

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU - ABUJA
ON WEDNESDAY THE 9TH DAY OF OCTOBER, 2024.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE R. OSHO -ADEBIYI

SUIT NO. PET/630/2023

BETWEEN

OLIVIA IFEOMA OKOLO ----- PETITIONER

AND

CHIBUNNA ONYEKACHI BENSON ----- RESPONDENT

JUDGMENT

The Petitioner by a Petition filed 9/10/2023 against the Respondent claims the following:

1. A DECLARATION that the marriage between the Petitioner and Respondent has broken down irretrievably.
2. A DECREE of dissolution of the marriage between the Petitioner and the Respondent.
3. And such further order or orders as this honourable court may deem fit to make in the circumstances of the case.

The grounds upon which the Petitioner brought this application are;

- i. That since the marriage the Respondent has behaved in such a manner that the Petitioner cannot reasonably be expected to live with the Respondent.
- ii. The Petitioner no longer feels safe being in the marriage and has intermittently suffered astronomical rise in her blood pressure.
- iii. Since the marriage the Petitioner's mental health has deteriorated with a significant toll on the Petitioner's health.

In support of the Petition, the Petitioner filed verifying affidavit, certificate of reconciliation and witness statement on oath. Upon being served with the Petition the Respondent filed an answer and cross Petition, wherein the Respondent/cross petitioner is seeking for the following:

1. An Order dismissing the Petition of the Petitioner for lacking in merit.
2. A decree of nullity of the marriage on the following grounds:

- a. That the marriage was voidable arising from the willful refusal/inability of the Petitioner to consummate the marriage.
- b. The marriage is voidable at the instance of the Cross Petitioner arising from the non-disclosure of the full extent of the Petitioner's state of health leading up to the marriage.

The Respondent/Cross Petitioner likewise filed his witness statement on oath after which the Court set down the matter for hearing.

The Petitioner/Cross Respondent testified as the sole witness in proof of her case. From the facts as stated by the Petitioner, the summary of the case of the Petitioner is that she and the Respondent got married at the Federal Marriage Registry Abuja on the 15th of October, 2022. That it was clear from their conversation that they would not cohabit until they have both gone through the marriage rites in the Holy Roman Catholic Church. That the Respondent was fully aware that the Petitioner was born with a medical condition known as hip dysplasia which caused her so much pain and discomfort. That the Respondent was supportive, especially in helping the petitioner find a hospital in the UK for a hip replacement surgery. However, due to the COVID-19 pandemic, the surgery was delayed, and she eventually underwent surgery in Nigeria, followed by a revision surgery in Turkey. Thereafter the Petitioner went through intensive physiotherapy sessions, at least twice a week to the knowledge of the Respondent. The Petitioner averred that despite her ongoing pain and physiotherapy, the Respondent pressured her to move to the UK and have children, disregarding her medical condition and doctor's advice. That the Respondent refused to enroll in a required marriage course for their Catholic wedding and became increasingly distant, disrespectful, and dishonest. That Respondent lied about his age, failed to inform her about his travels, and frequently ignored her for weeks whenever they had misunderstanding. That the Respondent's behavior also caused her significant emotional distress, leading to depression and new health problems, including high blood pressure and mental health issues. That despite efforts from family and friends to resolve their issues, the Respondent refused to attend marriage counseling and showed little interest in continuing the marriage. This led the Petitioner to decide to end the marriage, inform both families and return the bride price. That the Respondent deleted their pictures from social media, further indicating his lack of desire to continue with the marriage. Lastly, the United Kingdom Home Office notified the Petitioner that her visa to enter the United Kingdom as Partner (Standard) had been canceled suspecting that the Respondent was behind it.

In evidence the Petitioner tendered two (2) documents which was admitted in evidence and marked thus;

- i. Certificate of marriage No. 00167694 dated 15/10/2022.
Exhibit A
- ii. A mail from UK Home Office dated 17/11/2023 with attachment from UK Home Office dated 17/11/2023.
Exhibit B

Under cross-examination, Petitioner admitted that she had her surgery sometime in August, 2021 and till date she still suffered severe pains. Petitioner further admitted that her doctors had advised her after her surgery not to place any weight on her hips until she fully recovered. Respondent Counsel further asked her:

Q: Consummating the marriage would have complicated your health progress?

