

GHANA / JUDGMENT

Awotwe Vrs Ninson [2023]

GHADC 289 (11 January 2023)

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1 IN THE DISTRICT COURT AGONA SWEDRU - A.D. 2023 BEFORE HIS HONOUR ISAAC APEATU
Civil Suit No A4/106/2023 11th January, 2023 MONICA AWOTWE ... Petitioner VERSUS ISAAC
NINSON ... Respondent

JUDGMENT

The contents of the petition filed by the petitioner disclose that the parties celebrated their customary marriage under the Ordinance on the 8th day of November 2008 at the Catholic Church, Agona Swedru. After the marriage, the parties cohabited as couples at Agona Swedru and later moved to Kasoa. That there are two children in the marriage whose names were not given. It is the Petitioner's claim that the marriage has broken down beyond reconciliation alleging that the respondent has deserted her for the past five (5) years. She therefore filed this petition on the 28th day of October, 2022 against the Respondent praying that the marriage between the parties be dissolved and custody of the children be granted to her. 2 In accordance with Order 18 rule 1(3) of the District Court rules, C.I. 59, the Petitioner filed this petition stating the grounds on which she claims the relief for dissolution of the marriage. As stated above, the Petitioner deposed in her petition that the marriage between her and the respondent has broken down beyond reconciliation. She averred that the respondent has deserted the matrimonial home for the past five years and that since then, they have not stayed under the same roof. She alleged further that the respondent has failed to maintain her and the children. That the respondent has denied her sex and has in the process joined himself to a woman at Kasoa with whom he has a child. She therefore prayed that the court to grant her the reliefs endorsed on her petition. The petition together with attached documents was duly served personally on the respondent. Even though the bailiff attached proof of service of the processes on him, the respondent nonetheless failed to appear in court when the case was called. The respondent did not appear in court neither did he file any answer to the petition. In the absence of the respondent's answer, the Petitioner was called to give evidence in proof of her averments. Petitioner testified on her personal behalf but did not call any witnesses in proof of her claims. I shall relay the testimony of the petitioner as I discuss the issues set out in the judgment. It is a general rule of law that the court before whom a suit for dissolution of marriage is filed, was under a statutory 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 3 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 the fact that the marriage has broken down beyond reconciliation, as in all civil cases, is on the party against whom a finding of fact would be made in the absence of further proof i.e. the petitioner herein: 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 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”. In accordance with the general rules of procedure as stated above, the Petitioner had the burden of proving all the averments she made against the respondent on a preponderance of probabilities. This is so despite the fact that the respondent failed to 4 make an appearance in court. If she succeeds in establishing the averments by evidence, the onus will then shift to the Respondent to lead some evidence to rebut same. Having established the above principles, it bears emphasizing that the Matrimonial Causes Act, 1971 (Act 367) is the substantive law which makes provision for dissolution of marriages in this country. Under section 1(2) of the Matrimonial Causes Act, 1971 (Act 367), 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. In application of the provisions of Act 367, the courts have 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. Having laid bare the basic principles under which divorces are granted in this country, what did the petitioner do to prove that the marriage has broken down beyond reconciliation? As I stated earlier, the Petitioner gave evidence for herself in a bid to prove break down of the marriage. And as I stated above, she did not call any witnesses. Petitioner testified to the effect that she got married to the respondent on 8th day of November 2008. And after the marriage, they cohabited in Agona Swedru and then in Kasoa. That they have a set of twins. That respondent has deserted her and the children for the past five years and that since then, they have not stayed under the same roof. That the respondent who works with a micro credit firm was transferred to Kasoa in
2020. However, since then he has not returned home. She alleged further that the respondent has failed to maintain her and the children. That the respondent has denied her sex and has in the process joined himself to a woman at Kasoa with whom he has a child thus committing adultery. She therefore prayed that the court to grant her the reliefs endorsed on her petition. The only issue which calls for determination in this case is whether or not the marriage between the parties has broken down beyond reconciliation. And the fact to be proven under section 1 (2) of Act 367 are that of desertion and adultery. It is settled law 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 lead to proving breakdown beyond reconciliation. In this case, the Petitioner has grounded her petition for divorce on the fact of desertion and adultery by the respondent. These I think were the main grounds of her petition for dissolution of the marriage upon. I shall first determine the ground of desertion. It bears stating as a fact that the court can grant divorce if it was established on the evidence that the respondent has deserted the petitioner for a

