

GHANA / JUDGMENT

# QUARTEY VRS NUTSUGAH (A4/19/2016) [2024] GHADC 14 (12 February 2024)

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IN THE TDC DISTRICT COURT HELD AT TEMA ON MONDAY THE 12TH DAY  
OF FEBRUARY 2024 BEFORE HER HONOUR AKOSUA ANOKYEWAA  
ADJEPONG (MRS.), CIRCUIT COURT JUDGE, SITTING AS AN ADDITIONAL  
MAGISTRATE  
MARY QUARTEY

----- PETITIONER

SUIT NO. A4/19/2016

14TH AUGUST CLOSE

COMMUNITY 17 - LASHIBI

VRS

FRANCIS NUTSUGAH

----- RESPONDENT

1ST AVENUE,

GREDA ESTATE-TESHIE

PARTIES:

PRESENT

COUNSEL: NO LEGAL REPRESENTATION FOR PETITIONER

FATI MAHAMI FOR RESPONDENT PRESENT

## JUDGMENT

Mary Quartey v. Francis Nutsugah Page 1 of 19 The instant case is a cross-petition which flows from a petition for the dissolution of the marriage between the parties. The Petitioner, the wife in the present case instituted a petition for the dissolution of a marriage celebrated between herself and the Respondent. Her claim in the petition was based on unreasonable behavior and adultery. The Respondent filed his answer to the petition and cross petitioned for the dissolution of the marriage between himself and the Petitioner. The Respondent based his ground on the fact that the Petitioner had behaved in an unreasonable manner and had committed adultery. The Petitioner however withdrew her petition for the dissolution of marriage. The Respondent did not withdraw his cross-petition; therefore, it was within the ambit of this Court to proceed to

hear the matter based on the cross petition filed by the Respondent. THE CASE OF THE RESPONDENT The case of the Respondent's cross petition follows that he married the Petitioner on 31st January, 2009 under the Marriage Ordinance at St. Mary's Catholic Church, Samreboi and has since lived together as husband and wife until 26th June 2016 when the Petitioner filed a petition for divorce. That there are two issues of the marriage, namely Hephzibah Sesinam Nutsugah and Buelah Sedinam Nutsugah, 10 years old and 6 years old respectively at the time the cross petition was filed. It is the Respondent's case that the Petitioner has behaved in a manner which he cannot be reasonably expected to live with her as husband and wife. He also claims that the Petitioner has committed adultery and as a result of the adultery, he finds it intolerable to live with her. The Respondent therefore prays for dissolution of the marriage, custody of the children with reasonable Mary Quartey v. Francis Nutsugah Page 2 of 19 access to the Petitioner, a maintenance order against the Petitioner, award of damages, compensation and cost. At the end of the hearing of the cross petition, a brief written address was filed for and on behalf of the Respondent by his lawyer on 24th May 2023; and the Court has duly taken notice of the same. 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 Respondent and the Petitioner has broken down beyond reconciliation?
2. Whether or not custody of the children should be granted to the Respondent?
3. Whether or not the Petitioner should be ordered to contribute towards the maintenance of the children?
4. Whether or not the Respondent is entitled to an order for damages against the Petitioner for denying the Respondent access to their children, for wasting his time and making him incur unnecessary financial cost?
5. Whether or not the Respondent is entitled to a compensation from the Petitioner for the divorce?
6. Whether or not the Petitioner should be ordered to pay cost including legal fees? Mary Quartey v. Francis Nutsugah Page 3 of 19 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 the Respondent to prove the facts alleged in his cross petition to establish the breakdown of the marriage.

## ANALYSIS

Mary Quartey v. Francis Nutsugah Page 4 of 19 I shall now proceed to resolve the above issues in the light of the law and decided cases.

