

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA- ABUJA

FRIDAY TH 27TH DAY OF OCTOBER,2023

BEFORE HIS LORDSHIP: HON. JUSTICE ALIYU YUNUSA SHAFI

SUIT NO: FCT/HC/PET/488/2022

BETWEEN:

YOU-ON-ON ATIMANU OLUSINA-----PETITIONER

AND

OLUSINA OLUFUNMISO SODEINDE----- RESPONDENT

JUDGMENT

By a notice of petition with suit no: PT/488/2022, the petitioner sought for the following reliefs.

- 1. A Decree that the marriage celebrated between the petitioner and the Respondent on the 30th May, 2009 has broken down irretrievably.**
- 2. A decree for the dissolution of the marriage celebrated on the 30th of May 2009, between the petitioner and the respondent same having broken down irretrievably on account that since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the Respondent.**
- 3. An order granting custody and of all the five children to the petitioner.**

4. Award of monthly monetary contribution for welfare, maintenance, health care, feeding, health and education advancement and upkeep of the of the children.

Accompanying the petition is a verifying affidavit of You-on-on Atimanu Olusina of 14 paragraph, certificate relating to reconciliation & witness statement on oath of You-on-on Atimanu Olusina and list of documents.

The petitioner filed a motion exparte for an order of substituted service. The order was moved and granted and the enrolment order served on the Respondent.

The respondent on the 30/1/2023 file the respondent counter affidavit to the petitioner witness statement on oath deposed to by Oluwasina Sodeinde of 8paragraph and attached to the counter are exhibit referred to as exhibit Sodeinde and certificate statement/ certificate made pursuant to section 84 of the Evidence Act, 2011.

The respondent filed a motion on notice dated the 14th day of march, 2023 for an order granting the respondent/Applicant access to the Five children of the marriage, the motion which was abandoned and hence struck out.

The respondent on the 21/3/2023 filed a motion on notice for extending time within which the respondent/Applicant can file and serve his answer and cross-petition in response to the petitioner/respondents petition and an order deeming as properly filed and served the petitioner's petition in this suit. The motion was moved and the order sought was granted.

The respondent's answer and cross-petition was filed dated the 21-03-2023 of 25 paragraphs and an affidavit verifying the answer and cross petition dated the 21-03-2023 and attached with certificate relating to reconciliation dated the 21-03-2023.

The petitioner filed the petitioner/respondent's counter affidavit in opposition to the respondent/ applicant's motion on notice dated the 14-03-2023 deposed to by one You-on-on Atimanu Olusina of 23 paragraphs.

The respondent/Applicant filed a further and better affidavit in opposition to the petitioner/respondent's counter affidavit dated the 23-03-2023 same deposed to by one Olusina Olufunmiso Sodeide of 17 paragraphs with a written address where a sole issue was detailed for determination to wit:

“Whether the respondent/Applicant is entitled to the reliefs sought in his application”

Upon the motion of the petitioner dated the 14th day of March, 2023 the petitioner, file a reply and answer to the respondent cross petition dated the 15th day of May, 2023 filed on the 19-05-2023 of 10 paragraphs.

In the course of the petition, the petitioner testified as PW1 dated the 14th day of February, 2023 wherein she was cross-examined, the Respondent equally testified as DW1, cross examined and re-examined.

Thereafter both counsels submitted their final written address dated the 13th day of June, 2023 filed on the same date, while the petitioner/cross-respondent’s final written address dated 29th day of June, 2023 and the respondent reply on point of law was dated the 10th day of July, 2023 and filed on the same date. Both parties adopted their final written address dated the 12th day of July, 2023 wherein the written address of the respondent formulated three issues for determination to wit:

- 1. Whether the petitioner/cross-respondent has adduced cogent, relevant and admissible evidence in proof of the facts relied upon as constituting the grounds for the grants of a decree of dissolution of marriage by this honorable court.**
- 2. Whether the petitioner/cross respondent is entitled to the reliefs sought on the face of the petition.**
- 3. Whether the respondent/cross petitioner is entitled to an order for the restitution of his conjugal rights.**

On the other hand the petitioner/cross respondent in its final written address formulated three issues for determination to wit;

- i. Whether by the facts adduced and evidence led in support of the petition, the petitioner has sufficiently established and proved that the marriage has broken down irretrievably to warrant a dissolution by this honorable court and grant of order of maintenance?**
- ii. Whether having regards to the allegation of facts adduced and evidence led in support thereof, the interest of the welfare of the children is not better served by awarding custody of the children of the marriage to the petitioner?**

iii. Whether the respondent/cross petitioner as constituted is competent or proved to entitle the cross-petitioner to the reliefs sought.

The respondent's reply on points of law therein formulated three issues for determination which issues are the same as captured on the final written address.

From the following issues as brought down I would consider those issues in view of the claim or reliefs sought by the petitioner in this petition. Those reliefs which has been captured from the beginning of the judgment.

Now to the issues:

I have carefully perused the issues so formulated by both the respondent, and the petitioner in their final written address, issues I and that of issues I of both the respondent and petitioner seems to be the same, hence I shall take the issues as one. Issue II of that of respondent and issue III of the petitioner are the same, hence I shall adopt same as one issue for determination in all I shall adopt other issues as mine.

