

UGANDA / JUDGMENT

Campbell Mcneil v Ruth Mcneil

(Civil Appeal No. 3 of 1952)

[1952] EACA 89 (1 January 1952)

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COURT

East African Court of Appeal

BEFORE

Bourke J, Nihill P, Worley VP

CASE / FILE NUMBER

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR BARCLAY NIHILL (President), SIR NEWNHAM WORLEY (Vice-President)
and BOURKE, J. (Kenya)

CAMPBELL McNEILL, Appellant (Original Petitioner)

v

RUTH McNEILL. Respondent (Original Respondent)

Civil Appeal No. 3 of 1952

(Appeal from the decision of H. M. Supreme Court of Kenya—Connell, J.) Divorce—
Desertion—Evidence—Animus deserendi.

The respondent left the appellant in 1945 with the appellant's consent for the purposes of taking the children of the marriage to the U. S. A. and educating them there. The respondent did not return from the U. S. A. and the petitioner contended that there was evidence of *animus deserendi*.

Held (23-5-52).—(Vice-President dissenting.) The appellant had failed to discharge the onus of proof that prior to the 11th October, 1947, his wife had formed the intention to desert him.

Cases referred to: Pardy v. Pardy, (1939) 3 A. E. R. 779; Ettenfield v. Ettenfield, (1939) P. 377; Harriman v. Harriman, (1909) P. 123; Sifton v. Sifton, (1939) 1 A. E. R. 109; Pratt v. Pratt, (1939) 3 A. E. R. 437.

Mackie Robertson for Appellant.

Goodbody for respondent.

JUDGMENT (delivered by SIR BARCLAY NIHILL (President)).—The only ground in this appeal from a judgment of the Supreme Court of Kenya in a divorce matter is that the learned Judge misdirected himself in coming to the conclusion that there was no reliable evidence on which he could find that the respondent had deserted the appellant-petitioner when in fact there was evidence to justify a finding of desertion constructive and actual.

The appellant, the husband, married the respondent, who is a citizen of the United States of America, in New York on 8th June, 1929. Thereafter they lived together in America, Scotland and Kenya and two sons were born of the marriage. In September, 1945, the respondent took the children to America ostensibly for the purposes of their education. They were then fourteen and thirteen years old. Neither the wife nor the children have ever returned to the appellant. In his petition he alleged that his wife had deserted him without cause for a period of at least three years or upwards preceding the date of the petition which was filed on 11th October, 1950. In his evidence the appellant conceded that when she left for America in 1945 it was with his consent and that he paid the major portion of the expenses. The respondent in her answer to the petition denied desertion and has sworn an affidavit to the effect that it is false to say that she has ever deserted her husband. The appellant, therefore, had to satisfy the learned trial Judge not only as to the factum of separation but that there had been an **animus deserendi** on the part of his wife which had continued for at least three years preceding the date of the filing of the petition. It was material therefore to prove that an **animus deserendi** was operative not later than 11th October, 1947. This the appellant failed to do to the satisfaction of the trial Judge and speaking for myself I can find nothing to indicate misdirection on the part of the learned Judge or that he placed too great an onus on the appellant. The appellant has accused the respondent of a matrimonial offence which she has denied and a duty lay on the Court to be satisfied by an adequate standard of proof, that the offence had been committed before granting the

appellant relief. In adultery cases it used to be said that the standard of proof required was as strict as that required in a criminal case before an accused person could be found guilty, namely that the tribunal had to be satisfied beyond reasonable doubt. In the fifth edition on Rayden on Divorce in paragraph 111 it is submitted that desertion like the other matrimonial offences must be proved beyond reasonable doubt. It may be that in the light of some recent decisions in England the learned author here puts the matter too high even for adultery, but I know of no authority for the proposition that as regards any matrimonial offence a Court is entitled to decide the issue on a mere balancing of probabilities. I think it is fair to say that the basis of the appellant's case is that although he reluctantly consented to his wife going to America at all, the only reasonable inference to draw from her subsequent conduct is that even when she left him in 1945 she had then a concealed but actual *animus deserendi*. Now the learned Judge who heard this petition was not satisfied that this had been proved. On the evidence he felt unable to find that the appellant had withdrawn his consent to the American arrangement, and that he had