1. Whether or not the marriage between the Respondent and the Petitioner has broken down beyond reconciliation? Sections 1(2), 2(1) and (3) of the Matrimonial Causes Act, 1971 (Act 367) 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; Mary Quartey v. Francis Nutsugah Page 5 of 19
  - (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 circumstances the burden is therefore on the Respondent to prove that the marriage has broken down completely; proof of one or more of the facts under section 2(1) of Act 367 is/are necessary. In *Mensah v. Mensah* [1972] 2 GLR 198, Hayfron-Benjamin stressed that there was nothing in

the Matrimonial Causes Act, 1971, which supports the view that divorce has become a relatively easy matter. Divorce, whether in relation to a customary or Ordinance marriage, was a serious matter from whatever side one views the subject. It affects the status of the parties and the interests of the children. The Courts can grant the decree only in genuine cases of breakdown beyond reconciliation. The Act is not and was not intended to be a “Cassanova's Charter”. From section 2(1)(a) of Act 367, a Petitioner may rely on the fact that the Respondent has committed adultery and that as a result of the adultery he or she finds it intolerable to live with the Respondent. Section 43 of Act 367 defines adultery as the voluntary sexual intercourse of a married person with one of the opposite sex other than his or her spouse. It follows from the above that to be successful on the fact of adultery, the Petitioner must Mary Quartey v. Francis Nutsugah Page 6 of 19 establish that there was voluntary sexual intercourse and that the act made it intolerable to live with the Respondent. Sexual intercourse in this sense must achieve at least partial penetration. Also, the attempt to commit adultery must not be confused with the act itself, and if there is no penetration, some lesser act of sexual gratification does not amount to adultery. In Dennis v. Dennis [1955] 2 ALL ER 51, Mrs. Dennis desired to have sexual intercourse. She attempted but was unable to effect any penetration. It was held that no adultery had been committed. However, once sexual intercourse is proved, the onus is on the Respondent to show that it was not consensual. As to the standard of proof required to establish this offence, the standard as stated in Quartey v Quartey [1972] GLR 6 is that, adultery must be proved beyond reasonable doubt. On the fact of adultery alleged by the Respondent against the Petitioner, the Petitioner denied the Respondent's allegation of adultery on her part. As a result, the Respondent had a burden to lead sufficient evidence to prove his allegation of adultery on the part of the Petitioner. This burden, the Respondent failed to discharge in the sense that the Respondent 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 Petitioner. In the case of Adjete v. Adjete [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 Mary Quartey v. Francis Nutsugah Page 7 of 19 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 Respondent had the onus to prove his allegation of adultery on the part of the Petitioner, to the satisfaction of the Court which assertion he failed to prove. Considering that the Respondent could not prove his allegation of adultery after it was denied by the Petitioner, I find from the entire evidence on record that the Petitioner did not commit adultery and dismiss the said allegation of adultery. By section 2(1)(b) of Act 367, a Petitioner may rely on the fact that the Respondent has behaved in a way that the Petitioner cannot reasonably be expected to live with the

Respondent to prove that the marriage has broken down beyond reconciliation. Under this section the Petitioner must prove that the conduct of the Respondent constituted unreasonable behavior on the part of the Respondent; and that by reason of this conduct, the Petitioner cannot reasonably be expected to live with the Respondent as a result of the unreasonable behavior. The conduct complained of must be serious. It must be much higher than the ordinary wear and tear of married life. In *Knudsen v Knudsen* [1976] 1 GLR 204 C.A , the Court held that: "In assessing such conduct, the Court had to take into account the character, personality, disposition and behavior of the Petitioner as well as the behavior of the Respondent as alleged and established in the evidence. 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". From the facts as presented by the Respondent, he alleged that the Petitioner engaged in suspicious sexual relationships, particularly when, months after their marriage, she went to her ex-boyfriend at Obuasi and put off her phone for 2 days. At odd times, between the hours of 10pm and 1am, and on weekends, she would engage in unhealthy and romantic conversations on phone, saying, "I don't have a man, and I am staying alone". That the Petitioner brought a man, Yusif, popularly called Dada to stay with her after she refused to relocate with him to Greda Estate. From the evidence on record, the Petitioner failed to define the extent of her relationship with the said Yusif. The question any reasonable person would ask is why would a married woman travel to visit her ex- boyfriend for two days and turn off her phone? Why would a married woman allow another man dress up in her room? The instances and acts of the Petitioner did not amount to adultery however same constitute unreasonable behavior. The conduct of the Petitioner, in my view, falls short of that of a reasonable married person and no self- respecting married person should descend into such position therefore the Respondent cannot be reasonably expected to live with her. The Respondent has been able to prove to the Court that there have been attempts at reconciliation which have all proved futile. This the Respondent established in his cross- petition. He gave a list of several people who made efforts to assist them to reconcile and the various instances attempts have been made at reconciliation. The fact that the instant cross petition is before the Court is evident that the attempts at reconciliation have failed. From the evidence on record the parties had irreconcilable differences and did not live together as husband and wife for more than two years before the presentation of the cross Mary Quartey v. Francis Nutsugah Page 9 of 19 petition. I accordingly from the evidence on record that the marriage between the Petitioner and the Respondent has broken down beyond reconciliation.