A: Incorrect. That is not true.

When asked whether her refusal to join the Respondent in the U.K was because her health would be compromised if parties tried to consummate the marriage, petitioner replied in the negative.

Having closed her case, the Respondent/Cross Petitioner opened his defence with the Respondent testifying as the sole witness and adopted his statement on oath as his evidence in this case. He averred that they had their traditional marriage rites in Nigeria, followed by a legal marriage in Abuja. However, tensions arose over the Petitioner's insistence on a Catholic wedding, despite already being married legally and traditionally. That he reluctantly agreed to the Catholic wedding but faced resistance from the Petitioner, who refused cohabitation until after the Catholic wedding takes place. That the Petitioner had a medical condition called congenital hip dysplasia, which she did not fully disclose initially. That he discovered the condition would prevent her from bearing children or consummating the marriage. Despite offering support, including during her surgery in Turkey, the Petitioner refused to move to the UK or proceed with consummating the marriage. That the Petitioner surprisingly claimed disinterest in the marriage, saying it was invalid without a Catholic wedding. That the Petitioner's father returned the bride price, signalling their intent to dissolve the marriage. The Petitioner filed for divorce, and the Respondent informed UK authorities, leading to the suspension of the Petitioner's spousal visa. The Respondent averred that the marriage is voidable due to the Petitioner's health condition and her refusal to consummate their marriage, requesting the court to nullify the marriage.

In evidence the Respondent tendered six (6) documents which was admitted in evidence and marked thus;

- i. Certificate of compliance. **Exhibit DW1**
- ii. Mobile/Online transfer of money for the sum of €1,000, €1,562 and €3,000. **Exhibits DW2, DW3 and DW4**
- iii. Picture of Respondents political platform of Action Alliance contesting for governor of Imo state. **Exhibit DW5**
- iv. Letter of referenced dated 5/10/2022 signed by General Overseer Rev. Dr. William Wood. **Exhibit DW6**

Under cross examination Respondent agreed that he was aware of Petitioner's health condition prior to the marriage. That he also assisted the Petitioner to source for a hospital in Turkey where her hip replacement surgery was carried out. Respondent also admitted that he spent the night with Petitioner on the wedding night. That Petitioner also spent the night with Respondent at Bon Stralton Hotel in Abuja. that Petitioner refused to travel to see Respondent in the United Kingdom on the instructions of her parents. Respondent also admitted writing to the United Kingdom home office canceling the residency of the Petitioner. The Respondent concluded his cross examination by stating that he has not been to Nigeria this year. The Respondent thereafter closed his case and the court adjourned for parties to file their final written address.

Parties adopted their respective written address as argument in support of their case. The Respondent/Cross Petitioner from the address filed, raised two (2) issues for determination to wit;

1. Whether from the evidence before this Honourable Court, the Cross Petitioner is entitled to a decree of nullity of the marriage, at the instance of the Cross Petitioner, arising from the inability of the Petitioner to consummate the marriage, arising from a medical condition, the nature of which, was not fully disclosed to him.
2. Whether from the Evidence before this Honourable Court the Petitioner has been able to prove its case to be entitled to the reliefs sought.

On issue 1, Learned counsel submitted that the Respondent has been able to lead in evidence compelling facts in satisfying conditions for the grant of a degree of nullity of marriage as embedded in the provisions of the Matrimonial Causes Act. Counsel averred that while the law is sensitive to the plight of the party with the disability, it allows for the other party to exercise the right to approach the Court to seek a nullity

of the marriage, where there was no disclosure of the nature or extent of such disability prior to the time of contracting the marriage. That parties to a marriage, prior to the said marriage, are bound to disclose material facts, such as the state of their health, in clear and unambiguous terms as anything short of it amounts to a concealment, misrepresentation or fraud. That the evidence that bothers on the nature of the Petitioner's medical condition and the absence of full disclosure to the Cross Petitioner was not countered, challenged or contradicted by the Petitioner, in or during cross examination, hence should be deemed admitted.