asked her without qualification to return to Kenya and that she had refused to come. The learned Judge considered that there was an absence of reliable evidence to this effect which must mean that he was unconvinced by the mere **ipsi dixit** of the appellant unsupported by any corroborative evidence. In the light of such documentary evidence as has been produced. I think this was the only possible view that could be taken, for even as late as August, 1947 (Ex. A, letter from appellant to respondent dated 3rd August, 1947) the appellant wrote a letter to his wife full of advice on how she should deal with the children and concluding with the words "all my love to you who are so much to me". There is not a word in this letter to suggest that he has withdrawn his consent to her remaining in America or that he is pressing her to return. The change came in November when he wrote and told the respondent that he had fallen in love with another women (see letter dated 23rd November, 1947). It is unnecessary to consider what effect this letter may have had on the respondent, because the appellant, as I have already observed, had to discharge the onus of proving that prior to the 11th October, 1947, his wife had formed the intention to desert him. This the learned Judge held as a fact that he had failed to do.

I would accordingly dismiss this appeal with costs.

BOURKE J. (Kenya).—By a petition for divorce presented on the 11th October, 1950, the appellant alleged desertion by his wife without cause for a period of at least three years immediately preceding the presentation of the petition; the date from which the desertion is alleged to have commenced is given as the 23rd September, 1945.

In support of her answer to the petition the respondent, who is in the United States of America, denied by affidavit that she has been guilty of desertion. The evidence in the case consisted of the oral testimony of the petitioner and the contents of certain letters passing between the parties. The learned trial Judge came to conclusion that there was no reliable evidence entitling him to find desertion by the respondent and the petition was dismissed. The ground of appeal as set forth in the memorandum of appeal is: \$-\$

"That the learned Judge misdirected himself in coming to the conclusion that there was no reliable evidence in which he could find that the respondent had deserted the petitioner when in fact there was evidence to justify a finding of desertion constructive or actual."

It may be said at once that there is no question of constructive desertion arising, nor has the case for the petitioner at any stage been argued or put forward upon any such lines. Further, it will be apparent that there is no

allegation in the memorandum of appeal that the learned trial Judge in his approach to the evidence, and when he came to assess its value, acted upon any misconception of the law to be applied in a matrimonial cause of this kind. It is evident from several passages in the judgment that the judge, though he does not say that he disbelieved the petitioner, did not view the evidence before him as being of sufficiently cogent or trustworthy a nature to satisfy his mind as to the merits of the petitioner's case and to bring him to the finding that there was desertion entitling the granting of a decree for dissolution of the marriage. The petitioner has undertaken the formidable task of showing that the learned Judge erred in attaching insufficient weight to the

evidence and in regarding it as undependable, and of convincing this Court that the material upon the record is strong enough and satisfactory enough to justify by way of inference of fact a finding that there has been the desertion as alleged.

As has been seen, the date given in the petition as that upon which the respondent is alleged to have deserted her husband is the 23rd September, 1945. No attempt was made to substantiate that allegation; on the contrary the petitioner made it clear through his evidence that it was agreed between himself and the respondent that they should temporarily live apart in order that the latter should take the two children of the marriage, then aged 13 and 14 years, to the United States of America for the purpose of completing their education. The respondent accordingly left the family home and brought the children to the United States in September, 1945, while the petitioner remained in Kenya where he was employed. The respondent did not return from the United States. It is submitted that the evidence is sufficient to establish that desertion by the respondent commenced in the early part of 1947 or at any rate prior to the time in October of that year when the three years began to run.

