IN THE DISTRICT COURT

AGONA SWEDRU - A.D. 2023

BEFORE HIS HONOUR ISAAC APEATU

Civil Suit No A4/09/2023

6th January, 2023

AGNES ODOOM … Petitioner

VERSUS

JOE ASIAMAH … Respondent

JUDGMENT

The petition was filed by the petitioner-wife of the marriage for dissolution of marriage. It was filed on 6th July, 2022 and same served on the respondent. The petition recites that the marriage between the parties was celebrated on the 20th day of January 2018 at the District Court, Ajumako. There is one issue in the marriage. The petitioner claims that the marriage has broken down beyond reconciliation. She thus filed this suit seeking from the court the following reliefs:

1. That the ordinance marriage between both parties be dissolved.
2. Custody of the son by name Nana Kofi Yeboah must be given to the petitioner with reasonable access to the respondent…
3. An order directing the respondent to maintain the 3 year old son

4. An order of the court for alimony of GH¢20,000.

In accordance with Order 18 rule 1(3) of the District Court rules, C.I. 59, the Petitioner attached the grounds of her petition for dissolution of the marriage to her petition. The Petitioner deposed in her petition that the marriage between her and the Respondent has broken down beyond reconciliation. She averred that the respondent always maltreat and assault her without any tangible reasons whenever she asked for housekeeping money. She also alleged that the respondent has denied her sex for the past 6 months to the extent that the respondent has chosen to sleep in the hall. That there is lack of communication between them. That the respondent has failed to maintain her and the child. She therefore filed the petition for dissolution of the marriage.

The petition together with attached documents was duly served on the Respondent as mandated by procedure. On receipt of the processes, the respondent filed an answer to the petition and averred denying most the averments made by the petitioner in her petition. He denied the assertion by the petitioner that he has not been maintaining her and the child claiming that he has been maintaining them since they married. He denied the assertion that he has denied the petitioner sex explaining that once he attempted to have sex with the petitioner. She however rejected him saying that he should not touch her body which made him shun sleeping with her. He alleged that the petitioner always failed to wash his cloths and cook so he also failed to communicate with her. He claimed that the petitioner has already sent some bottles of schnapps to his uncle seeking for the dissolution of the marriage.

The general rule of law has always been that the court before whom a matrimonial case is brought was under a statutory and positive duty to inquire so far as it reasonably could, into the charges and counter charges alleged by parties in a divorce suit as this one. But the onus of proof is on the petitioner to prove all allegations made against any

such respondent and where a respondent made a counter allegation, he/she in accordance with section 14 of NRCD 323, bears the onus of proof to establish those allegations. And in discharging the onus on the petitioner, it was immaterial that the respondent had not contested the petition; he/she must prove the charges and, flowing from all the evidence before the court, the court must be satisfied that the marriage had irretrievably broken down. See **Danquah v. Danquah [1979] G.L.R. 371; Donkor v Donkor [1982-83] GLR 1158**.

The onus therefore, of producing evidence that the marriage has broken down beyond reconciliation, as in all matrimonial causes, is on the party against whom a finding of fact would be made in the absence of further proof i.e. the petitioner: see Section 17(a) and (b) of NRCD 323. In the task of proving breakdown of the marriage, it is important to underscore the authority that matters that are capable of proof must be proved by producing sufficient evidence so that, on all the evidence, a reasonable mind could conclude that the existence of a fact is more reasonable than its non-existence. This is the requirement of the law on evidence under sections 10 (1) and (2) and 11(1) and (4) of the Evidence Act, 1975 (NRCD 323).

The burden of producing evidence has thus been defined in Section 11 (1) of NRCD 323 as follows;

> "11 (1) For the purpose of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party".

And it bears stating that the burden of proof is also not static but could shift from party to party at various stages of the trial depending on the obligation that is put on that party on an issue. This provision on the shifting of the burden of proof is contained in Section 14 of NRCD 323 as follows:

> "14 Except as otherwise provided by law, unless it is shifted, a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that party is asserting".

In accordance with the general rule of procedure as stated above, the Petitioner had the burden of proving all the averments she made against the respondent on the standard of preponderance of probabilities. If she succeeds in establishing her averments by evidence, the onus will then shift to the Respondent to lead some evidence to rebut same.