On issue 2, Counsel submitted that the Petitioner was unable to lead evidence in satisfaction of the conditions laid out in section 15 (2) and 16 the Matrimonial Causes Act. That the duty on the Petitioner to establish one of the circumstances mentioned in the act to justify reliance on Section 15(2) c of the MCA is sacrosanct. Counsel further submitted that the Petitioner has not been able to satisfactorily prove the grounds upon which this Court can hold the marriage to have broken down irretrievably occasioned by the conduct of the Respondent/Cross Petitioner as provided for in **Section 16(1) of the Matrimonial Causes Act**. Counsel urged the court to resolve this issue in favour of the Respondent/Cross Petitioner and hold that the Petitioner has not satisfactorily proven her cases in accordance to the provisions of **Section 15(2) (c) and Section 16(1) of the Matrimonial Causes Act** to be entitled to a degree of dissolution of the marriage. In conclusion counsel urged the court to grant an order for a decree of nullity of the marriage and dismiss the Petitioner's case for dissolution of the marriage, having failed to satisfactorily fulfill the conditions necessitating same. Counsel relied on the following authorities; **Sections 5(1) (a), 35(2) and 36(2) MCA; M. V. M (1956) 3 All ELR 769; UDOGWU V. OKI (1990) 5 NWLR (Pt. 153) 721; MANU V. STATE (2023) 10 NWLR (PT. 1892) 231; HARIMAN V. HARIMAN (1989) 5 NWLR (PT. 119) 6; ADETULE V. ADETULE(2022) 10 NWLR (Pt. 1838) 201; EKREBE V. EKREBE (1999) 3 NWLR (Pt. 596) 514; NANNA V. NANNA (2006) 3 NWLR (Pt. 966) 1 amongst others.**

The Petitioner Counsel also filed his written address and raised two (2) issues of law stating that the Respondent did not present himself before the Commissioner for Oaths on the date endorsed on the witness statement on oath and the verifying affidavit to the Cross-Petition. That the irregularity is grave and urged the honourable Court to strike out the Respondent's Witness Statement on Oath together with the Cross-

Petition for being irregular and not properly deposed. Learned counsel raised two issues for determination thus:-

1. Whether the Petitioner has successfully established that her marriage to the Respondent has broken down irretrievably and thus entitled to the reliefs sought in her Petition?
2. Whether the Respondent established that the marriage between the parties hereto was voidable and thus entitled to the relief sought?

Learned counsel submitted that the Petitioner and Cross Petitioner are duty bound to discharge the evidential burden prescribed in **Section 131 of the Evidence Act** to be entitled to the judgment of this Court. That the said evidential burden can only be discharged by each party leading credible evidence; documentary or oral to establish his or her respective case. Counsel submitted that both parties are ad idem that their marriage was contracted at the Federal Marriage Registry, Abuja, in accordance with the Marriage Act on 15th October, 2022 and urged the court to hold that there is a valid marriage between the parties contracted under the Marriage Act. Counsel also submitted that the Petitioner relies on the matrimonial offence in Section 15(2)(c) of the Act which is that since the marriage the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent. Counsel then submitted that the court is saddled with the task of deciding conducts or behaviours which when proved by a petitioner will help the court to make a determination that a marriage has broken down irretrievably. Counsel submitted that Petitioner lead credible and unchallenged evidence in proof of the numerous acts of cruelty against her by the Respondent as averred in her Witness Statement on Oath in proof of this Petition. That these acts of cruelty ranged from intentional break in communication with the Petitioner by the Respondent which lasted for more than 6 (six) months, the Respondent's constant nagging and disrespect for both the Petitioner and her family, particularly her father, travelling on several occasions without the knowledge of the Petitioner, and showing zero care or attention to the Petitioner's health or medical condition, amongst others. Counsel submitted that the Respondent admitted that he assisted the Petitioner in sourcing for hospital, paid part of her medical expenses and visited her in Turkey when she underwent surgery. That all of these happened before the marriage, hence the Respondent was very well abreast with the fact that the Petitioner had hip dyslexia and that after the surgery she required time to fully heal to be able to carry the weight of a baby in her womb. That it is settled law that any evidence unchallenged or uncontradicted affords the court credible

material to rely on in deciding the case at hand. Thus, since the Respondent has not controverted or successfully challenged the aforementioned evidence, it is only right for the court to rely on such evidence in giving judgement.

