CORAM: HIS WORSHIP MR. JOSEPH YENNUBAN KUNSONG, SITTING AS DISTRICT MAGISTRATE, ASOKWA DISTRICT COURT "2" ON 30TH NOVEMBER, 2023

SUIT NUMBER AR/AO/DC2/C5/83/21

JOSEPH OTENG - PETITIONER
OF H/NO. PLOT, 63 BLOCK D
GYINYAASE, KUMASI.

V

FAUSTINA DONKOR - RESPONDENT
OF DOMPOASE APRABO, KUMASI.

PARTIES----------PRESENT.

REV. SAMUEL GABORAH FOR THE PETITIONER-PRESENT
ABIGAIL OSEI FOR O.O. ACHEAMPONG FOR THE RESPONDENT-PRESENT

JUDGMENT

Petitioner is a Pastor and Respondent is a trader. Parties were married under the Marriage Ordinance Cap 127 on 6th August, 2000 at the Apostolic Faith Mission International, Pankorono, Kumasi. Following the marriage, parties co-habited at Nkawkaw, Kadjebi, Mparaeso, Ahinsen, Gyenyase, Dompoase, Aprabon and Atonsu, Kumasi. There has been no previous court proceeding in respect of this marriage. There is one issue of the marriage; Esther Oteng Gyamfi aged 19 years.

Petitioner prays the court for the dissolution of the marriage on grounds of unreasonable behavior, adultery and inability to reconcile differences on the part of Respondent. Parties have been living apart in the last years.

Petitioner averred that the marriage had broken down beyond reconciliation because Respondent had behaved unreasonably towards him. Particulars of unreasonable behavior cited by Petitioner included the fact that Respondent failing to recognize Petitioner as husband and spreading false rumors about petitioner, lack of communication and sex and that the parties have been living apart for over three years now. This led to Respondent being physically and verbally abusive towards Petitioner. Petitioner averred that Respondent has already received her share of the matrimonial properties and that both parties have filed terms of settlement. Petitioner averred that families and church members had done their best to resolve issues between parties without success. The situation deteriorated to the extent that Petitioner now live separately from Respondent. Thus, Petitioner is currently living elsewhere.

Petitioner claimed that all attempts at reconciliation by their family members had failed. Petitioner therefore prayed the court for the following reliefs:

(i.) An order for the dissolution of their ordinance marriage celebrated on 6th August, 2000 at the Apostolic Faith Mission International, Pankrono-Kumasi.

(ii.) Custody of Easter Oteng Gyamfi should be conferred on Respondent with reasonable access to the Petitioner.

Respondent averred that in 2014 Petitioner started committing adultery and was having extra-marital relationship with one Akosua at Kaase-Kumasi. Respondent averred that Petitioner did not change his adulterous conduct but continued in spite of several calls on him to desist from such conduct. Respondent aver that in April, 2020, Petitioner

announce to his entire church members that a member had given him a house at Asenua to use as a prayer center and that he will be at the said house.

According to Respondent, even though Petitioner spent the whole week in the said house and only came home during weekends, Petitioner never disclosed the location of the house to Respondent. Respondent further aver that in 2020, both families made several attempts to settle the issues between the parties but without success. It is the case of the Respondent that she had information about an intended marriage between Petitioner and one Akua Abrah and confronted families of the said woman with evidence but the Petitioner went ahead and on 6th March, 2021 got married to the said Akua Abrah and currently resides with the new wife at Atonsu. The Respondent aver that Petitioner has behaved in such a way that the Respondent finds it intolerable to live with him.

Amazingly Respondent in his answer to the petition filed on the 19th April, 2021 admitted most of the averments contained in the Petition. Respondent asserted that Petitioner was physically abusive towards her too. Respondent elaborated on an occasion when Petitioner disrespected her when Respondent paid a visit to the house petitioner said he was using as a prayer center.

Respondent admitted that parties had irreconcilable differences culminating in her being staying separately from the Petitioner for over three years now. Respondent admitted that she was currently living elsewhere. Respondent enumerated her failed attempts at pleading with Petitioner to return to the matrimonial home. Respondent claimed that Petitioner had taken a resistant stance neither to reconcile with her nor to allow anyone to resolve their issues and has since 2020 failed to maintain the Respondent. Respondent confirmed the fact that the parties have amicably settled on the ancillary reliefs and have since filed terms of settlement on 23/05/2023 regarding the matrimonial properties. Respondent therefore prayed the court for the following reliefs:

(i.) Dissolution of ordinance marriage celebrated between the parties on 6th August, 2000.