In view of the foregoing, this suit will be decided base of the following issues:

- i. Whether the petitioner/cross-respondent has adduced cogent, relevant and admissible evidence in proof of the facts relied upon as constituting the grounds for the grant of a decree of dissolution of marriage by this honorable court.**
- ii. Whether having regards to the allegation of facts adduced and evidence led in support thereof, the interest of the welfare of the children is not better served by awarding custody of the children of the marriage to the petitioner?**
- iii. Whether the respondent/cross petitioner is entitled to an order for the restitution of his conjugal rights.**
- iv. Whether the respondents cross petition as constituted is competent or proved to entitle the cross petitioner to the reliefs sought.**

The petitioner in its relief sought seek the following:

- 1. A Decree that the marriage celebrated between the petitioner and the Respondent on the 30th May, 2009 has broken down irretrievably.**
- 2. An order granting custody and of all the five children to the petitioner.**

- 3. Award of monthly monetary contribution for welfare, maintenance, health care, feeding, health and education advancement and upkeep of the children.**
- 4. Any other or further orders as this honorable court may deem fit to make in the circumstance.**

On the first issue whether the petitioner/cross respondent has adduced cogent, relevant and admissible evidence in proof of the facts relied upon as constituting the grounds for the grant of a decree of dissolution of marriage by this honorable court.

On this the Respondent in resolving this issue referred to the provision of Section 15(1)(2) of the MCA being the grounds upon which a party may seek for an order for dissolution of marriage from the court, and what determines when a marriage has broken down irretrievably.

The section provides thus:

A petition under this act by a party to a marriage, may be presented to the court by either party to the marriage upon the ground that the marriage has broken down irretrievably.

Subsection 2 a-h

(2) The court hearing a petition for a decree of dissolution of a 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.

On this he stated that, the law has made it abundantly clear that to satisfy a court that a marriage has broken down irretrievably, the petitioner must prove one or more of the aforementioned provisions of section 15(1)(2) of the MCA. On this he referred the court to the case of *Uzokwe V Uzokwe (2016) LPELR-40945 (CA)* where the court of Appeal per Tom Shoibu Yakubu (JCA) PP 13-14 pages C-E held thus:

PARAGRAPHS 4.4- 4.7

4.4 This was established in the case of **UZOKWE v. UZOKWE (2016) LPELR-40945(CA)** where the Court of Appeal Per **TOM SHAIBU YAKUBU, JCA (Pp 13 - 14 Paras C - E)** held thus:

"Now, in order to prove or succeed in the divorce petition, the respondent predicated his complaint against the appellant on intolerable behaviour.

This complaint is situated and cognizable under Section 15(2) (c) of the Matrimonial Causes Act, 1970. The said Section 15(2)(c) provides inter alia: "15. (2) The Court hearing a petition for a decree of dissolution of a 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." Unarguably, the petitioner had the onus of proffering evidence, to the satisfaction of the Court, to the effect that there were intolerable acts exhibited by the respondent, which he/she could no longer cope with and live under the same roof with her/him as the case may be. Therefore, where the petitioner fails to prove one, at least of the facts contained in Section 15(2) - (h) of the Matrimonial Causes Act, the petition for divorce will fail and the marriage will not be dissolved notwithstanding the fact that both parties desired the divorce. Akinbuwa v. Akinbuwa (1998) 7 NWLR (pt.559) 661. In the instant case, the respondent's petition having been predicated on intolerable behaviour which is a fact to be proved under Section 15(2) (c) of the Act, he was obliged to lead evidence of such intolerable acts on the part of the appellant, which led to the filing of the petition for the dissolution of their marriage." (Emphasis Underlined).

4.5 Also, in the case of **BIBILARI v. BIBILARI (2011) LPELR-4443(CA)** the Court of Appeal held thus:

"The Matrimonial Causes Act ascribed a Section to the standard of proof in matrimonial matters or Causes. S.82 (1) and (2) of the Matrimonial Causes Act stipulates as follows: (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. From the above provision, the Court will pronounce a Decree of dissolution of marriage if satisfied on the evidence that a case for the petition has been made. Thus the matrimonial offence must be strictly proved once the Court is reasonably satisfied of the existence of

a ground to grant the divorce. The Court will then proceed to hold that the marriage has broken down irretrievably. The standard of proof is not on a balance of probabilities or preponderance of evidence as in general civil cases. The standard of proof is on the petitioner but taken as discharged once it is established to the reasonable satisfaction of the Court...The Petitioner who desires a dissolution of that marriage must discharge the standard of proof stipulated by the Act and establish in evidence one of the facts set out under S 15 and S 16 of the same Act. There must be a conduct or act that can be described as a behaviour for which Court will hold the Petitioner cannot reasonably be expected to live with Per REGINA OBIAGELI NWODO, JCA (Pp 30 - 32 Paras E - B)

4.6 The Petitioner/Cross-Respondent in her Petition claims that the grounds upon which the Petition is based includes emotional torture, cruelty, negligence, irresponsibility and verbal abuse to which the Respondent/Cross-Petitioner has vehemently denied and the Petitioner/Cross-Respondent has failed to provide any substantial evidence before this Honourable Court as required by law, to back these claims.

