

IN THE DISTRICT COURT
AGONA SWEDRU - A.D. 2023
BEFORE HIS HONOUR ISAAC APEATU

Civil Suit No A4/22/2023

5th April, 2023

EUNICE ESSEL

...

Petitioner

VERSUS

OBED KWAGYAH DANQUAH

...

Respondent

JUDGMENT

The marriage between the parties was celebrated on the 3rd day of November, 2018 at the St. Anthony Catholic Church, Agona Swedru. After the marriage, the couple cohabited at Cape Coast. There is one issue out of their marriage named as Ewurabena Bentsiwah Danquah. Petitioner alleges that the marriage has broken down beyond reconciliation and has therefore filed this petition to have the marriage dissolved.

In accordance with the rules of this court, specifically, Order 18 rule 1(3) of the District Court rules, C.I. 59, the Petitioner filed her petition stating the grounds on which she based her claim for dissolution of the marriage. The Petitioner averred in proof of her

assertion that the marriage between her and the respondent has broken down beyond reconciliation to the effect that the Respondent has behaved in such a way that the Petitioner cannot reasonably expected to live with him and has caused the Petitioner much anxiety, distress and embarrassment. She gave the particulars of unreasonable behaviour as follows: That the Respondent cultivated the habit of nurturing problems in the marriage and assaulted her even in the presence of peacemakers and relatives somewhere in 2021. That the Respondent is violent and takes offensive instrument when he thinks he is not happy with her (Petitioner). That the Respondent severally and incessantly engages her excessive sexual intercourse against her consent. That the Respondent exchanges his naked pictures with other ladies on the internet. That the Respondent casts insults and aspersions on her both in private and in public without any provocation. That the Respondent has declined to maintain the marriage even at the instance of innocuous request from her (Petitioner). That the Respondent left the matrimonial home since July, 2021 and lives with one Bernice Aboagye at Swedru which the Respondent is currently living with same at Winneba. That she (Petitioner) has ceased to recognize the marriage between the parties as subsisting and has no intention of returning to the Respondent.

She averred further that the Respondent has made it known to her personally that he has lost all interest in the marriage and wants divorce. That after diligent efforts between the parties, family members and mutual friends the parties have been unable to reconcile their differences.

She therefore prayed for the following reliefs:

- i. That the marriage celebrated between the parties be dissolved.
- ii. That the Petitioner be granted custody of the child with reasonable access to the Respondent.

- iii. That the respondent be ordered to maintain the child GH¢500 per month.
- iv. That the Respondent be ordered to pay hospital bills and school fees, educational expenses of the child.

The petition together with all attached documents was duly served on the Respondent in accordance with procedure. On receipt of the processes, the respondent filed an Answer to the petition and admitted that the marriage has broken down beyond reconciliation. He however blamed the breakdown of the marriage as being due to Petitioner's unreasonable behaviour towards the Respondent. He particularised the unreasonable behaviour and stated that the Petitioner persistently and unjustifiably blamed him for causing the closure of their shop, which in fact was caused by Petitioner's inability to pay the shop attendant/keeper when Respondent relocated to live with his parents at Agona Swedru to seek medical treatment. He further asserted that Petitioner had on several occasions told him (Respondent) that she was no more interested in the marriage and wanted a divorce despite attempts by their parents and a Roman Catholic Father to reconcile them. That the Petitioner had for several occasions unjustifiably accused him of having affair with other women in spite of lack of proof and Respondent's denial of such accusations. That the Petitioner has for the past three years changed the locks to her rooms in Cape Coast making it impossible for him to get access to the rooms and or to lodge with the Petitioner whenever he visited her at Cape Coast as a result of which the Respondent has stopped visiting her and has relocated to her present residence/duty post. That the Petitioner has for more than two (2) years denied him sex and has prevented him from visiting her but rather entertains other men who sleep over in her room to the knowledge of their child. That though he maintains the child of the marriage by sending money to the Petitioner through mobile money

transfers, the Petitioner persistently bears false accusations against him that he does not maintain the child.

That due to Petitioner's unreasonable behaviour, he has stopped maintaining the Petitioner but maintains the child of the marriage. That it is rather the Petitioner who is in serious relationship with another man which is known to other occupants of the flats at Cape Coast where the Petitioner lives and makes the allegation and seeks the divorce as a cover of her adulterous acts. That he was living with the Petitioner at Cape Coast and was running his shop where he used to sell sports wears till July 2021 or thereabout when he got sick and moved to Aboso near Agona Swedru to live with his mother for medication. That he moved to Winneba when he secured his current job to live in a duty post provided by his employers and that he has never lived with any woman at Swedru or Winneba. That due to the Petitioner's unreasonable behaviour, the parties have become incompatible and cannot therefore be expected to live as husband and wife. That he has been telling the Petitioner he has lost interest in the marriage in answer to Petitioner's conduct of constantly telling him that she has fallen out of love for him and is therefore unwilling to continue with the marriage. That both parties have not supported efforts to reconcile their differences because both of them have fallen out of love and are unwilling to continue with the marriage.

Respondent then cross-petitioned for the following reliefs:

- i. That the marriage between the parties be dissolved.
- ii. That custody of the child of the marriage be made to the Petitioner and Respondent be granted reasonable access.
- iii. That both parties be ordered to maintain the child and bear the cost of her education and medical expenses.
- iv. That each party be made to bear the cost of his/her litigation.

The cases of the parties laid bare, I move to consider which of the parties the burden of proof lay in this case? It is a general rule of law that the court 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 of a particular fact, as in civil cases, is on the party against whom a finding of fact would be made in the absence of further proof: see Section 17(a) and (b) of NRCD 323. The authorities are also in harmony 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 chipping in 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”.