(ii.) Half share each of the properties acquired during the subsistence of the marriage

(iii.) Custody of the child of the marriage granted to Respondent with reasonable access granted to Petitioner.

(iv.) That petitioner be ordered to settle Respondent with GHC 50,000.00 as financial provision.

(v.) Maintenance pending the dissolution of the marriage.

At the close of pleadings, parties were ordered to file their witness statements. Parties complied with the orders of the court and went through full Hearing. The parties were legally represented in this suit, parties testified by themselves and did not call any witness. Neither party cross-examined the other after their evidence-in-chief except to confirm that the marriage is broken down beyond reconciliation. Parties admitted that their marriage had broken down beyond reconciliation and all attempts by family members at reconciliation had proven unsuccessful. Parties were ad idem in their prayer for dissolution of their marriage.

ISSUES

At the close of Hearing, the issue for determination was whether or not the marriage had indeed broken down beyond reconciliation.

APPLICABLE LAW

This being a civil suit, the standard of proof required of a party who makes assertions which are denied, is one on a balance of probabilities. This therefore requires a party making assertions to adduce such evidence in proof of the assertions, such that the court

is convinced, that the existence of the facts he asserts are more probable than their non-existence.

Section 11(1) and (4) of the Evidence Act, 1975 (N.R.C.D. 323) provides that:

> *Section 11—Burden of Producing Evidence Defined.*
>
> *(1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.*
>
> *(4) 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.*

In the case of **Dzaisu and Others V Ghana Breweries Limited [2007-2008]1 SCGLR 539**at page 545, the Supreme Court per Sophia Adinyira stated as follows:

> *"It is a basic principle in the law of evidence that the burden of persuasion on proving all facts essential to any claim lies on whosoever is making the claim.*

Parties settled the ancillary reliefs and returned to court and filed Terms of Settlement on 23/05/2023 detailed as follows:

(i.) Eight thousand Ghana cedis (Ghc 8,000.00) only paid by Petitioner to the Respondent.

(ii.) A chamber and a hall self-contained house on a one (1) plot numbered 104 block "A" located, situated and situated at Nkwanta.

(iii.) Two (2) taxi cabs with registration number AS-9359-19 Renault and AS-6337-18 Honda Civic.

(iv.) Completed and handed over the building in paragraph two (2) supra to Respondent.

(v.) Has handed over the entire documents to the said plot to the Respondent.

In view of the Terms of Settlement filed by the parties, the only issue for determination by this court was whether or not the marriage celebrated between the parties had indeed broken down beyond reconciliation. The issue to be determined to bring finality to the suit therefore is whether or not the marriage between the parties has broken down beyond reconciliation.

EVALUATION OF THE LAW AND EVIDENCE

The sole ground for the granting a petition for divorce in this jurisdiction, shall be that the marriage has broken down beyond reconciliation. This is provided for by **Section 1(2) of the Matrimonial Causes Act, 1971 (Act 367**). The facts required to prove that the marriage has broken down beyond reconciliation are set out in **Section 2(1) of the Matrimonial Causes Act, 1971 (Act 367)** as follows;

Proof of breakdown of marriage.

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

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

(b) That Respondent has behaved in such a way that Petitioner cannot reasonably be expected to live with Respondent; or

(c) *That Respondent has deserted 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 husband and wife for a continuous period of at least two years immediately preceding the presentation of the petition and 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; or*

(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."*

Regardless of the Terms of Settlement filed on 23rd May, 2023, and in accordance with section 2(2) and 2(3) of the Matrimonial Causes Act, 1971 (Act 367), on a petition for divorce, the court ought to inquire so far as is reasonable, into the facts alleged by Petitioner and Respondent to satisfy itself on all the evidence that the marriage between the parties has indeed broken down beyond reconciliation. **Section 2(2) and Section 2(3) of the Matrimonial Causes Act, 1971 (Act 367)** provides as follows;

(2) *On a petition for divorce it shall be the duty of the court shall inquire, so far as is reasonable, into the facts alleged by Petitioner and Respondent.*

(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."*

The particulars of breakdown of the marriage which both parties stated mostly relate to the conduct or behavior of the other party. By virtue of section 2 (1) (a) (b) (f) of the Matrimonial Causes Act, 1971 (Act 367), where it is established that the behavior of either party is such that, the other cannot reasonably be expected to live with him or her, the Court may proceed to dissolve the marriage.

