

IN THE CIRCUIT COURT HELD AT ACHIMOTA, ACCRA ON FRIDAY, THE 15<sup>TH</sup>  
DAY OF DECEMBER, 2023 BEFORE HER HONOUR AKOSUA ANOKYEWAA  
ADJEPONG (MRS.), CIRCUIT COURT JUDGE

SUIT NO. C5/09/2023

MAURICE KENA ASARE

----- PETITIONER

GS-0126-7276

BORTIANOR

ACCRA

VRS

PORTIA NYARKO

----- RESPONDENT

GA-579-5767

AWOSHIE

ACCRA

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PARTIES: PRESENT

COUNSEL: YVONNE AMEGASHIE FOR PETITIONER ABSENT

MARY OHENEWAA AFFUL, ESQ. FOR RESPONDENT PRESENT

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## JUDGMENT

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### FACTS

The parties got married under Part III of the Marriages Act, (1884-1985), Cap 127, on 23<sup>rd</sup> December 2012, at Victory Bible Church International in Accra. The Petitioner is a radio journalist whilst the Respondent is an unemployed caterer. There is one issue of the marriage namely; Miranda Darley Asare-Kena, aged 10 years. On 26<sup>th</sup> June 2023, the Petitioner filed the instant petition on grounds that the marriage between himself and the Respondent had broken down beyond reconciliation and prayed the Court for the following reliefs;

- i. Dissolution of ordinance marriage celebrated between the parties as having broken down beyond reconciliation.
- ii. An order that the Respondent will have custody over the issue with him having reasonable access to the issue.
- iii. Any further order(s) this Honourable Court may deem fit.

The Respondent answered the petition and also prayed as follows:

- a. Dissolution of the ordinance marriage between the parties.
- b. An order for GH¢1,000.00 as maintenance for the child.
- c. An order for the custody of the child to be granted to her.
- d. An order for the Petitioner to pay all school and medical bills as and when they are due.

### THE CASE OF THE PETITIONER

It is the case of the Petitioner that the Respondent has been adulterous and behaved in such a way that he cannot reasonably be expected to live with her. The Petitioner alleged that during the early parts of the marriage, several meetings were called for the parties to be reconciled due to the erratic behavior of the Respondent. He alleged that the Respondent had inappropriate communication with other persons of the opposite sex. Further to that, he alleged that the Respondent deserted the marriage between the parties after he informed her of his awareness of the inappropriate communication. That five years after the Respondent and the issue of the marriage left the matrimonial home unceremoniously, he was able to speak to his daughter through the aunt of the Respondent who forwarded her number to him. That the Respondent has caused him so much pain, embarrassment and anxiety such that he cannot reasonably be expected to remain married to her.

### **THE CASE OF THE RESPONDENT**

The Respondent denied the allegations of adultery and unreasonable behavior, and attributed the cause of the breakdown of the marriage to the irresponsible behaviour of the Petitioner. According to her, the Petitioner was not taking responsibility for the maintenance of the home. That she never handed her mobile phone to the Petitioner but it was the Petitioner who installed a system in her phone and listened to her conversations. The Respondent continued that most of the time it is her brothers and friends who lived outside the country who communicate with her and that she was not having any relationship with any man. According to the Respondent when she was admitted to hospital the Petitioner never took responsibility of her but brought a lady to stay with him and that she found in the washing machine a lady's panties and brassier when she was discharged from the hospital. That she overheard the Petitioner and his

mother discussing about the said lady to enable him travel abroad after his mother was hostile to her. The Respondent further stated that she had to take her child and leave the Petitioner because he refused to take care of the home and failed to pay the child's school fees. She concluded that her life with the Petitioner has been traumatic even though she has sacrificed, co-operated and supported the Petitioner.

Based on the pleadings and the evidence led, the Court set down the following issues for determination.

### **LEGAL ISSUES**

1. *Whether or not the marriage between the Petitioner and the Respondent has broken down beyond reconciliation.*
2. *Whether or not the Respondent is entitled to an award of maintenance for the child of the marriage.*

### **BURDEN AND STANDARD OF PROOF**

In every civil case, the general rule is that the burden of proof rests upon the party, whether Petitioner or Respondent, who substantially asserts the affirmative of his case.

*Section 12(1) of the Evidence Act, 1975 (NRCD 323)*, provides that:

*"except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of probabilities."*

In the case of *Adwubeng v. Domfeh* [1996-97] SCGLR 660, the Supreme Court held that in all civil actions, the standard of proof is proof by the preponderance of probabilities, and there is no exception to that rule.