2. Whether or not custody of the children should be granted to the Respondent? Under section 22(2) of 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. However, the Act does not specify the factors a Court must consider in awarding

custody or access to a child. The Children's Act, 1998 (Act 560), provides useful guidance. The primary consideration is the welfare of the child as stated in section 2 of Act 560. Under section 45(1) of Act 560, a family tribunal making a custody order shall consider the best interests of the child, and the importance of a young child being with the mother when making an order for custody and access to a child. Among the factors to consider are; the age of the child, the importance of a child to be with the parents unless the child is persistently abused, the need for continuity in the care and control of the child, the views of the child if independently given, the need to keep siblings together, and any other relevant matter. In the case of *Opoku-Owusu v. Opoku-Owusu* (1973) 2 GLR 349, the Court held as follow: "In such an application the paramount consideration is the welfare of the children. The Court's duty is to protect the children irrespective of the wishes of the parents." In the normal course, the mother should have the care and control of very young children, particularly girls or those who for some special reason need a mother's care; and older boys to have the influence of their father... there is no principle in custody cases that a boy of *Mary Quartey v. Francis Nutsugah* Page 10 of 19 eight should other things being equal, be with his father; in all cases the paramount consideration is the welfare of the infant and the Court must look at the whole background of the infant's life and at all the circumstances of the case. In *In re McGrath (Infants)* [1893] 1 Ch. 143, C.A. Lindley L.J. said at p. 148 what the Courts consider in determining the welfare of the child in the following terms: "The duty of the Court is, in our judgment, to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded." Also in the case of *Braun v. Mallet* [1975] 1GLR 81, the Court held that: "The poverty of a parent is not per se a ground for depriving him of the custody of his or her child, and the mere fact that another claimant to custody is in a position to give the child a better start in life does not automatically give him a prior claim:" In the instant cross petition, the Respondent prays for custody of the children with access to the Petitioner. The Petitioner vehemently objects to it and asks for custody. The Petitioner's reasons for the objection are that, she has been the one fully taking care of the children since the Respondent moved out of the matrimonial home in 2016. Further to that, she has relied on loans to maintain the children. From the Respondent's argument, he believes the children will be safe under his custody because he claims the Petitioner *Mary Quartey v. Francis Nutsugah* Page 11 of 19 keeps the children out of school, keep the children up late at night which has caused them to decline academically, he also avers that the children have been fingered by area boys due to the Petitioner's carelessness. The Respondent claimed that the Petitioner's carelessness led to the children being fingered by area boys; and that the co-tenants Mr. and Mrs. Ametepe knew and informed him about the incident. During cross examination, the Petitioner asked the Respondent if he can bring Mr. Ametepe to this Court to come and testify; and he answered that he may not be able to bring Mr. Ametepe because he does not know his whereabouts