4.7 In **SIYANBOLA v. SIYANBOLA (1957) WRNLR, 42** the Court held that: *“to constitute cruelty, there must be evidence that the cruelty complained of is of such a character as to cause danger to life, limb or health (bodily or mental) or that it is such as to give rise to reasonable apprehension of such danger”*. Evidently, from this case, the Petitioner/Cross-Respondent has not been able to proof any fact as claimed in her grounds or evidence to constitute cruelty on the part of the Respondent/Cross-Petitioner.

Further that taking cognizance of the submissions, averments and testimony of the petitioner/cross-respondent before this honorable court, it is clear that the petitioner/cross respondent has been unable to satisfy nor bring before this honorable court any credible evidence showing that the marriage celebrated between the petitioner/cross-respondent and the respondent/cross-petitioner has broken down irretrievably as enshrined in section 15(2) of the MCA and therefore urge the court to so hold.

The petitioner/cross-respondent on this referred the court to section 15(1)(2) of MCA as stated in this judgment. Thus the petitioner/cross-respondent submitted that in proving one or more of the facts as stipulated above, the wordings of the

Act admit of discretion, being disjunctive to either prove one or more facts. Effectively therefore, the totality of facts adduced and evidence by the petitioner go to prove item (c) of subsection (2) of section 15 of the MCA to wit;

“That since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

Referred to the case of Wokoma V Wokoma 92020) LPELR-49882 CA, the Court of Appeal per totality of facts adduced and evidence by the petitioner go to prove item (c) of subsection (2) of section 15 of the MCA to wit;

“That since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

Referred to the case of Wokoma V Wokoma 92020) LPELR-49882 CA, the Court of Appeal per Yargata Byenchit Nimpar JCA (PP.34-42) PARA E-E laid down the requirements of proof in respect of the species of facts to be proved to establish respondent’s behavior that the petitioner cannot reasonably be expected to live with thus:

PARAGRAPHS 3.04-3.08

3.04 In **WOKOMA v. WOKOMA (2020) LPELR-49882(CA)** the Court of Appeal, Per **YARGATA BYENCHIT NIMPAR, JCA** (Pp 34 - 42 Paras E - E) laid down the requirements of proof in respect of the species of facts to be proved to establish Respondent’s behavior that the petitioner cannot reasonably be expected to live with, thus:

“... The petitioner/ Respondent is expected to prove two main factors which are: a. the sickening and detestable behavior of the respondent; and b. that the petitioner finds it intolerable to live with the Respondent. Furthermore, the standard of detestable behavior that the petitioner is expected to resent or not tolerate must be weighed on the objective scale and not subjective in terms of the behavior, trait or character of the party involved.

3.05 While these facts are not in themselves grounds, they constitute but the factual situations required to support the sole ground of irretrievable break

down. See the case of **ADEPARUSI v. ADEPARUSI (2014) LPELR-41111(CA)**. In establishing these factual situations therefore, this Honourable Court is invited to note the uncontroverted evidence of the Petitioner in paragraphs **6, 7, 8, 9, 10, 11 & 12** thus:

6. That soon after the marriage to the Respondent, I began to notice that the Respondent does not demonstrate any responsibility towards my upkeep nor show any love and care for me as he took no responsibility for my clothing and largely abandoned the responsibility of the family feeding except for a particular food he occasionally craves, otherwise, unconcerned about the routine family diets.
7. The Respondent has remained perpetually negligent in contributing to the family's upkeep and other such necessities except contribution for payment of the children's fees.
8. The Respondent is verbally and emotionally abusive, on account of which my mental and emotional health have taken a resulting spiral which have given rise to feelings of neglect, depression and loneliness in me. Sometime in November, 2021, the Respondent under no provocation took a cold look at me and declared that he was only enduring the marriage with me as my presence no longer give him joy nor happiness. He further went on to tell me that the only reason he went into the marriage with me is to have children, and that since I have given birth to enough children, continuing with me is no longer exciting to him.
9. I have suffered such emotionally torture and blackmails at a drop of a hat, particularly, anytime we had quarrels or arguments usually triggered off by his insensitive remarks for which he would never take responsibility for his actions. He always blames me for all his mistakes or faults. For all the times that I have cohabited with the Respondent, I have been subjected to untold emotional torture arising from Respondent's incessant talking down on me and levelling of humiliating accusations of adultery even before the children. he has shown total absence of love, warmth and care, cruelty, unsavoury conducts of aloofness, hostility, denial of conjugal rights, sometimes up to two years at unbroken stretch except on the pains of incessant pleas from me.
10. That my children are no longer comfortable and happy whenever the Respondent is present in the house.

