IN THE DISTRICT COURT HELD IN THE WESTERN REGION ON WEDNESDAY AT AGONA NKWANTA ON THE 18TH JANUARY 2023 BEFORE HIS WORSHIP SIDNEY BRAIMAH DISTRICT MAGISTRATE

WR/AA/DC/A4/6/22

JENNIFER MENSAH OF AGONA AHANTA	**:::**	**:::**	**PETITIONER**
AND			
FELIX MENSAH OF AGONA AHANTA	**:::**	**:::**	**RESPONDENT**

JUDGMENT

The petitioner herein instituted the present action for dissolution of the ordinance marriage between the parties in compliance to Order 32 rule 2 of the District Court Rules; 2009 [C.I 59]. The undisputed facts in this case are that the parties herein are married under the ordinance marriage on 9th December, 2017 at the Church of Pentecost in Agona Nkwanta with one child and no jointly acquired properties between them. The petitioner did not claim for any financial provision as part of his reliefs.

The petitioner herein is a trader in Agona Nkwanta with the respondent who is a Mason. The parties were residing at respondent's house in Agona Nkwanta after the said marriage. The petitioner contended that marriage between the parties have broken down beyond reconciliation due to the unreasonable behavior of the

respondent and the irreconcilable difference between them. The particulars of the breakdown of the marriage as alleged by petitioner were that respondent has failed to introduce her to his parent and family members on the grounds that he wanted their child to be seven years old before he presented them to his parent. Petitioner again alleged that respondent takes the least opportunity to beat her over the slightest misunderstanding and that the respondent forces himself to have sexual intercourse with her without her consent. The petitioner further contended that due to the afore-stated beatings; she vacated her matrimonial home two years after the marriage. Accordingly; petitioner is praying to the court to dissolve the marriage between the parties and grant custody of their child to her and with access to respondent. Petitioner is also claiming an order of maintenance for Ghc200.00 per month and for the respondent to bear the medical, educational, clothing and other incidental expenses accruing to him as a parent.

Respondent contested the petition by denying that the marriage between the parties is marred by irreconcilable differences. The respondent countered the allegation by petitioner that she does not know his parent and family member as they were present at the wedding apart from his mother who is domicile in Cote' d'voire. Respondent again denied ever subjecting petitioner to beatings or forcing himself on her to engage in sexual intercourse without her consent or neglecting to maintain her as his wife. The respondent also countered the allegation by petitioner by contending that petitioner terminated their pregnancy without notice to him and thereafter she ceased permitting him to have any sexual relations with her. Respondent again submitted that prior to the said abortion; petitioner regularly makes demands before permitting him to have sex with her. Respondent further submitted that all attempts to reconcile them by petitioner's family; the Pastor and the elders of their church failed mainly because petitioner refused to return to their matrimonial home and resolved to

dissolve the marriage between the parties. Respondent prayed to the court to refuse to grant the petition by the petitioner.

On the facts not in dispute; the following issues are for determination:

1. Whether or not the marriage between the parties is broken down beyond reconciliation?
2. Whether or not the respondent is entitled to any financial provision?
3. Whether petitioner is entitled to maintenance of Ghc200.00 per month?
4. Whether or not petitioner is entitled to custody of the child in issue?
5. Whether or not the petitioner is entitled to her reliefs?

In civil cases, the burden of proof determines the eventual outcome of the case between the parties and the party that is able to discharge the burden placed on him/her is likely to have the verdict in his/her favour. Under the rules of evidence, the burden is categorized into two heads i.e. the burden of persuasion and the burden of producing evidence. Sections 10(1) and (2 of the Evidence Act 1975 (NRCD 323) define the burden of persuasion as follows;

10(1) " For the purposes of this Act, burden of persuasion means the obligation of a party to establish a requisite degree of believe concerning a fact in the mind of the tribunal of fact or the court."

10(2) " The burden of persuasion may require a party (a) to raise a reasonable doubt concerning the existence of a fact or (b) to establish the existence of a fact by a preponderance of probabilities or by proof beyond a reasonable doubt.

Section 11 of the same Act defines the burden of producing evidence in subsection (1) and (4) as follows;

11(1) " For the purposes 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."

11(4) " In other circumstances, the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence , leads a reasonable mind to conclude that the existence of the fact is more probable than it's non-existence."

In determination as to whether the parties entitled to an order of this court dissolving their marriage on grounds that it is broken down beyond reconciliation; the court takes cognizance of section **1(2)** of the Matrimonial Causes Act, 1971 (Act 367) which emphatically states that the only ground for the grant of a decree of divorce is that the marriage has broken down beyond reconciliation. Section 2(1) of Act 367 sets out the legal criteria in establishing that the marriage has broken down beyond reconciliation. I reproduce section 2(1) of Act 367:

(a) that the respondent has committed adultery and that by reason of such adultery the petitioner finds it intolerable to live with the respondent; or

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; or

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; or

(d) that the parties to the marriage have not lived as man 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 such 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 notwithstanding the refusal; or

(e) that the parties to the marriage have not lived as man 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."

On the evidence, the petition is grounded on three reliefs of dissolution of the marriage pursuant to section 2(1)(b)(c) and (f); alleging the marriage had broken down beyond reconciliation; unreasonable behaviour and their failure to reconcile their differences after diligent effort.