now. With this assertion, the question any reasonable person would ask is why such a grave incident of the children being fingered by area boys was not reported to the department of social welfare or the police? Why did Mr. Ametepe choose to inform the Respondent and why did the Respondent not take steps to ensure that the perpetrators were dealt with by law? Even though the Respondent has failed to prove his allegation before the Court, in the best interest of the children, the Respondent is directed to report to the appropriate authorities for investigations to be conducted into same. In awarding custody, the Court takes into consideration several factors. One of the factors is the need for continuity in the care and control of the child. In *Attu v Attu* [1984-86] 2 GLR 743, the Court in granting custody of the children to the mother stated that, the applicant had waited for too long and had allowed the children to be deeply rooted in a foreign land with their mother. In the interest of the children, custody was given to the mother. Same principle was applied in *Re Dankwa* as the child had been deeply rooted with her father in Kumasi. It is pertinent to know that poverty alone cannot be a ground to deny custody, however, where the character has been impugned, as was applied in *Happee v Happee*, then custody will be denied. *Mary Quartey v. Francis Nutsugah* Page 12 of 19 From the facts, it is obvious that the children have been with their mother for a long time. With regard to the welfare of the children being at stake, the Respondent has not been fully able to establish his allegation and the said allegation is yet to be investigated upon report to the relevant institution(s). Relying on the above authorities and having regard to the ages and gender of the children and the need to ensure continuity in the control and care of the child, I will award custody of the children of the marriage to the Petitioner with reasonable access to the Respondent.

3. Whether or not the Petitioner should be ordered to contribute towards the maintenance of the children? 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, 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. Section 47(1) of Act 560 specifies that a parent or any other person who is legally liable to maintain a child or contribute towards the maintenance of the child is under a duty to supply the necessities of health, life, education and reasonable shelter for the child. According to section 48(1) of Act 560, the following persons who have custody of a child may apply to a Family Tribunal for a maintenance order for the child: a parent of the child; the guardian of the child; or any other person. Section 48(3) of Act 560 provides that the application for maintenance may be made against any person who is liable to maintain the child or contribute towards the maintenance of the child. Section 49 of Act 560 provides some useful guidance on the *Mary Quartey v. Francis Nutsugah* Page 13 of 19 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. According to section 51(2) of Act 560, a Family Tribunal may order a periodic payment or lump sum payment for the maintenance of a child and the earnings or property of the person liable may be attached. Pursuant to section 51(4) of Act 560, when considering an application for maintenance, a Family Tribunal may make a maintenance order which it considers reasonable for any child in the household. See also: Section 16 of Act 367. The evidence before this Court indicates that the Respondent has not been maintaining the children of marriage consistently. During cross-examination, the Respondent admitted that he studied for his PHD from 2015-2019 and faced some challenges then. He is currently a lecturer and a farmer. The Petitioner is a food vendor. The Petitioner, from all indications relied and still relies on the Respondent to make provisions for her. She even indicated that she had to take loans to maintain the children and the Respondent had to support her in the payment of rent. It is the careful view of this Court that in the *Mary Quartey v. Francis Nutsugah* Page 14 of 19 present set of facts and the evidence adduced at trial, the Court cannot grant the Respondent's prayer for maintenance order on the Petitioner. This is because the Respondent is relatively more financially stable than the Petitioner who cannot even afford to pay her rent. The Court has carefully considered the circumstances of the parties herein and having further considered the factors above as provided in the Children's Act, the Court will order the Respondent to pay an amount of GH¢1,000.00 as monthly maintenance allowance for the upkeep of the two children of the marriage. The Respondent shall be fully responsible for the educational and medical expenses of the said children and the Petitioner shall provide clothing for the children. I shall next address issues 4, 5 and 6 together. Issue 4 is "whether or not the Respondent is entitled to an order for damages against the Petitioner for denying the Respondent access to their children, for wasting his time and making him incur unnecessary financial cost"; issue 5 is "whether or not the Respondent is entitled to a compensation from the Petitioner for the divorce" and issue 6 is "whether or not the Petitioner should be ordered to pay cost including legal fees". When it comes to damages, compensation and claim for cost, they are all at the discretion of the Court and will be determined by the facts of each case and the circumstances that surround them. From the circumstances of the instant cross petition and the evidence on record, the Respondent's claim for damages against the Petitioner on the grounds mentioned cannot be granted because the Respondent himself admitted to a sexual relationship with one Emelia. This is the Respondent admitting to committing adultery *Mary Quartey v. Francis Nutsugah* Page 15