11. That I had made several attempts to his siblings and relatives for intervention to sort out the cause of his misconducts to me and the children but to no avail. My last ditch effort was in August, 2022 when my father, despite his ailing condition had to travel down from Cross River State to Abuja to intervene in the conundrum but no avail
12. That my emotional health is already at near breaking point that continuing with him in the marriage will eventually and most likely break me down beyond recovery.
- 3.06 Furthermore, under cross examination on the 24th of May, 2023, in response to the question put to the Respondent that he treated the family members of the petitioner with gross disdain by calling the younger brother of the Petitioner a thief, to which the Respondent/Cross-Petitioner remorselessly volunteered how he had maintained a police action against the younger brother of the petitioner from 2020 up until the time the petitioner lost her father in March, 2023 before the respondent dropped the complaint made to the Police against the Petitioner's younger brother.
- 3.07 Furthermore, Respondent equally volunteered under cross examination that about 80% of the family food upkeep came from the petitioner's income from her petty trading in foodstuff, lending credence to the Petitioner's allegation that she shouldered virtually the family upkeep from her income.
- 3.08 The totality of the foregoing inexorably go to prove that the marriage between the parties, on the basis of the forgoing factual situations of intolerability of the Respondent's behaviour as itemized and incontrovertibly deposed to in above listed paragraphs of the Petitioner's Witness Statement on Oath, read alongside the corroborative testimonies of the Respondent/Cross Petitioner, establish without equivocation that the marriage has broken down irretrievably on the intolerable conduct of the Respondent, warranting therefore, the mandatory invocation of the mandatory provision of the word "SHALL" to so hold, and dissolve the marriage. See the case of **UZOCHUKWU v. UZOCHUKWU (2014) LPELR-24139(CA)** where the Court of Appeal espoused on the principle, thus:

A Court hearing a petition for the dissolution of a marriage shall grant the relief if the marriage has broken down irretrievably. See Section 15 (1) of the MCA. Sub-section (2) of Section 15 sets out facts upon which the Court could hold

that a marriage has broken down irretrievably. Sub-section 2 (e) forms the crux of the argument of the appellant. It states: "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 - (e) That 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." I agree with counsel for the appellant that the use of the word "shall" in the context of the Sub-section imports a mandatory meaning - a command - on the authority of OMOTUNDE V. OMOTUNDE (2001) 9 NWLR (718) 252, 284,

Submitted further, that, on the strength of the foregoing factual situation as established and proved by the petitioner, this honorable court is hereby urged on to hold that the marriage between the parties has broken down irretrievably warranting the order of decree of dissolution of marriage.

A careful perusal of the submission of both the respondent/cross petitioner and that of the petitioner/cross respondent and the evidence of PW1 before this court stated that, in paragraph 4 of his witness statement on oath, he made reference to the marriage at the redeemed Christian church of God, and a certificate of the marriage was issued between Olusina Olufunmiso Sodeide and You-on-on Atimanu Olusina at the redeemed Christian Church of God green pastor parish Area A Nyanya dated the 20th July, 2009. The said certificate of marriage was tendered and admitted in evidence as exhibit A. that in paragraph 8 of his witness statement on oath she made mention of the children and attached to it are the certificate of Birth of the 5(five) children. The said certificate of Birth of the 5 (Five children) namely:

- a. Olusina Daniel Oluwadamilola
- b. Olusina David Anuoluwapo
- c. Olusina Deshawn Ifeolowapo
- d. Olusina Deborah Ayomide
- e. Oluwasina Diamond Olayinka were

All admitted in evidence as exhibit B-B4 respectively. She equally tendered a Newspaper publication for a change of name to that of the Respondent on leadership newspaper dated the 6-05-2014, which was admitted in evidence as exhibit C. she equally tendered a letter of her appointment with NSCDC, letter of conversion and the I.D card as exhibit D-D2.

Under cross examination by the respondent counsel on question and answer.

Q on the 20/08/2022 he left you behind with the kids and by the time he came back you have disappeared with the kids to unknown place?

A I went with the children to my mothers place which he was aware of at Madalla in Niger state before Zuma rock.

Q is it true that you packed all your belongings during that time including some of his documents?

A I pack my belongings and not anything that belongs to him and that some of my belongings are still in his house at New Nyanya Nasarrawa state.

Q did you tell me that on the 20-08-2022 you will be packing out your belongings from the house?

A I only told him I will be going for holidays with the children and not packing my belongings.

Q Was there any quarrel before you left the house on that day?

A Yes there was

Q when you left the house, two weeks later I asked you why did you moved the property out of the house?

A Yes he did.

Q You told me that if I love myself and my kids I should give you some space and I asked you is that a threat?

A Yes I said so that you should give me a space.

Q could you recall what your mother told you at that point?

A Yes sir, my mummy says whatever goes up must come down, he should take it easy.

Q Your mothers intention was for us to settle amicably?

A that was so.

Q that was so, I believe what your mother said, and why did you do underground planning to give me a divorce process.

A That before then I have made up my mind that I am no more interested in the marriage and on the 4-08-2022 my dad came from Calabar to tell him in person, that this was my decision based on all the complains and my petition. He told me in front of my dad that I don't have the right to end the marriage until when he said so, and since the marriage had a legal backing that is why I have to go through the normal process for its record.

Q could you recall that on the 4-08-2022, that your daddy came back from Calabar that he wants to see both of us?

A My daddy says he was given us a week to go and reconcile and get back to him but unfortunately when he came he told my mummy that I had bad character and that he will go any length to have his kids. There was even a little fight when he wanted to forcefully wanted to go with the kids.

Q how long did I keep malice with you?

A sometimes one or two years.

Q if indeed we have malice going on for two years, have you ever reported the case to the pastor or senior pastor?

A I reported to the pastor by name David and my immediate pastor

Q is the said pastor in Abuja?

A he was still in Abuja and two years after the marriage.

No re-examination.