Now whatever about the precise nature of the understanding between the parties as to the length of time that the respondent was to remain away from her husband, it is evident that the oral arrangement bringing about the factum of separation, though it was reluctantly consented to by the petitioner, sprang from exigencies of mutual domestic convenience. It was not a matter of a separation agreement in the sense of a legally binding contract conferring a status, and accordingly I do not see that any element of repudiation on the one hand, or absence of insistence upon settled terms upon the other, enters into the question, as where you have a binding agreement for separation, whether under deed, as in authorities to which we have been referred, notably Pardy and Pardy, (1939) 3 A. E. R. 779, or orally, (see *Ettenfield v. Ettenfield*, (1939) P. 377, 383). It is incumbent upon the petitioner to prove that four elements continued throughout the course of the three years immediately preceding the presentation of the petition, namely, on the side of the respondent, the factum of separation, which is not in dispute, and the **animus deserendi** or intention to bring cohabitation permanently to an end; and on his own side the absence of consent and absence of conduct reasonably causing the respondent to form the intention to bring
cohabitation to an end (see authorities referred to in Rayden on Divorce, 5th Edition, page 101). On the point of absence of consent it is not necessary for a spouse relying upon desertion to negative a state of passive acquiescence on his or her part or to show that he or she was at all times during the statutory period ready and willing to receive the deserting spouse back again, *Harriman v. Harriman*, 1909 P. 123, 148; *Sifton v. Sifton*, 1939 1 A. E. R. 109; but a deserted spouse must not actively by letter or conduct, consent to the other living apart, if desirous of preserving the right to enforce a legal remedy against the offending spouse (*Lately on Divorce*, 13th Edition, page 111).

In the first place it seems to me in considering whether there is sufficient reliable evidence to establish the forming of a supervening *animus deserendi* in 1947 and the continuance of such intention for three years prior to the presentation of the petition, that it is very important to be quite clear as to the nature of the mutual understanding under which the parties came to be

living apart. It has been argued here on behalf of the petitioner, though I observe no indication that the same contention was advanced before the lower Court that the consensus extended only to the respondent absenting herself from her husband for such time as sufficed to travel to the United States, see the children to school, and return thereafter to Kenya. But the learned Judge makes quite apparent the conclusion he reached on the evidence as to this aspect of the matter. He says in the course of his judgment: "there is no doubt at all in my mind that in the event of the sons' education being substantially completed, which it is, there is a duty in law... upon the respondent to return to Kenya and live with the petitioner". There is nothing in the memorandum of appeal bringing into question the rightness, having regard to the evidence, of the finding involved in the passage just quoted, namely, that it was agreed between the spouses that the children's mother should remain with them until their education was substantially completed, and there is no suggestion, or any contest about it, that such education was substantially completed in 1947 when they would be aged respectively about 15 and 16 years. In evidence the petitioner said that his wife's excuse for going to the United States was: "to put the children in school for further education". He was opposed to the children going away but in the end he consented to their going. Again he testified: "My wife said she wanted to go to U. S. A. to educate the children. I wanted to send them home or to South Africa. I asked her to visit the States without the children to see her sisters and brothers --- she said she wanted to go back to the U. S. A. and put the children at school: I just let her go for the children's sake". Nowhere does he say that the understanding was that having placed the boys at school she was to embark upon the return journey to Kenya, or that any arrangement was contemplated whereby they would be looked after by relatives or otherwise during the holidays, if it was to boarding school they went, or receive daily care if, as seems probable from the contents of the letter of 3rd August, 1947, they were attending a day school. There is every reason to conclude that both parents were very affectionately disposed towards their children, and I think it unlikely that the agreement was, as is now suggested, merely that having put them to school the mother should then leave them and return to this Colony. In the affectionate letters exhibited written by the petitioner to his wife during 1947, he seems to accept the position and does not query it in any way. Indeed by the letter of 3rd August, 1947, after discussing the treatment in upbringing of one of the boys, he writes: "You'll be thinking it easy for me to sit here philosophizing while you have the actual job to do. Darling I know you have the hardest job; I know also that I'd sooner have you the mother of any children fathered by me than any one else I know of". I do not think that there could be a clear indication that at that time it was recognized by the petitioner that his wife was fulfilling her side of the arrangement by tending the children—a more arduous responsibility than his share in keeping the family home going—and was doing so to his entire satisfaction. Even in the letter of the 23rd November, 1947, when the petitioner informs the respondent that he has fallen in love with another woman and offers terms if she will divorce him, the only accusation is that he has had little but contempt from her for years. There is no suggestion of the existence of any element of the desertion now the subject of complaint.