**Section 11(4) of the Evidence Act** explains the burden of proof in civil cases as follows:

*"In other circumstances, the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence, a reasonable mind could conclude that the existence of the fact was more probable than its non-existence".*

The standard of proof as stated therefore applies to a petition for divorce. See *Happee v. Happee* [1971] 1 GLR 104. Thus, the burden is on both parties to prove the facts alleged to establish the breakdown of the marriage.

## **ANALYSIS**

Before I analyze the evidence adduced at the hearing, it is essential to set out the relevant sections of the *Matrimonial Causes Act, 1971 (Act 367)* namely; sections 1(2), 2(1) and (3) which provide as follows:

*"1(2) The sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation.*

*2(1) For the purpose of showing that the marriage has broken down beyond reconciliation the Petitioner shall satisfy the Court of one or more of the following facts:- ...*

*(a) that the Respondent has committed adultery and that by reason of the adultery the Petitioner finds it intolerable to live with the Respondent;*

*(b) that the Respondent has behaved in a way that the Petitioner cannot reasonably be expected to live with the Respondent;*

*(c) that the Respondent has deserted the Petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;*

*(d) that the parties to the marriage have not lived as husband and wife for a continuous period of at least two years immediately preceding the presentation of the petition and the Respondent consents to the grant of a decree of divorce, provided that the consent shall not be unreasonably withheld, and where the Court is satisfied that it has been so withheld, the Court may grant a petition for divorce under this paragraph despite the refusal;*

*(e) that the parties to the marriage have not lived as husband and wife for a continuous period of at least five years immediately preceding the presentation of the petition; or*

*(f) that the parties to the marriage have, after diligent effort, been unable to reconcile their differences.*

*(3) notwithstanding that the Court finds the existence of one or more of the facts specified in subsection (1), the Court shall not grant a petition for divorce unless it is satisfied, on all the evidence that the marriage has broken down beyond reconciliation."*

In the instant case the burden is therefore on the Petitioner and the Respondent who has cross petitioned for the dissolution of the marriage to prove that the marriage has broken down beyond reconciliation; proof of one or more of the facts under section 2(1) of Act 367 is/are necessary.

***1. Whether or not the marriage between the Petitioner and the Respondent has broken down beyond reconciliation.***

Under the *Matrimonial Causes Act, 1971 (Act 367)*, the sole ground for granting a petition for divorce is that the marriage has broken down beyond reconciliation. To prove that the marriage has broken down beyond reconciliation, the Petitioner is required to establish at least one of the facts set out in *section 2(1) of Act 367*. The Petitioner in the instant petition has set out to prove facts *2(1)(a)* and *(b)*, namely, “*that the Respondent has committed adultery and that by reason of the adultery the Petitioner finds it intolerable to live with the Respondent*” and “*that the Respondent has behaved in a way that the Petitioner cannot reasonably be expected to live with the Respondent*”.

To succeed under *section 2(1) (a)* and *(b)*, the Petitioner must prove adultery on the part of the Respondent and the conduct constituting the unreasonable behavior on the part of the Respondent, and the fact that the Petitioner cannot reasonably be expected to live with the Respondent as a result of the bad behavior.

On the fact of adultery alleged by the Petitioner against the Respondent, the Respondent denied the Petitioner’s allegation of adultery on her part. As a result, the Petitioner had a burden to lead sufficient evidence to prove his allegation of adultery on the part of the Respondent. This burden, the Petitioner failed to discharge in the sense that the Petitioner in his evidence repeated the assertions in his pleadings and did not lead cogent evidence to substantiate his allegation of adultery after same was denied by the Respondent. The Petitioner did not go beyond his rhetorical statements as already asserted in his pleadings.

In the case of *Adjetey v. Adjetey [1973] 1 GLR 216 HC*, it was held by Sarkodee J. that:

*“Adultery must be proved to the satisfaction of the Court and even though the evidence need not reach certainty as required in criminal proceedings it must carry a high degree of probability. Direct evidence of adultery is rare. In nearly every case the fact of adultery is inferred from circumstances which by fair and necessary inference would lead to that conclusion. There must be proof of disposition and opportunity for committing adultery, but the conjunction of strong inclination with evidence of opportunity would not lead to an irrebuttable presumption that adultery has been committed, and likewise the Court is not bound to infer adultery from evidence of opportunity alone.”*

Applying the above authority to the instant case, the Petitioner had the onus to prove his allegation of adultery on the part of the Respondent, to the satisfaction of the Court which assertion he failed to prove. Considering that the Petitioner could not prove his allegation of adultery after it was denied by the Respondent, I find from the entire evidence on record that the Respondent did not commit adultery and dismiss the said allegation of adultery.