DW1 on the other hand, testified on the 24th May, 2023. In his evidence he stated that he lives at Anguwan Doka New Nyanya karu Local government Area

Nassarawa state. That the petitioner is his wife, and that they got married on the 30th of May, 2009 and the marriage was blessed with 5 promising children.

Further that, during the 13 years of the marriage on cohabitation within his best ability and capability and that he has discharged all the responsibility required by him as a husband to the petitioner such as clothing, feeding and welfare. That he has shown great love, respect not only to her but to the 5 children alongside with her immediate family. That during the course of cohabitation there was no adeptness, hostility, talking down to her as she alleged and no denial of her conjugal rights. That during this cohabitation, everything that pertains to their Education, the school fees has been shouldered by him for the 5 children, not until later February this year that he stopped.

That the management as husband and wife at home, he ensured that he stocked his house with foodstuffs that can last for one year like rice, beans, maize and corn. That he shoulders the medical bills of his children, opened NHIS for them and each time any of them falls ill he takes them to his NHI for medical attention. And that during this time he ensured that his family are well catered for and ensured that he met any for seeking needs as it arises during cohabitation.

Furthermore, that he had never subjected the petitioner's to any emotional hardship as she claimed, no quarrel as she claimed. That on the 20th August, 2022, his wife as usual said she was going for holiday to her grandma's place, and he did oblige her. She left with the five kids and has not returned with the kids to this moment.

A few weeks later, the petitioner father visited them from Calabar, they discussed as regard her leaving her matrimonial home with the 5 children and during the meeting his wife handed a written note to her father narrating all her wrongs in the marriage which she couldn't even believe. That I said she was very dirty and that she brought bad luck into the marriage, and that I use to give her #5,000 for her upkeep. That as she was saying all these, he interrupted and he told the dad with all this amount her packing out from the matrimonial home, if really they were true, he even asked his father to ask her whether he has ever laid his hands to beat or maltreat her or not meeting her welfare or upkeep. She was speechless as she could not answer anything.

In the area of welfare, as a caring husband to the petitioner his wife and her family, he secured her a permanent job, with two other from the same family. That is to show how loving and caring as he was and there is never a time the needs arises

from their side, he always meet and ensure that he solve those needs within his capability.

That during the cause of cohabitation, his certificate got missing and he believes she was the one or something else has been fishy. That during that period, her younger brother burgled inter her apartment and made away with some of his things, this made him report the matter in the police station. It was later he discovered that it was her younger brother that paid a visit on Tuesday.

That prior to that, the brother visited them and passed a night with them, on waking up and seeking the medical bills he has been waiting for, he quietly put it on the wardrobe where both himself and his wife has searched.

In conclusion he prayed the court to please resume his cohabitation with his wife, the children to be under same roof and that he believes if they are in the same roof the problem will be resolved, pleaded that he wants this petition dismissed and pray that the court reconstitute conjugal rights. Lastly wants the custody of all the children and not to the petitioner as the petitioner cannot take care of them, he prays the court to grant him custody of those children as he will take adequate care of them.

Under cross examination by the petitioner.

Q How old were you when you married your wife?

A I was 41 years old.

Q how old was she when you married her?

A She was 25 years old.

Q Throughout the period of the marriage, what was she doing beside being a senior officer of civil Defence?

A she was a staff of civil defense.

Q While in your house what other business was she doing?

A she wasn't engaged in any other business.

Q can you remember the bags of Cray fish, beans that she buys from taraba and calabar?

A That 85% are for domestic use while she sells the rest out.

Q You described yourself as a good caring husband in the order of Christ?

A Yes

Q Tell the court the reasons why for two years you refused this young woman sexual intercourse.

A There was nothing as such except for prayers and fasting.

Q That the two years you denied her sexual intercourse, were you fasting?

A There wasn't anything like that.

Q As a caring husband, what made you to confront the woman that she brought badluck and what made you say so?

A there were no such statement.

Q That you never show any respect to that family, that is why you accused the brother.

A This incident that happened, it is when the younger brother was about leaving the premises that they showed him with those items and that because of the love he has for the family, he decided to withdraw the case from the police station and decided to take the matter to the office and the officer in the matter discovered that all the items were found with the brother.

Q is there any crime daily report on that?

A Yes, it should be in the office

Q when did the case happen?

A it was December, 2020

Q You claimed that the woman eloped to the mother of your wife.

A Yes.

Q Tell them if it is not you that gave her consent

A Yes I did, but they didn't come back.

Q When was the last time you paid your children's school fees

A I stopped the payment of their school fees in December, 2022.

Q When you permitted them to visit the grandmother, before you heard that they were not going to come back did you visit them?

A I visited them after the expiration of the holiday when they did not come back.

Q What to your knowledge did they spend the holiday?

A All I know is that they are under the watchful hand of their mother at madallah, Niger state.

Q Who is leaving with you know?

A Nobody leaves with me now.

Q Where do you work?

A NSCDC Nassarawa State command.

Q Is your mother still alive?

A my mother is late.

Q can you confirm to this court the position of your wife, her grade level and where she works?

A She is now at grade Level 10 with NSCDC

Q What is her Educational Qualification?

A NCE Holder, BSC and masters in Economics

No re-examination.