Thus, in accordance with the general rules of procedure and the rules of evidence, the Petitioner had the burden of proving all the averments she made against the respondent on a 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 failing which a ruling shall be made against him on that particular issue.

Petitions for dissolution of marriage in this country are governed by the Matrimonial Causes Act, 1971 (Act 367). Section 1(2) of Act 367 stipulates that a Court shall not grant a petition for divorce unless the marriage is proven to have broken down beyond reconciliation. And 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 bears reemphasizing that the Matrimonial Causes Act (*supra*) does 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. There is a requirement for a petitioner in such a case for dissolution of marriage to 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. This has been the principle laid down in a line of cases including **Donkor v Donkor** [*supra*]. The court in the Donkor v Donkor case 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.

I have stated briefly the law on dissolution of marriages above. The law requires that the petitioner leads evidence to prove breakdown of the marriage. Now, the question is, what 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 whenever there was a misunderstanding between

them the respondent would assault her. That he slaps her anyhow and on one occasion he slapped her in the presence of her pastor who had attempted to settle their differences. That's the respondent is flirting with other women and does not respect her. That the respondent failed to maintain her and the children and that anytime she asked for money, he took offence. That the respondent is presently staying with another woman.

Respondent was called to give evidence after the petitioner closed her case in accordance with procedure. He gave evidence on his own behalf but did not call any witnesses. The respondent stated to the effect that he has lost interest in the marriage and prayed that the marriage be dissolved.

In the cross examination that followed, there respondent admitted that he is gainfully employed and that he was in a position to maintain the child.

Having stated the various cases presented by the parties, what are the issues that the court has tabled for resolution in this case? Considering as I stated above that the sole ground for the dissolution of a marriage under the ordinance is that the marriage has broken down beyond reconciliation, I think that the singular issue which call for determination in this case is whether or not the marriage between the parties has broken down beyond reconciliation. I shall in finding proof of this singular issue venture to determine whether the petitioner's assertion that the respondent has committed adultery was made out. If not, I shall find out if the respondent made any assertions against her and if yes, if any of respondent's assertions against the petitioner were also proved.

As an addendum to the law already stated above, the law has been 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 in proof of her assertions able to establish the omnibus ground?

From the petition and the evidence led by the petitioner on record, the petitioner's main ground based on which she seeks a dissolution of this marriage appears to be that the respondent has committed adultery. I shall evaluate the evidence to find out if the allegation made was proved in the evidence. It will be recalled that the Petitioner had stated that after their marriage, they lived in Cape Coast. That due to the unreasonable behaviour of the respondent, there were misunderstandings between them. And that the Respondent left the matrimonial home since July, 2021 and went to live with one Bernice Aboagye at Swedru. That the Respondent is currently living with same woman at Winneba. It bears noting that these are the facts based on which the petitioner sought to prove her allegation of adultery. On its face, these facts amount to adultery which is a valid ground to seek dissolution of the marriage.

In his answer to the allegations, the respondent did not deny that he had committed adultery by taking another woman with whom he cohabits. He readily admitted the allegations made against him by the petitioner. Adultery has been defined as sexual intercourse between two persons of whom one or both are married but who are not married to each other. See **Bromley, Family Law (6th ed.), p. 195**. Adultery is thus a voluntary sexual intercourse of a married person with one of the opposite sex other than his/her spouse. The adulterous act must itself be voluntary. Consequently, if a married woman is raped or her consent to the intercourse was obtained by force or fear,

she does not commit adultery. See **Yarrow v Yarrow [1892] P. 92; Blum v Blum [1963] 107 Sol Jo 512**. The standard of proof is on a balance of the probabilities. But although the evidence need not reach certainty as in criminal cases, it must carry a high degree of probability. As such adultery can be inferred from the circumstances of the case but mere opportunity to commit adultery will not be sufficient to ground adultery. And though direct evidence of adultery is rare, it must be proved to the satisfaction of the court. See the case of **Adjetey v Adjetey [1973] 1 GLR 216**.

In this case, even though the petitioner alleged adultery against the respondent, by his testimony, he admitted it. He evinced no intention to contest that fact in his evidence. The upshot is that the respondent has admitted that he has committed adultery with the said Bernice Aboagye with whom he cohabits while his marriage to the petitioner was pending. In the case of **Quartey v Quartey [1972] 1 GLR 6**, the Court held that a Court may act upon an admission of adultery even though there be no confirmatory proof of it, if the court is satisfied that the evidence as to the admission is trustworthy and if the evidence amounts to clear, distinct and unequivocal admission of adultery. Fortunately, respondent's admission in this case does not admit of any inconsistencies. It was clear enough to be relied on by the court. I hold that the respondent has committed adultery.

I am of the firm conviction that the petitioner was able to prove breakdown of the marriage based on the fact provided in section 2(1) (a) of Act 367 i.e. that of adultery. I am satisfied that the petitioner proved that the respondent has committed adultery. On the totality of the evidence on record, I am satisfied that the marriage has broken down beyond reconciliation. I will therefore grant the petitioner's prayer and pronounce dissolution of the marriage between her and the respondent. The marriage between the parties is hereby dissolved on account of the petitioner.

There is one child of the marriage. Custody of the child is granted to the petitioner with reasonable access to the respondent on two weekends in a month and during such holidays and vacations as the parties may agree. It is thus ordered that the respondent maintains the child with an amount of GH¢500 each month. He shall hence be responsible for the health, educational, shelter and all other needs of the child.

There shall be no order as to cost. Parties to bear their own costs.

HIS HONOUR ISAAC APEATU

DISTRICT MAGISTRATE