On the 2nd issue, counsel submitted that on the Respondent's first ground one cannot willfully refuse to have sexual intercourse yet lacking the capacity to consummate. That willful refusal to consummate is not one of the grounds recognised under Section 5 of the Matrimonial Causes Act for voiding a marriage, rather it is one of the facts which, if proved, would make a court find that a marriage has broken down irretrievably and thus enter an order dissolving a marriage. That onus is on the party alleging willful refusal to consummate to lead credible evidence of his request for sexual intercourse with the other party which was denied or refused. On the second ground of the Cross-Petition, counsel further submitted that non-disclosure of the other party's state of health is not a ground that makes a marriage voidable as provided under Section 5 of the Act. Learned counsel submitted that the onus is, however, on the party alleging incapacity to consummate to prove that the other party is incapable to consummate. That the Respondent woefully failed to satisfy any of the conditions provided under Sections 5(1)(a), 5(1) & 36(1) and 36(1)(a) of the Act. That all the Respondent was able to establish is that the Petitioner underwent a surgery for hip dysplasia which makes her limp. Learned counsel submitted that the onus is, however, on the party alleging incapacity to consummate to prove that the other party is incapable to consummate. That the Respondent having failed to discharge this evidential burden of proof; this honourable Court is bereft of the requisite evidence to make a finding of lack of capacity to consummate against the Petitioner. Counsel submitted that the Petitioner led credible evidence confirming that the marriage was consummated and went further to assert that she had several sexual intercourses with the Respondent before and after the marriage. Counsel submitted that there are numerous acts between the Petitioner and Respondent which suggests the possibility of them having sexual intercourse with each other. Counsel further submitted that assuming for a moment that the Petitioner lacks the capacity to consummate by reason of hip dysplasia, the Respondent woefully failed to prove that the said illness is without cure or not curable. Hence is fatal to the case of the Respondent. Counsel urged this honourable Court to hold that she has successfully established that her marriage to the Respondent has broken down irretrievably and thus entitled to be granted the reliefs sought in the Petition. While further urging this honourable Court to dismiss the CrossPetition on the

ground that the Respondent failed to establish the twin conditions to establish that the Petitioner is incapable of consummating the marriage. Counsel relied on the following authorities; **Adetule v. Adetule** [2022] 10 NWLR (Pt. 1838) 201; Section 15(2)(c) and 16(1) of the Act; **Ibrahim v. Ibrahim** [2007] 1 NWLR (Pt. 1015) 383 at 403, Paras. F-h; **Damulak v. Damulak** [2004] 8 N WLR (Pt.874) 151 at 166, Paras. A-B; **Nanna v. Nanna** (2006) 3 NWLR (Pt. 966) 1; **Williams V. Williams** (1996) 1 All NLR 36; **Bibilari V. Bibilari** (2011) 13 NWLR (Pt. 1264) 207 at 232, Paras A-B; **Fed. College of Edu. Technical, Potiskum v. Joseph** [2020] 9 NWLR (Pt. 1729) 381 at 407, Para. D and **Maiwake v. Modu** [2007] 13 NWLR (Pt.1050) 167 at 184, Para. H.

The Cross Petitioner in his reply on points of law submitted that the Petitioner raised new issues, particularly challenging the competency of the Cross Petitioner's Witness Statement on Oath and the verifying affidavit. The Cross Petitioner argued that these issues were not originally addressed and are a misrepresentation intended to distract the court. To address these issues, the Cross Petitioner raised the legal question of whether a witness's adoption of their statement on oath cures any perceived irregularities. Citing legal precedents, the Cross Petitioner contended that once a witness re-adopts their statement under oath in court, any prior irregularity is corrected. They further emphasized that the court had accepted the Witness Statement without challenge, and any perceived defect was cured through the adoption of the statement in court. Therefore, they requested the court to dismiss the Petitioner's arguments. Counsel cited **Uduma V. Arunsi** (2012) 7 NWLR (Pt. 1298) 55 and **Adejogbe V. Aduloju** (2022) 3 NWLR (Pt. 1816)131.