continuous period of at least two years immediately preceding the presentation of the petition or 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. These two facts are contained in section 1(2) (c) and (e) of Act 367. The courts have also made judicial pronouncements on the fact of desertion as a ground for dissolution of a marriage in a line of decisions given in cases such as *Happee v Happee & anor* [1974] 2 GLR 186; *Barnes v Barnes* [1971] 1 GLR 202; *Hughes v Hughes* [1973] 2 GLR 342. The courts have held that proof of desertion under any of the two lengths of time can ground dissolution of marriage. The courts have however added that for divorce to be grounded on these facts, it is of utmost importance for the court to find out whether the desertion has run for continuous periods of two or five years immediately preceding the presentation of the petition. In this case, the petitioner alleged that the respondent has deserted her for a continuous period of five years. However, in her evidence, she appears to say that it was two years i.e. 2020. Be that as it may, I find that the desertion complained of by the petitioner is alleged to have begun in 2020. The exact month is not given. However, assuming it happened in the last month of 2020 i.e. December 2020, it is clear that the respondent has left his matrimonial home since December 2020. According to the petitioner, she has made several efforts to get the respondent to come back to the matrimonial home but to no avail. It has been almost two years since the respondent decided to go away from the matrimonial home. That I think under the circumstances, is a long time to go away from the matrimonial home. The petitioner also alleged that the respondent has committed adultery by having a child with a woman in Kasoa. She failed to name the woman. However, the fact is that respondent has committed adultery with that unnamed woman. 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. It is also defined by Halsbury's *Laws of England* (3rd ed.), Vol. 12, at pp. 235-236, to mean, "consensual sexual intercourse during the subsistence of the marriage between one spouse and a person of the opposite sex not the other spouse." Rayden on *Divorce* (7th ed.), at p. 131 defines in clear terms that the offence is committed when it takes place "between a married person and a person of the opposite sex." 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 burden of proving adultery lies upon the party who alleges it. This is because there stands in favour of the spouse against whom this grave misconduct is charged, a presumption of innocence. The standard of proof of such allegation of adultery is on a balance of the probabilities as established above. But although the evidence in proof of adultery 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. The view has been taken long ago that one who alleges adultery must show at least a prima facie case. If that is done the court may then, in the absence of evidence in disproof, come to the conclusion and infer that adultery has been committed. It bears emphasizing the basic principle of evidence that in a civil trial, the defence may expressly admit a fact pleaded in a statement of claim or a petition or impliedly admit it by failing to traverse it. In this case, the Respondent has not denied any of the allegations made by the petitioner against him either in the petition or in the evidence. This is because even though he was served with the petition and the accompanying hearing notices to appear in court, he did not appear to respond to them. The fact as already stated in this case is that the respondent was duly and regularly served to appear to answer the charges leveled against him by the petitioner but he failed to appear. The reasons for his failure to appear are unknown to me. What I know is that the respondent was served by substituted service after personal service failed to appear but he failed to appear. As was held in *Republic v Circuit Court; ex parte Dzakah* [1984-86] 1 GLR 741 where the opportunity is given a party to appear in court and he fails to appear, he cannot raise a claim later that he was not heard. In such a case the party who fails to appear can be said to have deliberately abstained from taking advantage of an opportunity to be heard and no breach of the audi alteram partem rule can be said to have occurred. In the case of *Doris Naadu Nartey v Christian Kumi*, Civil Appeal No. J4/20/2006 dated 13th March, 2007, the Supreme Court held per Sophia Adinyira (Mrs.) JSC as follows: “As I see it the main point raised in this appeal by the appellant is that he was not given a hearing and this was a breach of natural justice i.e. a breach of the maxim audi alteram partem rule. However, this maxim cannot avail a party who has notice of a trial but fails or refuses to appear.”⁹ This principle of law has been affirmed in recent cases of the Supreme Court: *Republic v High Court (Human Rights Division), Accra; Ex Parte Akita* [2010] SCGLR 374; *Republic v High Court (Fast Track Division) Accra, Ex Parte Ayikai (Akosoku IV – Interested Party)* [2015-2016] 1 SCGLR 289. 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. Having failed to appear in court, the respondent is deemed to admit the allegations of fact made against him by the petitioner. This admission does not admit of any inconsistencies. It is clear, distinct and unequivocal whatsoever and admits of no controversy. Having admitted adultery, there was no further burden on the petitioner to prove anything. His admission relieved the petitioner of the burden placed on her shoulders to prove the allegation she had made. And I think that his admission sounded so clear enough as to be relied on by the court. I hold that the respondent has committed adultery with the unnamed woman at Kasoa. So, on the issue of whether the marriage has broken down beyond reconciliation, I find that the petitioner succeeded in convincing the court by her evidence that the marriage has broken down beyond reconciliation. I find in this case that the respondent was duly served to appear but he has failed to avail himself. In his unjustified absence, evidence has been taken from the petitioner. Based on the

evidence on record, an evaluation has been made. It has been held in a line of judicial decisions that where some evidence is given by the Plaintiff in a case (petitioner in this instance), no matter how indefinite or insufficient it may be, if not rebutted by a better or superior type of evidence, the trial court is perfectly entitled to consider it, and what credence or weight it decides to attach to it is entirely a matter for it. If it believes or accepts the particular piece of evidence on an issue of fact, its decision cannot be questioned unless it is based on a wrong principle of law. See *Yoguo v Agyekum* [1966] GLR 482 at 505. I am of the opinion that the petitioner proved on the available evidence that the respondent has deserted her for a continuous period of two years from 2020 and also that he has committed adultery. I do think that these facts have been well established in the evidence adduced by the petitioner and these facts ground dissolution of the marriage between the parties. I have read carefully the evidence as presented by the petitioner. I am of the firm conviction that the Petitioner was able to prove breakdown of the marriage based on section 2(1) (a) and (c) of Act 367. I am satisfied that the Petitioner proved that the respondent has committed adultery and has deserted her for at least two years before the filing of this suit. On the totality of the evidence on record, I am satisfied that the marriage has broken down beyond reconciliation. I 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. The marriage certificate is cancelled accordingly. There are two children of the marriage. It appears that the two children are staying with the petitioner. It is ordered that custody of the two children named as Louis Ninson and Lawrence Ninson aged 13 years be and is hereby granted to the petitioner. No order is made also as to cost. HIS HONOUR ISAAC APEATU DISTRICT MAGISTRATE

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