The Matrimonial Causes Act does not enumerate conducts that would amount to unreasonable behaviour to warrant the dissolution of a marriage. From decided cases, conducts such as assault of a partner, threat of death, writing damaging letters to a spouse’s employers, causing the arrest of a spouse without just cause, denial of a partner of sex, failing to cooperate in finding a solution to the couple’s inability to have children and verbal abuse have all been held to constitute unreasonable behaviour which coupled with the inability of the parties to reconcile can lead to a dissolution of the marriage. Thus, in case of Happee v. Happee & Anor [1974] 2 GLR 186, where the Respondent wife reported her husband to his employers to have stolen some properties belonging to his company, wrote to a freemasons lodge that the Petitioner was unfit to be a member, smashed the windscreen of the Petitioner’s car for which she was convicted, and caused his arrest by policemen when he was on board an airplane at the Kotoka International



Airport which all turned out to be baseless, the Court held in holding 2 that, *“the conduct of the Respondent as disclosed by the evidence fell very far short of that of a reasonable married woman. The Respondent had behaved in such a way that the Petitioner could not reasonably be expected to live with her. On the evidence the marriage between the Petitioner and the Respondent had broken down beyond reconciliation”*

Here in the instant case, what is the behaviour of the Respondent complained of by the Petitioner?

The Petitioner testified that their marriage has been riddled with numerous quarrels thus there has hardly been any peace in the matrimonial home, such that during the first week of marriage, the Respondent requested for divorce as she claimed she would no longer be married. That subsequent and several meetings called for them to be reconciled due to the erratic behaviour of the Respondent, failed. That after the birth of their first issue, the Respondent kept intimating for divorce and threatened several times to leave the marriage whilst keeping her mother abreast with every misunderstanding, perceived or real, that occurred in the marriage. That the Respondent traveled to Kuwait and upon her return resumed saying that she did not want to stay married again. That the Respondent left the matrimonial home unceremoniously. That several attempts were made through family members to reach the Respondent and enquire about the whereabouts of the issue especially and the Respondent, but to no avail. That all the family members indicated to him that they were unaware of the whereabouts of the Respondent; and a report was made to the Domestic Violence and Victim Support Unit (DOVVSU), Gallaway, Koforidua for assistance in reaching the Respondent and the issue. He further stated that it was after five years that he was able to reach her to speak to his daughter through her aunt. That the Bishop of the Church they attended, made it possible for them to meet to attempt reconciliation at which meeting they agreed to end the marriage but would avail themselves for mediation first. However, several attempts to get the Respondent to attend

mediation have failed. That they have not lived as man and wife for five years now and that sexual intimacy has long ceased between them, and that the Respondent had deserted the marriage celebrated between them.

The Respondent on her part, testified that the marriage has broken down due to the unreasonable behavior of the Petitioner and his adulterous life who subjected her to severe economic hardship, stress and embarrassment throughout the entire marriage. That the Petitioner's attitude towards her changed three days after their marriage when they had already moved to live together in her mother's residence at House Number HNOB 1034 Awoshie. According to the Respondent from this period, the Petitioner abandoned his responsibilities and ignored to take care of the children and herself. That in 2015, due to the hardship she was going through, she secured a visa to enable her travel outside Ghana to Kuwait to seek greener pastures so that she could take care of herself with her only child which she informed Petitioner of her travel where he reconciled with her and even escorted her to the airport on the day she set off from Ghana. That when she settled in Kuwait, she got a job, and she was in constant communication with the Petitioner, that occasionally she sent him money for himself and also for the upkeep of the children. That everything went so well between the Petitioner and herself until she returned from Kuwait to Ghana in March 2018 to live together with him and the children in Koforidua.

According to the Respondent, Petitioner later approached her that he is getting support from a wealthy woman to travel abroad which woman she later realized that Petitioner was in a sexual relationship with, as his 'sugar mummy'. That she also took steps to reach a family member in Germany to also assist her with supporting documents to also secure a visa to travel to Germany since the living conditions over there is better than Kuwait. That Petitioner tapped on her phone and accused her of cheating with the family

members which issues were brought before family members to resolve about each of them getting outsiders to help them travel abroad.

