made by the petitioner counsel on this regard. I so hold.

The respondent on this urge the court to hold as the respondent is not a salary earned, has no fixed income but depend solely on the current economic situation in the country to survive, and having undertaken to take care of all the maintenance of the two children of the marriage urge this court to make such orders in consideration of the economic realities in our society.

On the issue of adultery, submitted that there is nothing before the court to show that the Respondent committed adultery. Since the marriage. Further that none of the ingredient of adultery is evidence before the court. And that the only purported evidence adduced that should be through into the dustbin is a mere conversation report from person we don't know where they are from. The conversation which was neither dated or names of parties mentioned anywhere. This under cross-examination when she was asked whether she have access to the phone of the Respondent?

She answered in a negative, that did she secretary visit the phone of the respondent? She responded severally. Submitted that the resulted effect therefore is that such a document must have been imported mischievously to deceive the court as to show that the Respondent had admitted adultery that never existence, ill-conceived and completely irrelevant in this regard. Pray the court to discountenance such prayers.

In response to the above on adultery, it is the submission of the petitioner council, on this he avers that the petitioner had tendered a picture of vulgar conversation from respondent phone showing his adulterous nature and that the respondent never rebutted this during his testimony. On this submitted that where the evidence in support of a claim is unchallenged and uncontroverted by the other party the court is bound to accept such evidence. See *Ijebu-Ode Local Government Vs Adedeji Balogun & 10 Ors* (1991) NWLR (prt. 166) 136.

Under cross-examination the following Question and Answered was asked.

Q do you have access to the Respondent Phone?

A no I don't .

Q you have never secretly open his phone?

A I don't – secretly open his phone.

Q referred to exhibit D where was exhibit D printed from?

A it was taken out from the Respondent.

Q will you still tell the court that you have no secretly have access to his phone?

A I have no access.

On this I wish to state that, the accusation on mere suspicious or speculation has to be verified facts and evidence either positive, direct or circumstantial. Circumstantial in the sense that the court can infer or draw inference that adultery actually took place between the Respondent and party cited. Proving adultery can only be done by involving another third party, the person the Respondent committed adultery with secondly, adultery or sexual intercourse are often done in private so it may be difficult to prove in real sense.

Under the matrimonial causes Act, adultery couple with, intolerability is one of the listed grounds for divorce, the prove of where is proof of

“Irretrievable breakdown” of the marriage. I know as a fact that cheating can significantly complicate the divorce process in many ways, from affecting

alimony to parenting time, cheating spouses may face a major uphill battle. In addition, marriage that involves infidelity are often more contention and emotions may run high throughout the negotiation process. Adultery in this sense by any married woman who shall have sexual intercourse with a man not her husband and by the man who has carnal knowledge of her knowing her to be married, even if the marriage be subsequently declared void. in proof of adultery, evidence must show that the infidelity occurred during the marriage, which includes anytime during a separation clear and positive proof is required to prove adultery before the court, although it can be established by ----- circumstantial evidence, including emails, photos, texts, social media and other documents.

Some of the most common types of evidence that may be gathered include the following.

- 1. That message and email. this can provide evidence of communication between the partner and another person/ which may include an affair.**
- 2. Photocopy and videos**
- 3. GPS tracking**
- 4. Financial records**
- 5. Witness statement**

The above flowing from the petitioner witness statement on oath paragraph 18(c) (d) reproduces above:

c. that the Respondent is on the habit of watching and having pictures and partaking on online sex with different ladies as well as dating any lady without much ado about my feelings.

d. that there was a time he started dating a girl I knew in Kaduna after the respondent showed me the lady's number and I pleaded with him not to date her and embarrassed me, but he did and this led to his beating me up and holding my neck to the wall.

Exhibit D being the text message the petitioner is relent on reads:

Respondent I can't cook,

- **My people just went there for two weeks**
- **Respondent they are coming back tomorrow morning.**
- **-u should have invited me nah.**
- **Third party I wanted to go with them**

- Respondent oh a really want to make love with you
- third party I didn't have your contact any more I love to see how you handle me. You almost kill me that day.
- Send me your contact.