Parties relied on their witness statements filed in court as their evidence in chief. Petitioner did not cross-examine Respondent during proceedings; he declined to do so. In open court he said he had nothing to say apart from what she had stated in her witness statement as her evidence in chief. Respondent also elected not to cross-examine Petitioner. In line with his petition, petitioner admitted most of the averments of Respondent. All he said was that he wanted the marriage dissolved. In **Quagraine V Adams [1981] GLR 599, C.A,** the court 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."*

Keen Adrian (2008), in his book **"The Modern Law of Evidence" (Seventh Edition), Oxford, New-York, 195,** stated thus:

> *"A party's failure to cross examine however, has important consequences. It amounts to a tacit acceptance of the witness's evidence in chief. A party who has failed to cross-examine a witness upon a particular matter in respect of which it is proposed to contradict his evidence-in-chief or impeach his credibility by calling other witnesses, will not be permitted to invite the jury or tribunal of fact to disbelieve the witness's evidence on that matter."*

What amounts to unreasonable behavior, has been held to depend on the circumstances of each case. It must not be conduct which can be termed as trivial, such conduct as is occasioned by the wear and tear of marriage. The conduct must be grave and weighty,

such as to merit a finding that Petitioner cannot be reasonably expected to live with Respondent. In **Mensah v Mensah [1972] 2G.L.R 198** Hayfron Benjamin J. held that:

> *"… in determining whether a husband has behaved in such a way as to make it unreasonable to expect a wife to live with him, the court must consider all the circumstances constituting such behavior including the history of the marriage. It is always a question of fact. The conduct complained of must be grave and weighty and mere trivialities will not suffice…"*

Petitioner is therefore bound to establish how Respondent's behavior affects the marriage as a result of which he cannot reasonably be expected to live with Respondent. In the case of **Hughes v Hughes [1973] 2 G.L.R 342,** SarkodieJ. In his judgment said:

> "*To succeed Petitioner must show that Respondent's conduct reached a certain degree of severity. It must be such that no reasonable person would tolerate*".

Petitioner stated under oath that the parties had been married since 6th August, 2000. Petitioner's plaint with Respondent with regard to her unreasonable behavior was her failure to recognize Petitioner as her husband and spreading of false rumors on the petitioner which often resulted in emotional and verbal abuse being meted to Petitioner. Petitioner also testified that Respondent had been grossly disrespectful to the Petitioner.

During the hearing Respondent elected not to cross-examine Petitioner on any of her averments. This was what transpired;

CROSS EXAMINATION OF THE PETITIONER BY COUNSEL FOR THE RESPONDENT

Q: You would agree with me that the marriage between you and the Respondent has broken down beyond reconciliation.

A: That is so.

In the case of **Takoradi Flour Mills V Samir Faris [2005-06] SCGLR 882**, the Supreme Court held that where the evidence led by a party is not challenged by his opponent in cross examination and the opponent does not tender evidence to the contrary, the facts deposed to in that evidence are deemed to have been admitted by the opponent and must be accepted by the trial court.

In the absence of any evidence to the contrary, the court is of the view that all that Petitioner has said is true and Respondent is deemed to have admitted to all the averments.

Respondent in her answer and paragraph nineteen of her witness statement averred that Petitioner had committed adultery- "The Petitioner got married to another woman, one Akua Abrah on 6th March, 2021 and is currently with his new wife at Atonsu. In paragraph 20 of her witness statement, Respondent averred that prior to the said marriage, she had submitted a copy of their marriage certificate and wedding photos to her mother -in-law and soon to be wife's sister as evidence of their marriage. Petitioner did not contradict this and literally confirmed same by not cross examining the Respondent.

CROSS EXAMINATION OF THE RESPONDENT BY COUNSE FOR THE PETITIONER

Q: Is this marriage dead or it can be resurrected?

A: It cannot be reconciled.

Adultery is defined in **Section 43 of the Matrimonial Causes Act, 1971, (Act 367)** as follows:

> "*the voluntary sexual intercourse of a married person with one of the opposite sex other than his or her spouse;*".

It has been decided that the type of intercourse required in proving adultery is evidence of some penetration of the female organ by the male organ. In the case of **Adjetey v Adjetey [1973] 1 GLR 216** the court in its holding one held 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.*"

Also, in the case of **Quartey v Quartey &Anor [1972] 1 GLR 6,** Kingsley-Nyinah J. held that:

> *"A Court may act upon an admission of adultery even though there is 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 a clear, distinct and unequivocal admission of adultery."*

These are matters capable of proof to the contrary if so, however Petitioner failed to cross examine Respondent as to the veracity of same during trial. In the absence of a denial or any evidence to the contrary, the court is thus convinced that adultery has indeed been occasioned on the part of Petitioner.