The petitioner and PW1 were unanimous that respondent severally and continuously subjected petitioner to battery and sexual violations. Petitioner supports her submission at paragraphs 9, 11, 13 and 15 of her witness statement that she made several reports of the alleged beatings to respondent's family members and to Church elders. Petitioner again submitted that she made complaint to the police on the battery committed on her. The allegations by petitioner appear contradictory on the face of the record. It would be recalled that at paragraph 6(a) of the petition; petitioner deposed one of the particulars of breakdown of marriage that she does not know the parents and family members of the respondent and that anytime she urges respondent to take her to his family he makes excuses to avoid her plea. That averment is clearly contradictory to the evidence adduced by petitioner at paragraphs 9, 11 and 12 of her witness statement and paragraph 9 of PW1's witness statement where she deposed that she made several complaints to respondent's family members for the battery perpetuated against her. The question that begs an answer is how was petitioner able to make complaints to members of respondent's family if they are not known to her. Its trite rule of evidence that where the evidence adduced by a party or his/her witnesses is at variance with his pleadings on a material issue; that evidence has little or no

probative value. (See Odametey Vrs Clocuh [1989-90] 1 GLR 331, S.C). The court again finds on the record that petitioner did not refer to PW1 as a witness to the alleged beatings and damage to her properties in her pleadings or his witness statement and yet called her as her only witness and she failed to call members of her family who allegedly witnessed the incident as material witnesses to support her case.

On the record, petitioner also referred to DW1 and DW2 as witnesses to the alleged unreasonable and intolerable conduct exhibited by respondent and yet they discounted her evidence on the issue and contended that they did not witness the alleged beatings or any maltreatment at the hands of respondent when they visited the house or attempted to settled the matter as representatives of their church except by the insistence by petitioner to dissolve the marriage because respondent rejected but postponed the application by petitioner to bring her other child to the house for want of space. It is a settled judicial opinion that failure to call material witness to support a party's case is fatal. **(See Owusu v Tabiri (1987-88) 1 GLR 287).** The court also refers to the evidence adduced by petition at the beatings and injuries sustained were so severe that she was spitting blood and that she made a complaint to the police. The court is of the view that these are matter capable of positive proof. The petitioner could have obtained a copy of the official complaint filed with the police or entries made in the diary of action at the police station to establish the alleged battery with positive evidence in the face of denial by respondent and his witnesses. Indeed the law is well settled in Majolabi v. Larbi &Anor. [1959] GLR 190, that where evidence is capable of positive proof it must be proved and a mere repetition of the evidence on oath without more does not discharge the burden of proof required in law. The court however, relies on the evidence adduced by DW1 and DW1. From the record, the parties have established that the problems within the marriage were known to the Church and that the Pastor had delegated DW1, DW2 and other elders to assist the parties to reconcile. Accordingly; the court finds their evidence material. The court further consider them

as independent witnesses given that there is no evidence of any relationship between them and the parties or their relations to motivate any bias, interest or prejudice against them. The court therefore attaches much weight to their evidence. There is no evidence on record to cast doubt on the veracity and credibility of DW1 and DW2. The courts have held the evidence of such independent witnesses in high esteem. In the case of **Boateng V Boateng (2009) 5 GMJ 58 at 64** the Court of Appeal held that,

"where the evidence of the only independent witness on a vital issue corroborates the evidence of one party or the other, a court is bound to accept the case of the party so corroborated by the independent witness (emphasis mine) unless, there are good reasons for discrediting the independent witness in which case, the reasons must be clearly stated in the judgment"

Again in Aikins v. Dakwa [2015] 82 GMJ 25, the Supreme Court on the issue also held that:

"It is trite law that where an independent witness supports one party's case as against the other, that should, in the absence of strong reasons to the contrary settle the matter" **(See Akoto II v. Kavege (1984-86)2 GLR 365 C.A, Asare v. Donkor and Serwah II (1962) 2 GLR 176 and Manukure v. Agyekum (1992-93) 2 GBR 888 CA)**

Again, the record is patent that petitioner had deserted respondent for over two years prior to the filing of the petition (See paragraph 6 of Form for Petitioner; paragraph 2 of the petition and paragraph 2 of Answer to Petition). The undisputed evidence on record that petitioner left on her own volition at the time the matter was pending pursuant to settlement goes against her. Again, the failure by petitioner to establish by sufficient evidence that respondent battered or sexually exploited made her desertion of her matrimonial home without lawful excuse.

On the totality of the evidence on the record, the court finds as fact that that the parties to the marriage have not been successful in reconciling their entrenched difference upon diligent effort by many interveners to restore the affection between them in to motivate them to resume consortium. Accordingly, on the totality of the evidence on record the inevitable conclusion of any reasonable court will be to find that the marriage between the parties has broken down beyond reconciliation. The court therefore decree that the Ordinance marriage between the parties be dissolved forthwith.

The parties shall however contribute to educational, medical, food and clothing and any other incidental expenses accruing to the parties as parents. The court awards custody of the child of the parties to the petitioner with access on weekend and half of school vacation to the respondent. The court again orders respondent to maintain the child with Ghc200.00 per month effective January 2023 with yearly upwards review of 15 per cent until the child completes his education or training. Accordingly, the court awards cost of Ghc3000.00 against the petitioner. Interest thereof will be at the prevailing bank rate and same will take effect from today until the entire amount is fully paid.

(SGD.)

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H/W SIDNEY BRAIMAH

(DISTRICT MAGISTRATE)