That Petitioner's attitude towards her changed thereon and he started treating her poorly by coming home late, staying away from home for days, he stopped all communications towards her, there were also no sexual intimacy between them but he only catered for the needs of the children excluding hers. That due to the unreasonable attitude of Petitioner, she became so depressed and ultimately had a miscarriage as she was pregnant. That she was rushed to the Koforidua Central Hospital, had a surgery and was admitted for four days.

The Respondent further gave evidence that soon as she was discharged from the Koforidua Central Hospital, she returned to their matrimonial home only to see that personal belongings of a woman were in the home with some even in the washing machine. That she confronted the Petitioner and he admitted that those items are for his 'sugar mummy' and that he is only washing them for her because the woman was unwell and he is doing all that so that the woman can finance his travel abroad. That family members of both parties met again on their marital issues but could not resolve same as it turned out Petitioners' family did not see anything wrong with his adulterous and changed behaviour towards her to the extent that she had a miscarriage. That by June 2018, she could no longer take the emotional traumas meted out to her by Petitioner anymore and she packed some of her belongings and left to Koforidua and relocated to Awoshie in Accra in a rented apartment. That from the period she left Petitioner in 2018 to date, she did not hear from him until May 2023 when she was served with legal documents from DOVVSU at Ministries, Accra from the Petitioner seeking amongst others, custody of their child. That from June 2018 to date, which is about five years, Petitioner and herself have lived separately from each other. That she is now traumatized by all the events in the marriage, and it has become fairly evident that the Petitioner is no

longer interested in the marriage or changing his attitude towards her in any way or form. That Petitioner is a man of ungoverned temper who habitually uses abusive, violent and obscene language and threats on her, and she desperately needs the Court intervention to free herself from the marital bondage and agonies that he has subjected her to, throughout their marriage. That attempts at reconciliation of the parties by friends, elders of the family and marriage counselors from their church have not been successful. She concluded that the Petitioner has behaved in such a way that she cannot reasonably live with him. That he has caused her so much humiliation, embarrassment, depression, anxiety, distress, mental and emotional torture.

From the evidence led by the parties, the Court finds as a fact that the parties, after the marriage have not lived peacefully. The evidence on record indicates that both parties have highly suspected each other of infidelity and this made them incompatible. From the evidence on record both parties were seeking help from third parties to be able travel outside the country to seek greener pastures and this led to the mistrust for each other. Unfortunately their families and others mentioned could not assist them to reconcile.

The Petitioner did not deny the Respondent's assertion in her answer that he brought a lady to stay with him. The Petitioner did not file any reply to the answer to the petition to deny this assertion by the Respondent, neither was the Respondent cross examined on this assertion by the Petitioner when the Respondent told the Court in her evidence that the Petitioner admitted that the personal belongings of a woman in their home were for his sugar mummy and that he was only washing them for her because she was unwell and he was also doing all that so that the woman can finance his travel abroad.

In *Fori v. Ayirebi* [1966] GLR 627, the Supreme Court held that:

*“When a party had made an averment and that averment was not denied, no issue was joined and no evidence need be led on that averment. Similarly, when a party had given evidence of a material fact and was not cross-examined upon, he need not call further evidence of that fact”.*

This principle was further enunciated by Ansah JSC in **Takoradi Flour Mills v. Samir Faris [2005 -2006] SCGLR 882** when he referred to the case of **Tutu v. Gogo, Civil Appeal No. 25/07, dated 28<sup>th</sup> April 1969, Court of Appeal unreported; digested in 1969 CC76** where Ollenu JA (as he then was) stated thus:

*“In law, where evidence is led by a party and that evidence is not challenged by his opponent in cross-examination and the opponent did not tender evidence to the contrary, the facts deposed to in the evidence are deemed to have been admitted by the party against whom it is led, and must be accepted by the Court.”*

Also, in the case of **Quaigraine v. Adams [1981] GLR 599 CA**, it was held that where a party makes an averment and his opponent fails to cross-examine on it, the opponent will be deemed to have acknowledged, *sub silentio*, that averment by the failure to cross-examine.

Applying the above authorities to the instant case, the Petitioner is deemed to have acknowledged those facts as asserted by the Respondent and the Court hereby accepts same.

Flowing from the above, it can be safely concluded that it is the Petitioner’s behavior that made the Respondent desert the matrimonial home. Consequently, that was a constructive desertion therefore the Petitioner cannot turn around to accuse the Respondent of deserting the matrimonial home when he caused the Respondent to do so by his behaviour in bringing another woman to be with him in their matrimonial home.