Having carefully gone through the submissions of both the respondent and the petitioner and the evidence of PW1 and DW1 would I be right to say that the first leg of the relief has been proved? Here the learned counsel to the petitioner relied on section 15(2)(c) of the MCA, the section provides thus:

“That since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.”

On this, in paragraph 3.05 of the petitioner/Cross-respondent's final written address as stated in this judgment was not proved on the preponderance of evidence.

In a civil case, where the parties call evidence before the trial judge accepts or rejects evidence of either of the parties, he is enjoined to set up an imaginary scale by putting the evidence of the plaintiff who invariably has the burden to succeed in a civil case by preponderance of evidence on one side of the imaginary scale and then proceed to put the evidence adduced by the defendant on the other side of the imaginary scale and weigh the two together to see where the imaginary scale tilts. Ordinarily, the court performs its task of evaluation of evidence by placing the evidence called either side to the conflict on every material issue on either side of the imaginary scale and weighing them together and whichever outweighs the other in terms of probative value ought to be accepted, see *Whyte V Jack*.

Now the question is, have these facts been established by the petitioner before this court and if they are so established, are they sufficient facts to ground a dissolution of marriage under any of the sub paragraph of section 15(2) of the Act? There was evidence before the court no doubt, from the respondent that the petitioner packed out of the matrimonial home sometimes in the Year 2022 in August, when the petitioner left to spend holiday with the five kids, that he obliged her to go to Madalla to spend the holiday with the grandma with the kids. She left with the five kids and never returned with the kids.

The respondent who went further to state that after some few weeks the petitioner's father visited them from Calabar, they discussed regarding her leaving her matrimonial home with the 5 (five) kids during the meeting his wife handed a note to the father in a hotel narrating all her wrongs in the marriage which he could not have believed,, one she said he said she was very dirty and also that she brought bad luck into the marriage that he used to give her #5,000 (Five thousand naira) for her upkeep, as she was narrating the story to her dad, he then interrupted and told the dad that all this amounted to her packing out from the matrimonial home if really there were true? That he even asked the dad to ask her if he had ever laid his hands on her or maltreat hers or not meeting her welfare or upkeep? At this point she was speechless and could not answer anything.

The petitioner/cross-respondent could not lay any evidence to all that has been said by the respondent/cross-petitioner. The evidence of leaving the matrimonial home

was with the consent of the respondent and for the purpose of visiting the grandma at Calabar with the 5 kids, therefore the petitioner leaving the 5kids is without the consent of the respondent.

In divorce proceedings, the petitioner must prove one of the facts contained in section 15(2) (a-h) of the MCA before he can succeed and where the petitioner fails to prove that, the petition for the dissolution of marriage will be dismissed notwithstanding the fact that the divorce is desired by both parties. See *Akinbuwa V Akinbuwa*(1998)7 NWLR (PT 559) 661. In the instant case, it is the petitioner that desire the dissolution of marriage, it is therefore the duties of the petitioner who is alleging that the respondent has behaved in such a way that she cannot reasonably be expected to live with the respondent unless the petitioner satisfies this court on both of these matters this court will refuse to hold that the marriage has broken down irretrievably.

Two sets of facts call for proof under section 15(2) (c) of the Act. They are (1) the sickening and detestable behavior of the respondent and (2) that the petitioner finds it intolerable to live with the respondent. These two facts which are deduced from section 15(2) (c) of the Act are severable and independent. The petitioner must prove the detestable act or such condemnable conduct that the respondent find intolerable and then proceed to prove that she finds it intolerable to live with the respondent . See *Damulak V Damulak* 92004)8 NWLR (Pt. 874)151.

The test whether the petitioner can or cannot be expected to live with the respondent is objective. It is not therefore sufficient that the petitioner alleges that she cannot live with the respondent because of his behavior, the behavior must be such that a reasonable man cannot reasonably be expected to put up with, has been provided in section 16(10) of the Act. The section provides:

“Without prejudice to the generality of section 15(2) (c) of this Act, the court hearing a petition for a decree of dissolution of marriage shall hold that the petitioner has satisfied the court of the fact mentioned in the said section 15(2) (c) of this Act, if the petitioner satisfies the court that:

- a. Since the marriage, the respondent has committed rape, sodomy, or bestiality
or
- b. Since the marriage, the respondent has, for a period if not less than 2 years.
 - a. Been a habitual drunkard

- ii. Habitually been intoxicated by reason of taking or using too excess any sedative narcotic or stimulating drugs or preparation or has for a part or part of such a period been a habitual drunkard, and has for the other part or parts of such a period been a habitual been so intoxicated or
- c. Since the marriage, the respondent has within a period not exceeding five years;
 - 1. Suffered frequent convictions for a crime in respect of which the respondent has been sentenced in the aggregate to imprisonment for not less that 3years, and
 - 2. Habitually left the petitioner without reasonable means of support or
- d. Since the marriage, the respondent has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life or for a period of five years or more, and is still in prison at the date of the petition or
- e. Since the marriage and within a period of one year immediately preceeding the date of the petition, the respondents has been convicted of;
 - 1. Having attempted to murder or unlawfully to kill the petitioner,
 - 2. Having committed an offence involving the intentional infliction of grievous harm or grievous hurt on the petitioner or the intent to inflict grievous hurt on the petitioner. Or
- f. The respondent has habitually and willfully failed, throughout the period of two years immediately preceding the date of the petition, to pay maintenance for the petitioner,
 - 1. Ordered to be paid under an order of, or an order registered in a court in the federation or
 - 2. Agreed to be paid under an agreement between the parties to the marriage providing for their separation or
- g. The respondent;
 - a. Is at the date of the petition of unsound mind and unlikely to recover and
 - b. Since the marriage and within the period of six years immediately preceding the date of the petition, has been confined for a period aggregating not less than five years in an institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution”

From the foregoing, can it be said that the petitioner have proved the allegation as to warrant this court grant claim one? The answer is NO. that is to say, has the

petitioner established these facts to ground a dissolution of marriage under any of the sub paragraph of section 16(1)(A-G) of the Matrimonial Causes Act?