I have carefully gone through exhibit D and the content above, my observation is thus, the said exhibit D was not backed up with the phone number, even though the petitioner alleged that it was taken from the Respondents Phone but a glance of the question and answered the petitioner has denial not secretly open the Respondent phone, then where did she get the said text message from?

This has thrown the question to the petitioner. It is trite law that he who asserts a fact must prove the existence of that fact, it is equally trite that, when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person, and this must be done by a preponderance of the evidence. The petitioner must convince the court that the claims are more likely true than not. In the case of *Mrs Betty Darego V AG Leventis (Nig) Ltd & 3 ors*, LER (2015) /CA/481/2011. The Supreme Court in the case of *Abisi V Ekwea & 1 or* (1993) NWLR Pt (302) 643 had this to say:

“before a judge whom evidence is adduced by the parties before him in a civil case comes to a decision to which evidence he believes or accepts and which evidence he rejects, he should first of all but the totality of the testimony adduced by both parties on that imaginary scale, he will put the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then see which is heavier not by the number of witnesses called by each party, but by the quality of probative value of the testimony of those witnesses. This is what is meant when it is said that a civil case is decided on the balance of probabilities. Therefore, in determining which is heavier, the judge will naturally have regard to the following:

- a. Whether the evidence is admissible
- b. Whether it is relevant
- c. Whether it is credible
- d. Whether it is conclusive and
- e. Whether it is more probable than other given by the other.

Finally, after involving the law, if any, that is applicable to the case, the trial judge will then come to his final conclusion based

**on the evidence which he has accepted. Per Y. B. Nimpar
J.C.A.**

From the above, can the evidence given by the petition, the text message exhibit through evidence for this court to agree with the petitioner that the Respondent have committed adultery? The answer is no. the assertion by the petitioner is mere speculation. See Nigeria Port Authority V Aminu Ibrahim & 10 Anor(2018) LPELR-44464 (SC) where the court held:

“It is settled Nigerian evidential law that a court can only resolve the disputes of parties before it based on credible and cogent evidence places before it by the parties. A court cannot proceed to speculate or assume that a party is ordinarily entitled to relief. That party must plead sufficient facts and adduced credible and cogent evidence before the court can award such relief.

See Ladoja V Ajinobi (2016) 11 NWLR (pt. 1519) 88 AT 173 Paragraph G, Daniel V INEC (2015) 9 NWLR (pt. 1463) 113 AT 157 PARAGRAPH a SECTION 131, 133 and 134 of the evidence Act 2011 provide that in all civil/ proceeding, the burden of proving a fact is only Discharged on the balance of probabilities or the preponderant of evidence.

Before a court can award any relief claimed or asserted by a party, the court must be satisfied that the party has led preponderant evidence establishing that party’s entitlement to such claim

Given that from the evidence adduced by the petitioner on the claim of adultery, the petitioner did not ---- cogent and compelling reasons to convince this court why a should award damages against the Respondent.

Here again we extract two main considerations, which can conveniently be put in the form of question thus:

- 1. What is it that the adulterer has destroyed or damage, and what is it’s worth?**
- 2. By what methods and in what circumstance was the adulterous association brought about?**

To answer the first of these question, the court must examine the evidence to see how the husband and wife were living before the Respondent association with the suppose third party as she alleged became a senior factor. If husband and wife were living happily together, the third party’s action will have caused serious damages. If relationship between husband and wife were already

strained or they were living apart, much less damage or possibly none at all, will have been caused.