Before proceeding to resolve the issue, a look at the Petitioner's Counsel's reply on points of law shows that he raised an issue of law by which he challenged the Respondent/Cross Petitioner's Witness Statement on Oath which he adopted in Court as his evidence in support of his case and the verifying affidavit, the Court shall proceed to consider this issue of law first. It is the contention of the learned Petitioner's Counsel that the Respondent did not present himself before the commissioner for oaths on the date endorsed on his Witness Statement on Oath and verifying affidavit. In reply counsel to the Cross Petitioner submitted that it is an irregularity which is cured by the witness adopting his witness statement on oath. Cross Petitioner's counsel did not respond to the issue of the verifying affidavit raised by the Petitioner's counsel.

Order V Rule 10 Matrimonial Causes Rules provides:

A Petitioner **shall**, by an affidavit written on his petition and sworn to before his petition is filed -

- a. verify the facts stated in his petition of which he has personal knowledge; and
- b. depose as to his belief in the truth of every other fact stated in his petition.

It is clear from the provision of the Rules with the use of the word "shall", that it is mandatory for every petition to be verified by an affidavit. Failure to file a verifying affidavit is fatal to the petition. It is also settled that all pleadings in a matrimonial cause (which includes Answer and Cross Petition) shall include a verifying affidavit. In the case of **IMOH V. IMOH (2021) LPELR-52459(CA)** it was held that;

“By the above provision, it is clear that a petition which does not have a verifying affidavit sworn before a commissioner accompanying it will be incompetent and that will invariably deprive the Court of jurisdiction. The implication is that a petition for dissolution of marriage is not proper before the Court if it does not have accompanying it a verifying affidavit to the effect that the facts in the petition are within his personal knowledge.”

A verifying affidavit is an affidavit to confirm or substantiate on oath which means that such an affidavit must comply with the provisions of the Evidence Act on affidavits. **Section 112 of the Evidence Act** provides;

“An affidavit shall not be admitted which is proved to have been sworn before a person on whose behalf the same is offered, or before his legal practitioner, or before a partner or clerk of his legal practitioner”.

Likewise, **Section 117 (4) of the Evidence Act** provides that;

“An affidavit when sworn shall be signed by the deponent or if he cannot write or is blind, marked by him personally with his mark in the presence of the person before whom it is taken”.

In the case of **Odusote V. Odusote (2011) LPELR-9056 (CA)**, Per **MOHAMMED LAWAL GARBA**, JCA held thus;

“The use of the word "shall" ordinarily means that the provisions are mandatory because the word is used to express a command or directive which does not admit of a discretion. As a result, a petitioner has no option or choice in complying with the provisions in respect of his petition, but rather has a duty to do so. Compliance with the provisions therefore is a condition precedent to the filing of the petition in the sense that the affidavit required in the provisions must be sworn to by a petitioner before the

petition is filed. The petition must as a requirement of the provisions, contain the affidavit sworn to by the petitioner before it is or can be properly filed...”

From the above the court confirmed that a verifying affidavit is mandatory and is a condition precedent to the filing of a petition for dissolution of marriage.

However, **Section 113 of the Evidence Act** provides:

"The Court may permit an affidavit to be used, notwithstanding it is defective in form according to this Act, if the Court is satisfied that the said affidavit has been sworn before a person duly authorized".

The defect in the form of the witness statement on oath once it is sworn to "before a person duly authorized" is a mere irregularity which cannot affect the jurisdiction of the Court since it cannot invalidate the performance of official duty, invalidate proceedings, or render the statement inadmissible as evidence. The question here is whether the defect in the Respondent/ Cross Petitioner's witness statement on oath can be regarded as a mere irregularity or one so fundamental that it ought to rob the court of jurisdiction over the Answer and Cross Petition?

Respondent Counsel submitted that the defect of not swearing to both the statement on oath and verifying affidavit has been cured by the second oath taken in open court.

First, I will take the witness statement on oath, I do not agree with Petitioner's Counsel that the Respondent not signing his statement on oath before the commissioner of oath rendered it inadmissible. Rather, it is my opinion that the defect in swearing and signing a statement on oath before a commissioner of oaths is an irregularity which is cured by the second oath which the Registrar of the court administered to the Respondent before adopting his witness statement on oath. I refer to ***ADEDIBU & ORS VS LAWAL & ORS (2022) LPELR – 57360 (CA)*** in this case, the court held that a witness statement on oath not sworn before a duly authorised person to take oath in contravention of Section 112 Evidence Act, 2011 but subsequently adopted after having been sworn in open court to give oral evidence regularises the depositions.