of 19 which is a fact to prove that a marriage has broken down beyond reconciliation. The Respondent during cross-examination admitted to his sexual relationship with the said Emelia and the fact that he gave her money for shopping. He further indicated that it happened twice. When it comes to the fact of adultery, even a one-time act will suffice, however, the Petitioner withdrew her petition. If the Petitioner had proceeded with her petition, she could have proved her case against the Respondent based on his own admission. She only withdrew the case because she told the Court that, that is what the children wanted. I therefore find that the Respondent's claim for damages lacks any merit and he is consequently not entitled to same. Section 20 (1) of Act 367 provides that: "The Court may order either party to the marriage to pay to the other party a sum of money or convey to the other party movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision that the Court thinks just and equitable." From the law, financial provision upon the dissolution of a marriage is not the exclusive preserve of women and that, the Court, may, if the justice of the case demands, award financial provision for either the man or the woman. In the case of *Barake v. Barake* [1993-1994] I G.L.R 635 at page 666, where Brobbey J (as he then was) stated: "On such an application, the Court examines the needs of the parties and makes reasonable provision for their satisfaction out of the money, goods or immovable property of his or her spouse." *Mary Quartey v. Francis Nutsugah* Page 16 of 19 The award of lump sum financial provision under Act 367 is therefore need based and it is not intended to enrich one spouse at the expense of another or punish the one who is to be blamed for the breakdown of the marriage. In the case of *Obeng v. Obeng* [2013] 63 GMJ 158, the Court of Appeal held that: "what is "just and equitable" may be determined by considering the following factors: the income, earning capacity, property, and other financial resources which each of the parties has or is likely to have in the foreseeable future, the standard of living enjoyed by the parties before the breakdown of the marriage; the age of each party to the marriage and the duration of the marriage." Applying the above authorities to the facts presented before the Court as well as from the evidence on record and the circumstances of the parties as explained in the above analysis, none of the parties is entitled to compensation or financial support from the other. I accordingly find that the Respondent is not entitled to a compensation from the Petitioner. Section 24 of Act 367 provides that "at any time after the commencement of the proceedings, the Court may require either party to the marriage to pay to the other party the sum or sums of money that is, or are reasonable to enable that party to maintain or defend the suit." The Petitioner instituted the action against the Respondent but subsequently withdrew it with leave of the Court. The Respondent, however proceeded with his cross-petition. The facts of the case indicate that the Respondent is more financially stable than the Petitioner. Considering the circumstances of the instant case, the Court shall not order cost in favour of either party to the marriage. Thus, the Respondent's claim for cost is hereby dismissed.

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## CONCLUSION

From the foregoing, I conclude that the marriage between the parties has broken down beyond reconciliation and I hereby grant the Respondent's cross petition for dissolution of the marriage in the following terms;

1. I hereby grant a decree for the dissolution of the marriage celebrated between the parties on 31st January, 2009 at St. Mary's Catholic Church, Samreboi, thus the marriage is hereby dissolved.
2. The marriage certificate issued to the parties herein is accordingly cancelled. The parties shall present the original copy of the marriage certificate for cancellation by the registrar of the Court.
3. Custody of the children of the marriage, Hephzibah Sesinam Nutsugah, 10 years old and Buelah Sedinam Nutsugah, 6 years old respectively (at the time of the cross petition), is granted to the Petitioner with reasonable access to the Respondent.
4. The Respondent shall pay an amount of GH¢1,000.00 as monthly maintenance allowance for the upkeep of the children of the marriage; and shall also be fully responsible for the school fees, educational and medical expenses of the children of the marriage. The Petitioner shall provide clothing for the children. The monthly maintenance allowance shall be paid on the 2nd day of each month effective March 2024.
5. The Respondent's reliefs of an award of damages, compensation and cost are hereby dismissed. Mary Quartey v. Francis Nutsugah Page 18 of 19
6. There will be no order as to financial provision to either party to the marriage considering the circumstances of the parties.
7. Considering the circumstances of the instant case, the parties shall bear their own cost of the suit. [SGD.] H/H AKOSUA A. ADJEPONG (MRS) (CIRCUIT COURT JUDGE) Mary Quartey v. Francis Nutsugah Page 19 of 19

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