As is trite knowledge, the Matrimonial Causes Act, 1971 (Act 367) regulates divorces and other matrimonial causes in this country. Under section 1(2) of Act 367, a Court shall not grant a petition for divorce unless the marriage is proven to have broken down beyond reconciliation. As I have established above, the onus of such proof is on the party who alleges that the marriage has broken down beyond reconciliation. But under Section 2(1) of Act 367, for the purposes of showing that the marriage has broken down beyond reconciliation, a petitioner for divorce 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;

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.

It has been held in a line of cases including **Donkor v Donkor [supra]** that the Matrimonial Causes Act, 1971 (Act 367), did not permit spouses married under the Marriage Ordinance, Cap. 127 (1951 Rev.), to come to court and pray for the dissolution of their marriage just for the asking. And that the petitioner in such a case for dissolution of marriage must first satisfy the court of any one or more of those facts set out in section 2 (1) of the Act (above), not only by pleading them but also by proof for the purpose of showing that the marriage had broken down beyond reconciliation. The court explained further that Section 2 (3) of the Act, provided that even if the court found the existence of one or more of those facts it should not grant a petition for divorce unless it was satisfied that the marriage had broken down beyond reconciliation.

What then did the petitioner do to prove that the marriage has broken down beyond reconciliation? The Petitioner gave evidence in a bid to prove break down of the marriage. She however did not call any witnesses in proof of her case. The nub of petitioner's case is to the effect that she got married to the respondent on 20th January, 2018. That the respondent was fond of drinking and on such occasions, he would be brought home on a motor bike drunk. That on one such occasion, he came home late and was drunk. As soon as the respondent got home, he got a call and decided to go out again. That at the time she was pregnant. So, she decided to hold onto the respondent to prevent him from going out. But the respondent hit her. That she summoned the respondent before CHRAJ, Ajumako but the respondent failed to appear. She then

summoned him before DOVVSU but he failed again to appear. That he was arrested. The matter was settled. However, he kept assaulting her.

She alleged that the man has taken to drinking and is brought home drunk on a motor bike. Anytime she decided to speak to him about his drinking behaviour, he would assault her. Also, he was fond of committing adultery with many women. But he would assault her anytime she complained about it. She said she once went to visit him at Assin Fosu where he was and met him in the room with his former girlfriend. When she complained, it turned into a fight. That respondent came home drunk and wanted to have sex with her. When she refused, he left the bedroom and slept in the hall. That he has not maintained her for a whole year.

During the cross examination that followed, the respondent denied assaulting the petitioner. He further denied failing to maintain her and rather insisted that it was the petitioner who denied him sec when she was angry.

After the petitioner closed her case, the Respondent was called to give evidence in accordance with procedure. Respondent gave evidence but called no witnesses in proof of his claims. The nub of respondent's case is that there were issues with the marriage right from the onset. That anytime petitioner heard of any issue about him, she would resort to cursing him and would go to the woman with whom he had the issue and fight with her. She also attacked him without telling him what he had done. That he once attended a funeral and while there someone came over to tell her that he was flirting with certain women. That when he came home, she attacked him with a bottle but he managed to disarm her. That he often got angry and on one such occasion, he assaulted her. She refused to talk to him and as a result, she grew lean. He pointed it out to her but she made a complainant at DOVVSU where he was arrested. That when he was bailed, they moved to Agona Swedru. In their new neighborhood, the petitioner accused him of

flirting with a certain woman. Because of that, he moved from there to stay at Essiam for about a year. When they came together again, there was another accusation against him and it turned into a fight in which he pushed her and the petitioner made a report to the police and he was arrested.

Having established the cases and responses put before the court by the parties, my next task in this judgment is to find out the issue(s) emanating from the cases put before the court in order to unraveling this case. Upon a careful scrutiny of the pleadings, I am of the opinion that the only issue which needs to be determined in this case is whether or not the marriage between the parties has broken down beyond reconciliation. But as has been stated above, to arrive at this finding, the court ought to determine whether any of the grounds as above stated were relied on and proved. I shall therefore determine whether the petitioner's assertions fit into any of the grounds stated under section 2(1) (a) to (f) of Act 367. If not, I shall find out if any of respondent's assertions against the petitioner were also proved. This is because, the law is settled that in a petition for divorce, any other established fact has to support a finding that the marriage has broken down beyond reconciliation. And any of the grounds upon which divorce is founded as laid down under section 2(1) of Act 367 must only go to prove breakdown beyond reconciliation. So was the evidence led by the petitioner able to establish the omnibus ground i.e. that the marriage has broken down beyond reconciliation?