Hence, I am in total agreement that the Respondent having adopted his statement after having been sworn in open court regularised the deposition in his witness statement on oath.

However, a verifying affidavit as I had earlier stated in the earlier part of this judgment, is a condition precedent to the filing of a petition for

dissolution of marriage, hence it is a necessary requirement that must be fulfilled and filed alongside the cross petition of the Respondent. It is a mandatory requirement under **Order V Rule 10(1) of the Matrimonial Cause Act** which provides;

*A Petitioner **shall**, by an affidavit written on his petition and sworn to before his petition is filed -*

- a. verify the facts stated in his petition of which he has personal knowledge; and*
- b. depose as to his belief in the truth of every other fact stated in his petition.*

Order VII Rule 11(1) of the Matrimonial Cause Act provides;

(1) The party filing a pleading shall, by an affidavit written on his pleading and sworn to within 21 days before his pleading is filed.

- a. verify the facts stated in his pleading of which he has personal knowledge; and*
- b. depose as to his belief in the truth of every other fact stated in his pleading.*

It is essential to note that unlike a witness statement on oath which is deposed to after the petition, a verifying affidavit on the other hand **SHALL** be sworn to before the filing of the petition and in that affidavit, the Respondent as in this case is to depose of his personal belief in the truth of all the facts stated in his petition. See **UNEGBU VS UNEGBU (2004) 11 NWLR (Pt. 884)332. Order 1 Rule 4 Matrimonial Causes Rules** defines pleadings to mean petition, supplementary petition, answer, supplementary answer, reply or rejoinder. It is easily deducible that a cross petition comes under definition of pleadings as stated in **Order 1 Rule 4 Matrimonial Causes Rules. Order VII Rule 2** on the other hand stipulates the provision for “Affidavit verifying pleading”. Hence by the combined provision of Order 1 Rule 4 and Order VII it is therefore clear that an answer/cross petition has a mandatory requirement that it must be accompanied by a verifying affidavit. From the above, a verifying affidavit activates the jurisdiction of the court in matrimonial matters and it is not one that is curable by the taking of a second oath in open court, rather the absence of a verifying affidavit duly deposed to before a commissioner of oaths renders the whole cross-petition invalid as it is a condition preceding that it must be endorsed on a petition for dissolution of marriage before the jurisdiction of a court in matrimonial proceedings can be activated. A verifying affidavit is the blood that activates the heart of a petition for dissolution of marriage therefore a verifying affidavit not sworn before a commissioner of oaths prior to the filing of the cross petition of the Respondent renders the Respondent’

cross petition incompetent as it has failed to activate the jurisdiction of this court. The court have held that where the jurisdiction of a court is not activated by fulfilling the condition precedent to the filing of a suit as in this case the “verifying affidavit” the matter ought to be dismissed for lack of jurisdiction. However, the Respondent Counsel in his cross-petition brought up an issue of law which is seeking a decree of nullity on the grounds that the petitioner was unable to consummate the marriage due to her health condition known as hip dysplasia. Under the Marriage Act and the Matrimonial Cause Act, a party to a statutory marriage can pray for an order of court to nullify such a marriage on the grounds that the marriage is void or voidable. In case of a void marriage a court decree is not necessary to bring the marriage to an end once it is proved that parties were never husband and wife ab initio. However, in a voidable marriage one of the spouse will be the one to seek that such marriage be annulled. It is however worthy to note that a voidable marriage remains valid until a decree of nullity (annulment) is issued by the court. In other words an annulment of marriage is distinct from dissolution of marriage.

Lord Greenin the case of **DE RENVILLE VS. DE RENVILLE (1949) Page 100, 111 (CA)** distinguished between a void and voidable marriage as follows:

“A void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of a decree annulling its...”