I have referred to this evidence to show that there was material, and to my mind ample material, to justify what I regard as sufficiently clear finding by the learned Judge that the petitioner and respondent agreed to part in order

that the latter could take the children to school in the United States and remain with them in that country until their education was substantially completed, when, of course, they would be in a better position to stand upon their own feet. Accordingly throughout 1947, to go no further, the respondent had some justification for residing apart from her husband. It is against the background of this arrangement that it rested with the petitioner to show that his wife took advantage of the existing separation to manifest an intention to bring cohabitation permanently to an end.

The parties were married in 1929 in New York, the respondent being American by birth. The petitioner testified that the marriage, with the exception of certain periods, was unhappy from the year 1937 when his wife began to take an interest in other men. Though they shared the same room no marital intercourse took place, owing to the respondent's refusal, from 1941 until she departed in 1945 for America. The evidence mainly relied upon to prove the animus deserendi is that of the petitioner as to requests made to his wife by letters in 1946 and 1947 to return to him in Kenya, and his evidence as to her attitude and what she wrote in reply. None of these letters either in original or copy was produced. The petitioner was apparently making the case he had kept none of the letters from his wife. As to how he came to be heard to testify as to the contents of letters sent by him is obscure; it has not been explained and does not appear from the record that any attempt was made to procure or have them produced for evidentiary purposes. As the learned Judge remarked in his judgment, it was "unfortunate" that the letters were not available, and again he expresses the view that the evidence of request by the petitioner to his wife to return to Kenya was unsatisfactory, and that if there was any such request made the answer "alleged" by the petitioner was somewhat vague. The obvious desire of the trial Judge to know more of the contents of these letters is readily understandable; indeed it seems to me from the judgment that he is in some considerable doubt as to whether any request to return was made at all by the petitioner. Now there is no evidence that the respondent ever expressed a direct refusal to return to cohabitation with the petitioner or announced any intention of bringing the cohabitation permanently to an end. As the petitioner testified "she (the respondent) did not say she would or would not come back". In evidence the petitioner said that he wrote to his wife in 1946 and asked her when she was coming back to Kenya. He went on: "she replied evasively. I did not get all her letters. She said the children were at school. She was working and if she returned she would have to throw up her job there for a possible job here; it was not a definite I'm coming or not coming". The petitioner also wrote in 1946—whether in the same letter or by another letter is not made clear—saying that he was making inquiry as to getting employment in Canada where he would be prepared to make his home. The respondent replied to give reasons why such a course would not be suitable either for him or the children. The petitioner's evidence as to the two letters he wrote in 1947, upon which so much reliance is placed in this appeal, is, "Early in 1947, I asked my wife if and when she was returning. She replied, 'if God wanted to make a go of the marriage He would, if He didn't, He wouldn't.' She said she didn't understand why I acted as if

we were the first couple that ever separated. That killed any spark of affection I've had before. It was so negative and showed no effort on her part." It was at this time that, according to the petitioner, he definitely thought his wife had deserted him and that he wanted to divorce her, though there is no suggestion of divorce in the exhibited correspondence until he comes to write the letter of 23rd November, 1947, when he informs of his attachment to another woman and invites the respondent to divorce him. As to the second letter he deposed: "In 1947 I wrote and told my wife that if she didn't return I thought divorce proceedings were the only solution. She replied she was coming back in the spring of 1948. She did not return. She gave no reason why. . . ." In 1949 the respondent wrote to the petitioner suggesting that he might come to the United States but he declined on financial grounds and because he did not want to lose good employment here and live in a foreign country.