From the petition and the evidence on record, the petitioner's main ground based on which she seeks a dissolution of this marriage is mixed up and not well delineated. Even though she did mention some of the facts stated under section 2(1) of Act 367 as those she relies on to prove breakdown of the marriage, it took a bit of scrutiny to find them. She nevertheless appears to have grounded her petition on the fact of unreasonable behaviour, adultery and their lack of compatibility leading to irreconcilable differences. On the first ground of unreasonable behaviour, the petitioner alleged that the

respondent assaulted her in the marriage anytime there was a misunderstanding between them. She gave instances that the respondent assaulted her in her testimony before the court. In my evaluation, I find that the parties got married in January 2018. They have been married for just over four years and have a child. She alleges that the respondent assaulted her during the marriage. In her statements, she alleged that during two of such assaults on her, she made a complaint to the police and the respondent was arrested. She also alleged that the respondent took to drinking alcohole and always came home drunk and sometimes, was brought home on a motor bike drunk.

Now, even though the petitioner alleged assault by the respondent on her which required her to prove those allegations, I think that the respondent in some way admitted that he did assault the petitioner in the marriage leading to his persistent arrests by the police. There is also the issue of adultery. The petitioner alleged that the respondent committed adultery with numerous women and would go out and come home late. These allegations were denied by the respondent.

Be that as it may, there is an abundance of evidence to show that the parties did not gel well as married couples. All was not well in the marriage. In the evidence, the respondent asserted that there were issues in the marriage. As I have stated above, the petitioner alleged persistent assaults on her person by the respondent. That she had to make complaints to the police leading to the arrest of the respondent. However, when he was bailed from police custody, another assault was made. The respondent attempted a veiled denial of the allegation that he assaulted the petitioner during the marriage.

As I stated above, the petitioner grounded her petition for divorce in part, on the fact of unreasonable behaviour by the respondent under section 2(1) (b) of Act 367. In the case of **Knudsen v Knudsen [1976]1 GLR 204**, the Court in assessing a petition based on unreasonable behavior stated that the test to be applied in determining whether a

particular petitioner could or could not reasonably be expected to live with the particular respondent was an objective one, and not a subjective assessment of the conduct and the reaction of the petitioner. In assessing such conduct, the court had to take into account the character, personality, disposition and behaviour of the petitioner as well as the behaviour of the respondent as alleged and established in the evidence. It went on to state that the conduct might consist of one act if of sufficient gravity or of a persistent course of conduct or series of acts of differing kinds, none of which by itself might be sufficient but the cumulative effect of all taken together would be so.

In this case, the petitioner alleged that the respondent assaulted her in the marriage. She gave details and instances of the assault. She also alleged that the respondent was fond of drinking alcohol and on one occasion, when he came home drunk and attempted to have sex with her, she refused leading to the respondent taking offence and abandoning the bedroom for the hall. From the tenor of his cross-examination, the respondent appears to admit portions of the allegation that he assaulted the petitioner. He however attempted to justify the assaults on her. However justified he thinks he was, I find that the habit of assault of a woman by the husband in a marriage relationship should be decried in no uncertain terms. It needs to be condemned with all the force it deserves. Restraint is needed in any relationship and where one party fails to exercise it and resorts to abuse of the other, no court ought to lend its support to it. The respondent's assault on the petitioner is one that cannot be tolerated under any circumstance. And where there is proof of assault of a party to a marriage, the court ought to be cautious in making any order that has the effect of perpetuating the assault. In this case, I think that the petitioner has led sufficient evidence in proof of her claim that the respondent assaulted her in the marriage and that is a ground upon which the court can grant dissolution of the marriage.

Besides the fact that the respondent assaulted the petitioner and behaved unreasonably towards her, what clearly appears from the facts in evidence is that there are irreconcilable differences that exist between the parties to this marriage to such an extent that it is more likely than not that they cannot continue to live as husband and wife. This is a young marriage. They have been married for just over 4 years. However, as young as it is, I find that there are real differences between the parties which from the pieces of evidence, appear to have started right from the onset. These differences which I find from the evidence, has led to persistent quarrels and fighting between them leading to complaints to the police leading to the arrest of the respondent on several occasions. It is important to note that the respondent admitted the allegation of quarrelling and fighting stating that they were issues right from the onset of the marriage.