“A voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a Decree annulling it has been pronounce by a court of competent jurisdiction”

The Respondent in this case has sought for a decree of nullity on the grounds that the marriage was not consummated. Both parties are adidem that a marriage exists between them. By the Respondents prayers before their court, Respondent is of the opinion that it is a voidable marriage on the grounds of lack of consummation due to petitioner’s health, hence Respondent is praying for an order of court nullifying the marriage. **Section 5(1) (a) of the Matrimonial Causes Act** lists the grounds upon which a marriage shall be voidable by the court on the grounds of incapacity to consummate a marriage and **Section 5(1) (b) (c) (d)of the Matrimonial Causes Act** lists the grounds as impotency; unsound mind, a mental defective, recurrent attacks of insanity and epilepsy, either party is suffering from a venereal disease in a communicable form, or the wife is pregnant by another person who is not the husband. From evidence before me the Respondent failed to

prove that the petitioner is suffering from any of the above as a hip dysplasia does not fall into any of the above conditions mentioned in **Section 5(1) (b) (c) and (d)**. Also, **Section 37 (b) of the Matrimonial Causes Act** states that in order to obtain a decree of nullity, it must be shown that the petition (in this case cross-petition) was filed not later than 12 months from the date of the marriage. The cross-petition in this case was filed on 8/1/2024 whilst the marriage certificate is dated 15/10/22 which is more than a year after the marriage was celebrated.

From the facts stated above which includes the failure of the Respondent to attach a verifying affidavit duly deposed before a commissioner for oath, the failure of the cross-petition to prove that the health condition suffered by the Petitioner is one of those provided for under **Section 5(1)(b)(c) and (d) of the Act** in order to secure a decree of nullity of marriage on the grounds of non-consummation of marriage and the fact that the cross-petitioner failed to file a petition on grounds of non-consummation within 12 months from the date of marriage as provided under **Section 37(c) Matrimonial Causes Act** and lastly the Respondent confirmation that Respondent and Petitioner slept in the same hotel room after marriage, Respondent Cross petition hereby dismissed.

Having carefully considered the processes before the court, the only petition left before this court is that of the Petitioner and the sole issue for determination is:

Whether the Petitioner has successfully established that her marriage to the Respondent has broken down irretrievably and thus entitled to the dissolution of their marriage?

The law is now settled that, the ground upon which the Court could be called upon to decree for dissolution of marriage, is that the marriage has broken down irretrievably; and the Court on hearing the petition can hold that the marriage has broken down irretrievably if the Petitioner can satisfy the Court of one or more of certain facts contained in **Section 15 (1) and 15 (2) (a) – (h) of the Matrimonial Causes Act, 2004** as held in **PIUS v. OLORUNFEMI (2020) LPELR-49579(CA)**.

Under **Section 15 (2) of the Matrimonial Causes Act**, categorized under paragraphs A – H. It states:

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

(a) that the respondent has wilfully and persistently refused to consummate the marriage;

(b) that since the marriage the Respondent has 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 the respondent 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 three 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 or restitution of conjugal rights made under this Act;

(h) that the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.

Therefore, upon proof of any of the factors stated above to persuade the Court that the marriage has broken down irretrievably, the Court shall grant a decree of dissolution of the marriage if it is satisfied on all the evidence adduced as held in **UZOCHUKWU V. UZOCHUKWU (2014) LPELR-24139 (CA)**. The Supreme Court in **Duru v. Nwosu (1989) 4 NWLR (Pt.113) 24** stated thus:

“...a trial judge ought always to start by considering the evidence led by the plaintiff to see whether he had led evidence on the material issue he needs to prove. If he has not so led evidence or if the evidence led by him is so patently unsatisfactory then he had not made out what is usually referred to as a prima-facie case, in which case the trial judge does not have to consider the case of the defendant at all.”

The evidence of the Petitioner in proof of those facts are succinctly stated in the earlier part of this judgment. The Petitioner has relied on unreasonable behaviour pursuant to **Section 15(2)(c) of the Matrimonial Causes Act**. *The Section provides:*

"15(2) The Court hearing a Petition for a decree of dissolution of marriage shall hold the marriage to have broken down irretrievably if, but only if, the Petitioner 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. "