It is a fact that, the petitioner only left the matrimonial house to visit her grandmother at Madalla and left with the children with the consent of the Husband (Respondent) but not to go with the children. This act alone does not constitute consent from the respondent.

It is also in paragraph 12 of the petitioner counter affidavit where she stated thus:

‘That in denial of paragraph 11,12,13,14,15 & 16, I hereby state that I left with the children to my mothers place in Madalla a neighboring town in FCT, for the children annual holiday in August, 2022, not without his consent but on his express permission, contrary to the allegation that I fled with the children” this and many more.

Apart from the above, there was a communication between the petitioner and the respondent, the exchange of the communication is hereby attached for easy perusal.

From the totality of the evidence of the petitioner before this court, I hold that the petitioner has not convinced this court on the preponderance of evidence to warrant this court to ground the decree of dissolution of marriage in its favor. A proper construction of this provision with the evidence abound from the records, clearly established that it was the petitioner that was in desertion. on the conduct the petitioner finds intolerable to live with the respondent, the petitioner has not succeeded in proving any of the requirements that is required to be established under section 16(1) (a-G) of the MCA to ground a divorce under section 15(2) (c). from the totality of the evidence adduced before this court, it is my considered view that, the petitioner has not proved his petition as required by law. I said all these in view of the provisions of section 18 of the Matrimonial Causes Act defines constructive desertion as:

“A married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart and occasions that other party to the marriage to live separately or apart, shall be deemed to have willfully deserted that other party without just cause or excuse, notwithstanding that, the person,

may not in fact have intended the conduct to occasion that other party to live separately or apart”

The petitioner in paragraph 8 of it's verifying affidavit alleged that, the respondent is verbally and emotionally abusive, an account of which her mental and emotional health have taken a resulting spiral and that gives rise to feelings of neglect, depression and lowliness. That sometimes in November 2021, the Respondent under no provocation took a cold look at her and declared that he was only enduring the marriage with her as her presence no longer give him joy nor happiness, and paragraph 9 that the respondent always blackmails her anytime they have quarrels or arguments and always fails to take responsibility for his actions, that the respondent always blames her for his mistakes. This assertion from my view cannot ground a dissolution of marriage as the said paragraphs needs to be supported by credible evidence which is satisfactory and therefore capable of belief by an ordinary person on the street.

Section 131 (1)(2) of the evidence Act 2004 provide thus:

1. Whoever desires any court to give judgment as to any legal rights or liability dependent on the existence of facts which he asserts shall prove that those facts exist.
2. When a person is bound to prove the existence of any facts, burden of proof lies on that person.

On this the learned counsel to the respondent stated that, the Petitioner/cross respondent in her testimony and averments has been unable to succinctly show this court credible grounds for the reliefs sought on the face of the petition and therefore urged the court to dismiss the relief sought by the petitioner/cross Respondent.

In view of the foregoing this court will we accept the evidence & averment in the Respondent affidavit as the true reflection of things and hence will refuse to grant relief (1) of the petitioner relief. So I hold.

On the second relief as to whether the petitioner/Cross Respondent is entitled to the reliefs sought on the face of the petition.

On this it is the submission of the respondent where he stated that, the petitioner cross respondent in her petition claimed that the Respondent/Cross-petitioner has

behaved in a way that she cannot reasonably live with the Respondent/ cross-petitioner.

Referred to the case of Emmanuel V Funke (2017) LPEL-43251) CCA and section 15(2) (c) of MCA and submit that it is clear that the petitioner who relies on the ground that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent, must establish by cogent evidence that it would be unreasonable to require her to live with the respondent.

The learned respondent counsel submitted on this that, the Respondent/cross-Petitioner has since the inception of the marriage loved and cherished the petitioner/Cross-respondent and been caring to his wife, and providing for the petitioner/Cross respondent and also to the children of the marriage at all times and also cared for her family members/siblings that he equally got them job.

On the issue of custody of the children of the marriage sought by the petitioner/ cross respondent. That the petitioner/ Cross-Respondent in her testimony told the court that on the 20th day, of August, 2023 the petitioner/cross Respondent told the Respondent/cross petitioner that she was going to her mother'S house with the children of the marriage for holiday to which the Respondent/Cross Petitioner agreed.

To the dismay of the Respondent cross-petitioner when she came back to the house he found out that the petitioner/cross respondent had left the house with the five children of the marriage and all her belongings, the petitioner/cross respondent has since denied him free flow of access to the children of the marriage bearing a preconceived malice towards the Respondent/Cross which she intends to use to raise the children of the marriage to hate the Respondent/cross-petitioner if granted custody.