As I have already stated above, a party could ground a petition for dissolution of marriage by proving the fact that there exist irreconcilable differences between them and that the parties to the marriage have, after diligent effort, been unable to reconcile their differences as provided in section 2 (1) (f) of the Act. It was held in the case of **Mensah v Mensah [1972] 2 GLR 198** that in order to establish this head or guide line three things are requisite:

(a) There should exist differences between the parties.
(b) They should have made diligent efforts to reconcile these differences,
(c) They should have been unable to effect the reconciliation of the differences.

It was further held by the court that section 2 (1) (f) of the Act did not require that there should be disputes between the parties; it only required that there should be differences. It explained that a dispute is a difference but not all differences are disputes and that the inability of a spouse to have an issue is not a difference even though there may be a difference between the spouses as to how to remedy the situation. The court went on to state that the differences must be between the parties and that a litigation between the

wife's family and the husband's family would not be a difference between the wife and the husband, although it may lead to one. The fact that the husband belonged to the Justice Party while the wife supported the Progress Party did not mean that there were irreconcilable differences. It again stated that the differences should be such as would make it impossible for the marriage to subsist.

It should be remembered, that evidence of the differences is being proffered to show the breakdown of the marriage. Differences which cannot possibly affect the subsistence of the marriage are not sufficient. Evidence of petty quarrels and minor bickering which are but evidence of that frailty which all humanity is heir to is not sufficient. The differences must be real and not imaginary; they should be so deep as to make it impossible for the parties to continue a normal marital relationship with each other.

In this case, I find that there are serious differences between the parties in the marriage. I find from the evidence that the parties have been at each other's throats for long periods in the marriage. There is the general admission that the atmosphere that existed in the home was not too cozy. They fought a lot. The respondent had to relocate to Essiam where he claims he stayed for about a year due to the persistent fighting between them. In such a situation of chaos and rancor, I do not think that the court ought to attempt to reconcile what cannot be reconciled. It is not worth the effort to want to reconcile these parties as husband and wife. There is no love between the two. I think that the parties should not be condemned into going back into the marriage. It will certainly not work again. Any attempt to want to reconcile them will be to promoting further quarrels and animosity between the two. Looking at the situation between the parties, I cannot make a decree for them to go and stay under one roof. To do that will be turning my back on reality. It is no wonder that both parties are living in their separate stations without any form of communication. I find also that there have been several efforts by the families of the parties to have their marriage reconciled but have all proven futile.

The upshot of the above is that the differences between the Respondent and the petitioner have been widened the more that the parties to the marriage have, after diligent effort, been unable to reconcile their differences. And that is a valid ground to grant their request for dissolution of the marriage. I have read carefully the evidence as presented by the parties. I am of the firm conviction that the Petitioner was able to prove breakdown of the marriage based on section 2(1) (f) of Act 367. There are irreconcilable differences between the respondent and the petitioner which militate against any thought of reconciling the two. On the totality of the evidence on record, I am satisfied that the marriage has broken down beyond reconciliation. I will therefore grant the prayer for dissolution on account of the petitioner and pronounce a dissolution of the marriage between the respondent and the petitioner. The marriage between the parties is hereby dissolved.

There are no joint properties between the parties herein. But there is one child between the parties. It appears that the child is staying with the petitioner. Petitioner prayed for custody of the child to be granted to her. In the interest of the child, I think he should continue to stay with the petitioner being the mother so that she can devote motherly time to him. Custody of the said Nana Kofi Yeboah is granted to the petitioner with reasonable access to the respondent. The respondent shall have access to the child by paying him visits during two weekends in a month and having the child spend the vacations with him or on such days as the parties may agree.

The court ordered the respondent to maintain the child with an amount of GH¢300 each month pending the final determination of the matter. It is ordered that the petitioner continues to maintain the child of the marriage with GH¢300 each month as he has been doing.

The petitioner claimed in her petition for the payment of a lump sum of GH¢20,000 by the respondent as alimony. The legal framework for the payment of lump sum to a spouse upon dissolution of marriage is provided for in the Matrimonial Causes Act, 1971 (Act 367). Section 19 of the Act reads as follows:

19. Financial provision for spouse

> The Court may, whenever it thinks just and equitable, award maintenance pending suit or financial provision to either party to the marriage, but an order for maintenance pending suit or financial provision shall not be made until the Court has considered the standard of living of the parties and their circumstances.