The answer to the second of these questions, I think, will be relevant both in the estimating of consortium loss and injury to feelings. The general conduct and character of all three parties will be most material, if the husband, because it may show that by unkindness or indifference he has contributed to the breakup of his marriage factors which would operate in mitigation of the damages of the wife, because it will act as a direct pointer to her consortium value, and of the third party because the nature and extent of the part he plays in the wife's downfall will not only give some indication of his worth as a husband but will also directly affect the injury suffered by the wife to her feelings, etc.

bearing all these considerations in mind I now turn to the facts of this case.

The only evidence I have is that the parties were married in 200- and they have two children.

The past years of their marriage life was happy but after that, according to the petitioner, the marriage ceased to be happy mainly because of the issue of adultery and non-caring, beaten as she alleged. In this wise therefore I have no reason to doubt the truth of the husband's evidence in these matters. The evidence and the statement on oath of the petitioner did not take the matter much further. I therefore hold that this court will decline to grant the relief for damage asked for by the position as it was not proved by preponderance of evidence.

So I hold

I am saying that based on the fact that the Christian religion from the earliest days of the Christian faith, Christians have viewed marriage as a divinely blessed lifelong monogamous union between a man and a woman. It is considered as a holy sacrament or sacred Mystery. I refer to the Roman Catholic Church, which teaches that God himself is the author of the sacred institution of marriage, which is his way of showing love for those.

He created marriage as the divine institution which can never be broken even if the husband or wife legally divorce in the civil court, as long as they are both alive, the church considers them bound together by God.

Marriage is intended to be a faithful, exclusive, lifelong union of a man and a woman, committing themselves completely to each other, a husband and wife

strive to sanctify each other, bring children into the world, and Educate them in the Christian way of life. Man and woman although created differently from each other, complement each other. This complementarity draws them together in a mutually loving union.

The Christian holds marriage to be ordained by God for the union between a man and a woman. They see the primary purpose of this union as intimate companionship, rearing of children and mutual support for both husband and wife to fulfil their life calling if a man and a woman do not break their covenants, they are thus eternally married couple are often referred to as being sealed to each other. Sealed couples who keep their covenants are also promised to have their posterity sealed to them in the afterlife (thus family are forever”.

The church also teaches that marital love or conjugal love is the precious jewel of human life and the repository of the Christian religion because the core shared between a husband and a wife is the source of all peace and joy. When a husband and a wife work together to build their marriage, on earth, that marriage continues after the deaths of their bodies and they live as angels in heaven into eternity. God created marriage as a loyal partnership between one man and one-woman marriage is the firmest foundation for building a family. God designed couples for purpose of intimacy. Marriage mirrors God’s covenant relationship with his people. I say no more.

In the final analysis of this petition on claim one there is no dispute as to the decree of dissolution of marriage as both parties have consented that the marriage be dissolve. On claim two being the custody of the two children of the marriage, Ehikioya Jaxon Ose and Ehikioya Geovanni Ehimhen both males, both parties have agreed that the two children of the marriage be in custody of the petitioner and the Respondent to be responsible for Education, Medical bills and up keep until the children attained the age of 18 years when there will decide on whom among the petitioner the Respondent to live with and the Respondent be granted unfettered access to the two children.

In summation, having carefully evaluated the petition I accordingly make the following order:

- 1. An order of decree Nisi is granted dissolving the marriage celebrated between the petitioner and the Respondent on the 6th day of October, 2018.**
- 2. The petitioner to have the custody of the two children of the marriage by name**

a. Ohikioya Jaxon Ose (Male)

b. Ehikioya Geovanni Ehimhen (male) until they attain the age of 18 years, while the Respondent will be responsible for the maintenance, Education, Medical bills and the sum of N100,000 monthly for feeding to be paid into the petitioner account too be provided by the petitioner to the Respondent, the Respondent is hereby given access to see the children every Saturday or Sunday with the notification of his coming to visit the children.

As to the claim for damages it is not grantable by this court hence it is hereby refused.

This is the judgment of this.

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Hon. Justice A. Y. Shafa

Appearance:

1. K. M. Musa Sulaiman for the Petitioner.
2. Philip T. Ilukholo for the Respondent.