Behaviour is an integral element in the interpretation of **Section 15 (2) (c) of Matrimonial Causes Act 2004**. "Unreasonable behavior" is the term used to describe the fact that a person has behaved in such a way that their partner/spouse cannot reasonably be expected to live with the other. It is not easy to prove unreasonable behaviour. Such behaviour has to be negative. Allegations of some negative behaviour of a spouse is not enough to warrant the Court holding that the spouse is guilty of unreasonable behaviour. What is the nature of the behavior envisaged under **Section 15(2)(c) of the Matrimonial Causes Act?**The Act did not define the phrase "behaved in such a way". However, the behavior has to be negative. It must be such that a reasonable man cannot endure. The conduct must be grave and weighty in nature as to make further cohabitation virtually impossible. See: **Oguntoyinbo vs. Oguntoyinbo**(2017) LPELR - 42174 (CA). The duty on the court is to consider whether the alleged behaviour is one in which a right-thinking person would come to the conclusion that the Respondent has behaved in such a way that the Petitioner could not reasonably be expected to live with him taking into account the whole of the circumstances, and the matrimonial history of the parties. See **Ibrahim vs. Ibrahim 2007) I NWLR (part 1015) page 383**. The burden or standard of proof required in matrimonial proceedings is also now no more than that required in civil proceedings. This is so because in civil cases, the only criterion to arrive at a final decision at all times is by determining on which side of the scale the weight of evidence tilts. Indeed **Section 82 (1) and (2) of the Matrimonial Causes Act** provide thus:

- 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 if the court is reasonably satisfied of the existence of that ground or fact, or as to that other matter.

The standard of proof required therefore is no more than that of preponderance of evidence. The Court in **Nanna vs. Nanna (2006) 3 NWLR (pt. 966) pg. 1** 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.*

These two facts are separate and distinct from each other and therefore must both be proved. The evidence of the Petitioner is that the Respondent would travel to another location without telling her that he would be traveling; that she had to endure endless bad behaviour, nagging and disrespect from the Respondent; that the Respondent will go weeks without talking to her at the slightest misunderstanding; that both parties have not seen or been together in the last six (6) months and the last time they communicated was three (3) months prior to the filing of this petition via WhatsApp chat and that the Respondent's behavior also caused her significant emotional distress, leading to depression and new health problems, including high blood pressure and mental health issues. It should be noted that the test of whether the behaviour complained of is intolerable to expect the Petitioner to continue to live with the Respondent is objective and not wholly subjective. The burden is on the Petitioner to prove not only the undesirable behaviour of the Respondent which she is averse to, but also that she finds it intolerable to continue living with the Respondent. If she is unable to prove any of these allegations, her petition cannot succeed and it will be dismissed even if the divorce is desired by both parties as held in **Oguntoyinbo vs. Oguntoyinbo (2017) LPELR-42174 (CA)**. The above Petitioner's averments of intolerable behaviour were uncontradicted and unchallenged by the Respondent. It should be noted that no matter how well written the final written address of a counsel is, it cannot take the place of evidence. The Respondent did not challenge the evidence of the Petitioner on his conduct which she found unreasonable. The cross examination was only on the claim of the inability of the Petitioner to consummate the marriage. The law is trite and enjoins a Court to act on unchallenged evidence. The Court in the case of **MATAZU V. MAZOJI (2014) LPELR-23071 (CA)**, Per ABIRU JCA in P. 70, paras. D-F held

"The law is that where evidence of a witness is credible and it is not challenged under cross examination or met by contrary

evidence, it is tantamount to an admission and should be relied upon by the trial Court”.

I find the unchallenged evidence of the Petitioner in respect to intolerable behavior satisfactory and in conformity with the law and hold that the marriage between the parties has broken down irretrievably.

The Petitioner, having discharged the burden placed on her to prove the petition, the marriage in my view has irretrievably broken down by virtue of the provisions of **Section 15(2) (c) of the Matrimonial Causes Act 2004**. In the circumstances, I therefore hold that this marriage has broken down irretrievably and the marriage ought to be dissolved and **IT IS ACCORDINGLY DISSOLVED.**

Consequently, I hereby order as follows;

1. I hereby pronounce a Decree Nisi dissolving the marriage celebrated between the Petitioner, **OLIVIA IFEOMA OKOLO** and the Respondent, **CHIBUNNA ONYEKACHI BENSON** at the Federal Marriage Registry on the 15th of October, 2022.
2. I hereby pronounce that the decree nisi shall become absolute upon the expiration of three months from the date of this order, unless sufficient cause is shown to the court why the decree nisi should not be made absolute.

Parties: Petitioner is present. Respondent is absent.

Appearances: Godswill N. Iwuajoku appearing for the Petitioner. Respondent is not represented.

**HON. JUSTICE M. OSHO-ADEBIYI
JUDGE
9THOCTOBER, 2024**