No reasonable woman should be called upon to endure such behavior. I therefore find that the Petitioner has behaved in such a way that the Respondent cannot reasonably be expected to live with him.

Having regard to the evidence on record and the fact that the parties have irreconcilable differences and as a result have not lived as husband and wife for over five years now, I find and hold that the marriage between the Petitioner and the Respondent has broken down beyond reconciliation; and same is accordingly dissolved.

*2. Whether or not the Respondent is entitled to an award of maintenance for the child of the marriage.*

Under section 22(2) of the Matrimonial Causes Act, 1971 (Act 367), a Court in any proceedings under the Act, on its own motion or an application by a party, may make an order concerning an award of custody of a child to any person, regulate the right of access of any person to the child, provide for the education and maintenance of the child out of the property or income of either or both of the parties to the marriage.

In the instant case, the Petitioner prayed for an order that Respondent will have custody of the child of the marriage with him having reasonable access to the child. The Respondent also prayed for custody of the child of the marriage to be granted to her. Accordingly custody of the only child of the marriage is not in issue between the parties.

A person entitled to custody of children is also entitled to an award of maintenance from the other party for the upkeep of the children. It is trite learning that it is the responsibility of both parents to cater for their infant children. Section 22(3)(c) of Act 367, which grants

the Courts power to award maintenance and provide for the education of a child out of the income or property of either or both parties, does not enumerate the factors the Court must take into consideration. Section 49 of the Children's Act, 1996 (Act 560), provides some useful guidance on the factors to consider when making an order for the maintenance of a child. The primary consideration is the welfare of the child and the following factors:

- a) The income and wealth of both parents of the child or of the person legally liable to maintain the child.*
- b) Any impairment of the earning capacity of the person who has a duty to maintain the child.*
- c) The financial responsibility of the person with respect to the maintenance of other children.*
- d) The cost of living in the area where the child is resident.*
- e) The rights of the child under this Act, and*
- f) Any other matter which the Family Tribunal considers relevant.*

The evidence before this Court shows that the Petitioner has not been maintaining the only child of marriage consistently. He told the Court under cross examination that to the best of his ability he was taking care of his issue and will continue to take care of his issue.

The Court has carefully considered the affidavit of means filed by the parties herein and having further considered the factors above as provided in the Children's Act, the Court will order the Petitioner to pay an amount of GH¢500.00 as monthly maintenance allowance for the upkeep of the only child of the marriage. The Petitioner shall be fully responsible for the educational and medical expenses of the said child and the Respondent shall provide clothing for the child.

## CONCLUSION

On the totality of the evidence led, I hold that the marriage celebrated between the Petitioner and the Respondent has broken down beyond reconciliation. I accordingly dismiss the petition and grant the Respondent's prayer for dissolution of the ordinance marriage between the parties in the following terms:

1. I hereby grant a decree for the dissolution of the marriage celebrated between the parties on 23<sup>rd</sup> December 2012, at Victory Bible Church International in Accra, thus the marriage is hereby dissolved.
2. The marriage certificate with Certificate No. VBCI/AWO/483/2012 and License No. VBCI/ML/483/2012 is accordingly cancelled.
3. Custody of the only issue of the marriage, Miranda Darley Asare-Kena, aged ten years, is granted to the Respondent with reasonable access to the Petitioner. Reasonable access in the instant case means the Respondent shall release the said child to the Petitioner every other weekend thus two weekends in a month, every other holiday and half of her school vacations.
4. The Petitioner shall pay an amount of Five Hundred Ghana Cedis (GH¢500.00) as monthly maintenance allowance for the said child and shall be fully responsible for the educational and medical expenses of the child. The monthly maintenance allowance shall be paid on the 2<sup>nd</sup> day of each month effective this month December 2023.
5. There will be no order as to financial provision to either party to the marriage considering the circumstances of the parties.



Counsel for Respondent on the issue of cost, is praying for a cost of GH¢25,000.00 against the petitioner.

Petitioner: I plead with the court for a considerable amount of the cost because I am currently in so much debt and financially unstable. I plead with the court for a cost of GH¢5,000.00

Having listened to Counsel for the Respondent on the issue of cost and the Petitioner's response to same; and having regard to the processes filed in the instant petition, the conduct of the parties and their lawyers during the proceedings; and in light of *Order 74 rule 2 of C.I. 47*, I do hereby award a cost of GH¢5,000.00 against Petitioner the in favour of the Respondent.

**[SGD.]**

**H/H AKOSUA A. ADJEPONG (MRS)  
(CIRCUIT COURT JUDGE)**