It seems to me, and I have little doubt similar reflection affected the mind of the trial Judge, that having regard to the arrangement and understanding under which the parties ceased to live together in Kenya, and the very affectionate tones of the petitioner's letters exhibited written to the respondent in 1947 (with the exception of that of the 23rd November, 1947) that it is at least very desirable in an inquiry such as this to have fuller knowledge of the contents of the letters spoken of by the petitioner passing between the parties in 1946 and 1947. As to those of the petitioner exhibited through cross-examination, he explains that in them: "I was trying to maintain my affection for my wife even though she behaved badly." There is certainly no sign of strained expression of affection in these letters and nothing to suggest any thought on the petitioner's part that his wife has behaved badly or that she had given him any reason to think that she had formed the intention not to live with him again. There is no suggestion at all that these are letters selected by the respondent for the purpose of the case and that anything is being held back. As to the friendly letter, ex. 2, of the 30th September, 1951, written by the respondent to the petitioner, it seems to me that the learned Judge has made an appropriate comment as to the words relied upon by the petitioner, namely: "May God give you a forgiving heart".

The learned Judge has expressed his opinion that there is an absence of reliable evidence that the petitioner had on a number of occasions invited the respondent to return and live with him. He was not satisfied that the evidence afforded trustworthy proof of the **animus deserendi**. I have examined the evidence and it seems to me quite futile to submit that there is ground for holding that the lower Court was wrong in its assessment of the reliability and cogency of the evidence, and to ask this Court to say that there is sufficient trustworthy material upon the record to establish desertion. I am of opinion, with respect, that the learned Judge erred in regarding, as it appears to me he did, the arrangement to separate as a contract and that he occupied himself unnecessarily with the consideration whether the petitioner **wanted** his wife to return to him. But if I am right in that view, I do not think that he was brought to a wrong approach to the evidence when he came to consider whether there was adequate reliable proof that the respondent had formed the intention to bring the cohabitation permanently to an end. I find it quite impossible to say that the Court below was wrong in holding that there was no evidence of a satisfactory or reliable nature to establish this element of *animus deserendi* on the side of the respondent; indeed I go so far as to say that in my opinion the learned Judge could not reasonably

have come to any other conclusion. Since that is the view I take of the matter I find it unnecessary to go further and inquire on an examination of the evidence whether, assuming that there was an *animus deserendi* supervening upon the factum of separation, there is evidence going to prove the two necessary elements on the side of the petitioner, namely the absence of consent and the absence of conduct reasonably causing the petitioner to form the intention of bringing cohabitation to an end. The learned Judge did pause in his judgment to refer to the authorities in view of the petitioner's letter of the 23rd November, 1947, and indicated the line he would take did the issue arise for determination. But he goes on to say: "It becomes necessary however to decide the all-important point as to whether there has been desertion in fact and an intention by the respondent". The fact of separation was not in dispute and it is plain to my mind that in holding that there was no dependable evidence

on which he could find desertion, the learned Judge did not consider that the element of *animus deserendi* had been proved and accordingly dismissed the petition.

I would dismiss the appeal with costs.

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SIR NEWNHAM WORLEY (Vice-President).—I have had the opportunity of reading the judgments prepared by the other members of the Court but am unfortunately unable to concur with the conclusions they have reached. There were a number of unsatisfactory features in the trial of this petition and I cannot be assured that, had those features not been present, the learned trial Judge would necessarily have come to the conclusion that the petitioner had failed to prove his case. For my part I would therefore have ordered a re-trial.

As this is not the view held by the majority of the Court, I do not think there is anything to be gained by going into a detailed review of the evidence and I will content myself by referring to a few important points.

In the first place it is clear that the learned Judge misdirected himself in law in relying, as he apparently did, on the comment Rayden on Divorce, 5th Edition, page 112, "In order that a separation which began by being consensual may be changed into desertion, it must lose its consensual elements on both sides." That sentence is a quotation from the judgment of the Master of the Rolls in *Pardy v. Pardy* (1939) 3 All E. R. 779 at page 783 and if that judgment is read as a whole it is clear that Sir Wilfred Greene (as he then was) had in mind the case of spouses separated under a separation deed. On this point I think I cannot add anything to what my brother Bourke has said in his judgment.