Furthermore, submitted that, the Respondent/cross-petitioner has since his marriage to the petitioner/cross Respondent took care of the petitioner/ cross respondent's & provided her needs, give her conducive environment to live in and showered her with gifts and indicated his desire and willingness to continue to do so by the oath of marriage he took with the petitioner/Cross-Respondent.

On the custody of the children. The petitioner/cross- Respondent in it's final written address submitted that the fact that the five children of the marriage are under-age the custody of the children therefore becomes paramount significant. On

this the learned counsel submitted that, the MCA does not specifically provide the age limit as regards custody of children in divorce proceedings, that section 42 of the Act empowers court to make orders as they think fit, for the custody and education of a child who is under age of Eighteen. See the case of Okwueze V Okwueze (1989) LPELR-253 9 (CA) Also in the cas of Ojo V Ojo (1969) LPELR-25437(CA) the supreme court Per Atanda Fatai- Williams JSC as he then was at page 13-14 paragraph A-E, laid down the parameters for determination of custody of children under the age of 16 years thus:

“as for the order granting the custody of the children of the marriage to the Respondent made without due inquiry into the interest and welfare of such children, we will do no more than refer to the judgment of this court in Apará V Apará SC 28/1968 delivered on 30th September, 1968, on the point. It reads: we observe that very slight evidence was given at the trial about these matters and as this is not the first time on order relating to the custody of the children of a marriage is made peremptorily we feel that attention of judges should be directed to the importance of this matter in divorce proceedings. The point is amply dealt with by rule 33A(a) of the MCR, 1957 which provides as follows: 33A where at the hearing of proceedings for divorce nullity of marriage or Judicial separation it appears that there is a child of the family who has not attained the age of Sixteen years and (a) the Judge is Satisfied as respects every such child that arrangement have been made for the case and upbringing of the child and that those arrangement are satisfactory or are the best which can be devised in the circumstance, or that it is impracticable, for the party or parties appearing before the court to make any such arrangements-there shall be entered in the court minutes a statement recording the matters in regard to which the judge is satisfied under paragraph (a) of this rule- the matter of the custody of the children of a broken marriage is important to the parties as well as to the community and not only should this be argued in court, but judges should in appropriated cases retire into chambers and discuss this fully with counsel on both sides and their clients before making a final order in court. It should not be assumed that the successful party must have

custody of the children or that he is the proper party to whom the case of the children of the marriage should be entrusted.”

Further submitted that, following the advent of a new legal order ushered in by the passage of child rights Act 2007, as applicable to the Jurisdiction of this court, there is a shift in the applicable law towards what is considered as the best interest of the children in the determination of custody of children in a

Divorce proceedings. Referred to the case of Kakulu V Kakulu (2016) LPELR-41552 (CA).

“by the provisions of section i of the child rights act where children are concerned, whether undertaken by an individual, public or private body or administrative or legislative authority, the best interest of the child should be the primary consideration.

I have carefully considered the arguments of both parties and as I have made it clear by refusing prayer one two on the issue of the fact that the children are still underage.

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 a woman. It is considered as a holy sacrament or scared Mystery. I refer to Roman Catholic church, which teaches that God himself is the author of the scared 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 sanctity 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 respository 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.

Now from the provision of section 71(1) of the MCA, it will be wide discretion in custody matter. The court has the discretion to make such order in respect of custody, guardianship, welfare, maintenance, advancement or Education of the child as it think fit.

Parental divorce/separation is associated with an increase rise for child and adolescent academic, difficulties, descriptive behaviours. The five children still under age, often have the most difficult time when it comes to child divorce trauma. This is largely in part because they’re old enough to remember the family as a whole and also better able to understand the complex feelings associated with the loss of family structures as they know it. Also some kids tend to show worse social and emotional development and more regularly put themselves in risky situations. The absence could become a more triggering factors then death. The lack of a father in a child’s life can cause a substantial negative impact. The impact of parent divorce on children comes with painful emotions involving sadness, confusion, fears of abandonment, guilt misconceptions, anger loyalty conflicts, worry and grief and many more.

The respondent/cross petitioner has never consented to the divorce proceeding nor consented to the petitioner/ cross respondent having the custody of the Five children of the marriage and it will not be in the interest of this court to just close it

eyes by granting custody of the five children to the petitioner/ cross-respondent. This can only be granted if both parties have consented.

On a whole, the evidence of the petitioner/cross respondent lacks merit as such I order the petitioner/ cross-respondent to return the children of the marriage to the respondent/cross-petitioner as it were, as this court still considers that both parties are still legally married in law.

The action of the petitioner/cross-respondent of not returning the five children to the matrimonial home is totally wrong. The mother's house at Madallah is not the residence of the Respondent at worst's a total stranger to the children of the marriage.

In view of the forgoing I hold that the Petitioner/Cross-Respondent has not proven it's case in accordance with the law i.e. preponderance of evidence, hence this suit is hereby dismissed.

Both parties to bear their cost.

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Hon. Justice A. Y. Shafa

APPEARANCE:

1. Christ Agbiti with Henry C. Ibe for the Petition/Cross-Respondent.
2. Eniola Oyelami for the Respondent