In Respondent's evidence-in-chief, she asserted that parties had irreconcilable differences. In determining this issue, the court shall ascertain if the parties in the course of their marriage had been unable after diligent effort to reconcile their differences. Section 1(f) of the Matrimonial Causes Act, 1971 [Act 367] provides that:

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

In determining whether the parties have irreconcilable differences, I considered the wise words of Hayfron Benjamin J. in the case of **Mensah V Mensah [1972] 2GLR 198** where he held that:

> "*In seeking to prove failure to reconcile differences, differences must be distinguished from disputes. The differences must be between spouses. They must be such as to make it impossible for the marriage to subsist.*

Respondent in her witness statement intimated that Petitioner has deserted the family when he went to live in a certain house at Asenua and was having extra-marital affairs. This averment of Respondent had led to Petitioner being disrespectful in his attitude towards her and as a result parties have been living in separate accommodation for the past three (3) years.

Respondent mentioned of having made attempts to resolve their issues and also by bringing in family members and their church elders to assist in this regard but all efforts yielded no positive results. This evidence is sufficient and convinces the Court that attempts were made to resolve the issues between parties. I have therefore considered the happenings within this marriage in an objective manner by considering allegations of Petitioner as against that of Respondent and also considered the evidence each party adduced to establish that after diligent effort, they have been unable to reconcile their differences.

For the foregoing observations, having inquired deeply into all the matters and with all the evidence examined, I am wholly satisfied that the marriage between the parties has broken down beyond reconciliation.

The Respondent filed for custody of the child of the marriage and reasonable access granted the Petitioner. Petitioner is not opposed to this relief.
In considering the grant of custody and access, **Section 2(1) of the Children's Act, 1998 (Act 560)** provides that:

> *"The best interest of the child shall be the primary paramount in a matter concerning a child".*

The court has a duty to consider the best interest of the child and the importance for a young child to be with the mother. **Section 6(3) (b) of The Children's Act, 1998 [Act 560]** provides that:

> *"Every parent has rights and responsibilities whether imposed by law or otherwise towards his child which include the duty to –*
>
> *(b) provide good guidance, care, assistance and maintenance for the child and assurance of the child's survival and development."*

In addition to these considerations **Section 45(2) of The Children's Act, 1998 [Act 560]** requires the court to consider among others; the age of the child and also continuity of care.

In the instant case, the evidence on record is that Respondent currently has the child of the marriage living with her. Parties indicated that the issue of the marriage is nineteen (19) years old as at March, 2021 meaning she is now over twenty-one (21) and the Petitioner did not oppose to the custody of the only child of the marriage by the Respondent.

The court has considered that the issue is now twenty-one years old and will not need to be in custody of any of the parents since she is deemed to be an adult who could make

decisions for herself. It is the court's view that no orders could be given in respect of the issue of the marriage as she is now an adult and does not fall under the provisions of the Children's Act, 1998 (Act 560).

FINDINGS

a. Parties were married under the marriage Ordinance (Cap 127) on 6th August, 2000 at the Apostolic Faith Mission Internationl, Pankrono-Kumasi in the Ashanti Region.
b. In 2014, the Petitioner started engaging in extra-marital affairs/relationship with Akosua at Kaase and finally moved out from the matrimonial home and lived in a house located at Asenua.
c. Petitioner got married to a lady by name Akua Abrah on 6th March, 2021 and now reside with the said new wife at Atonsu.
d. Respondent has been disrespecting Petitioner and does no longer recognize Petitioner as her husband.
e. Respondent has been spreading false rumors about Petitioner making him feel radicle by the public.
f. Both Petitioner and Respondent have tried to resolve their issues with the assistance of their families and church elders but were not successful.
g. Both parties had agreed that their ordinance marriage celebrated on 6th August, 2000 should be dissolved by this Honorable court.
h. Both petitioner and Respondent has settled the ancillary reliefs and filed terms of terms of settlement to that effect.
i. The union between petitioner and Respondent produced one child who is now over 21 years old.

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DECISION

Drawing the curtain on this divorce petition, the court is of the considered view that the marriage between Petitioner and Respondent has broken down beyond reconciliation and therefore grant the Petition. Accordingly, judgment is granted that the ordinance marriage contracted between the parties herein on 6th August, 2000 at the Apostolic Faith Missions International, Pankrono-Kumasi is hereby dissolved. The marriage certificate with Registration number AFMI/126/2000 is hereby cancelled. Divorce Decree granted. No orders made as to cost.

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H/W JOSEPH YENNUBAN KUNSONG

DISTRICT MAGISTRATE COURT

ASOKWA-KUMASI

DATE: 30TH NOVEMBER, 2023.