The crux of the petitioner's case lay in his evidence that early in 1947 he asked his wife if and when she was returning and she replied, "If God wanted to make a go of the marriage He would: if He didn't, He wouldn't. She said she didn't understand why I acted as if we were the first couple that had ever separated." To me this seems a clear enough answer that as far as the respondent was concerned, the marriage was at an end and that she would not, of her own volition, make any effort to resume cohabitation.

I do not however find in the judgment any clear indication whether the trial Judge accepted or rejected this evidence. Before us the respondent's advocate agreed that the petitioner gave his evidence frankly and fairly and that he had not challenged this part of the evidence in cross-examination.

This brings me to what I can only regard as another unsatisfactory feature of the trial. Although Mr. Goodbody appeared for the respondent-wife he had not in fact been instructed by her. The respondent had filed an affidavit sworn in New York but took no further proper steps to defend the petition. She did, however, send a number of letters to the Registrar of the Supreme Court enclosing with them some letters written to her by the petitioner, which were put to him in cross-examination at the trial. We were informed, however, by Mr. Goodbody that he was requested by one of the Judges of the Supreme Court to appear for the respondent. I do not doubt that both the Judge in question and Mr. Goodbody acted as they thought best in the interest of the respondent but I cannot refrain from saying that this rather irregular proceeding had an unfortunate result. There was no application for discovery or notice to produce originals and the petitioner was allowed to give oral evidence of the contents of these and other letters without any question as to whether the letters themselves were in existence or could be produced. Indeed Mr. Goodbody, not having been properly instructed, was unable to say whether or not the respondent admitted or denied having received a request to return in 1947 or having given the answer sworn to by the petitioner.

I cannot find in the judgment any specific reference to this request and answer but I think it is referred to in the following passage:-

"The evidence however of such a request by the husband is unsatisfactory and in any event if such request was given the somewhat vague answer which he alleges that the respondent made was condoned by the petitioner's subsequent letters of affection. Either he wants his wife back or he doesn't. If he wants his wife back he should not write subsequently and give the impression that he is content with things as they are."

With respect I think that there is some misdirection here. There is of course no question of "condonation" of desertion though the petitioner must show that he did not actively consent to it. But this does not mean that he is debarred from writing affectionate letters to his deserting spouse. Desertion is a matrimonial offence from the beginning but it is not serious enough to ground a petition for divorce until it has been persisted in for three years. In the meantime the policy of the law is to encourage reconciliation if that be possible, and the deserted party is required to accept any bona fide offer by the erring spouse to resume cohabitation: an extreme example of this is found in **Pratt v. Pratt** (1939) 3 All E. R. 437. The writing of affectionate letters which might induce such an offer cannot therefore be construed as "condoning" the offence.

The real question to be answered is has the petitioner consented to the desertion? The learned Judge thought that in his subsequent letters to his wife the appellant had given the impression that he was content with the separation. In considering these letters, the Court should look to their substance and not to a few words written in some of them with a particular intention and

taken out of their context. It is therefore necessary to bear in mind that some of these letters are addressed to his wife and sons and in them one would not expect to find protests at her desertion. In particular in the letters of 3rd August, 1947, he is giving advice to his wife on the upbringing of the boys whom she had insisted on taking to America. He is cautioning her against appearing to favour one rather than the other and in the circumstances it is not surprising that he should have coated the pill with sugar lest she should reject it altogether.

In my respectful opinion the learned Judge was also wrong in paying attention to the wife's letter of 30th September, 1951 (ex. 2). This was written months after the wife had been served with the petition and after she had sworn an affidavit making totally unfounded charges of adultery against the petitioner. In view of this fact I cannot believe that there was any sincerity in this letter or in the offer to return in the spring of 1952.

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