When read together with section 20 of the same Act, a court may award financial provision for either party to the suit upon consideration of these conditions:

a. The standard of living of the parties
b. The circumstances of the parties
c. Just and equitable principles

The Act uses the term "financial provision". This expression "financial provision" is defined in section 43 to include "Maintenance and all other forms of financial support to be provided by one spouse to the other or to any child of the household." So, even though in practice, various terms such as maintenance, alimony, lump sum etc. are used, these are mere exercise in semantics. In fact, there is no distinction between maintenance, alimony and periodical or lump sum payment. They are all described as 'financial provision' in the Act.

Alimony or lump sum is thus to be understood to be a legal obligation on a person to provide financial support to their spouse before or after marital separation or divorce. Alimony is not child support where after divorce one party is required to contribute to the support of a child of the marriage. With the modern liberalized divorce laws such as ours, alimony has come to be linked to the concept of fault in the divorce. Thus, alimony to a wife was paid because it was assumed that the marriage, and the wife's right to

support, would have continued but for the misconduct or misbehavior of the husband. On the reverse, if the wife committed the misconduct, she was considered to have forfeited any claim to ongoing support. The misconduct of one of the parties to the marriage was therefore a factor in determining alimony in divorces. However, it has been held that even though a wife may have, by her conduct contributed to the breakdown of the marriage, that should not be a ground to deprive her of what is due her. In the case of **Wachtel v Wachtel [1973] Fam. 72 at 90, CA**, the English Court of Appeal went to great lengths to clarify the issue. Lord Denning stated thus:

> "It has been suggested that there should be a 'discount' or 'reduction' in what the wife is to receive because of her supposed misconduct, guilt or blame (whatever word is used). We cannot accept this argument. In the vast majority of cases it is repugnant to the principles underlying the new legislation, and in particular the Act of 1969. There will be many cases in which a wife (though once considered guilty or blameworthy) will have cared for the home and looked after the family for very many years. Is she to be deprived of the benefit otherwise to be accorded to her…because she may share responsibility for the breakdown with her husband? There will no doubt be a residue of cases where the conduct of one of the parties is in the judge's words . . . 'both obvious and gross,' so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered."

It is also worthy of note that there is no gender bias in the award of alimony as males may be granted alimony after divorces. That is why under the Act the expression "either party to the marriage" is used to refer to a husband or a wife.

So, is the petitioner entitled to the sum of GH¢20,000 which she claims as alimony in her petition? I have thoroughly considered the circumstances of this case. Alimony is said to

be in the nature of compensation for injury to a person who claims it. However, as I stated above, it cannot be totally said that the respondent is in every way to blame for the collapse of the marriage. I have established that even though he did not conduct himself well in the marriage, there were nonetheless irreconcilable differences between them which I think accounts primarily for the early breakdown of the marriage. I find that the respondent committed certain misconducts against the petitioner. However, that does not totally account for the breakdown of the marriage.

I have taken account of the fact that the parties lived as husband and wife for just under four years. From the petition, the parties got married in January 2018. During the short spell of this marriage, the petitioner has given birth to one child. I take cognizance of the toil, pain and stress associated with child bearing. It cannot be overemphasized. More so, there was the ever-present risk to her life when she conceived. Even though I do not know how old the petitioner is, looking at her, she is young. I do not think that she may not get another man to marry. She may marry if she desires to. Though the prospects of her getting another man to marry have not been diminished in any way, I still think that she needs to be compensated for her time, effort, sweat and sacrifices made in this marriage. Having given birth to one child, and taking account of the entirety of the case, I shall award alimony of Seven thousand Ghana Cedis (GH¢7,000.00) to the petitioner.

In the result, and based on the available evidence assessed on a balance of probabilities and the relevant law, the Petitioner succeeds in terms as follows:

i. The marriage between the Petitioner and the Respondent contracted under the Marriages Act, 1884-1985, Cap 127 is dissolved and the marriage certificate cancelled accordingly.
ii. The respondent shall pay alimony of GH¢7,000.00 to the petitioner for the sacrifices and services rendered to him as a wife and her time spent in the marriage.

iii. Custody of the child, named as Nana Kofi Yeboah is granted to the petitioner with reasonable access to the respondent.

Given the circumstances under which the parties lived in the marriage and how the marriage came to an end as is borne out by the evidence on record, I am not inclined to make any order for cost. Parties shall bear their own costs.

HIS HONOUR ISAAC APEATU
DISTRICT MAGISTRATE