

UGANDA / JUDGMENT

Duder v Duder (Civil Appeal No. 23 of 1949) [1949] EACA 12 (1 January 1949)

[1949] EACA 12**COURT**

East African Court of Appeal

BEFORE

Graham Paul CJ, Gray CJ, Nihill P

CASE / FILE NUMBER

Civil Appeal No. 23 of 1949

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COURT OF APPEAL FOR EASTERN AFRICA

Before SIR BARCLAY NIHILL, C. J. (Kenya), SIR G. GRAHAM PAUL, C. J. (Tanganyika), and SIR JOHN GRAY, C. J. (Zanzibar)

ALEXANDER HYDE DUDER, Appellant (Original Petitioner) v.**RUTH MARY DUDER, Respondent (Original Respondent) Civil Appeal No. 23 of 1949****(Appeal from decision of H. M. Supreme Court of Kenya-Bourke, J.)****Divorce—Desertion—Onus of proof.**

In 1945 the respondent lived partly with her parents at Worthing and partly on a farm in Wales spending only two nights with the appellant in July, 1945. When the appellant discovered his wife pregnant, the appellant requested respondent to have the child adopted and come to Kenya, stating that otherwise he refused to live with her. The respondent thereupon left the appellant and neither party had any future communication.

Held \$(4-8-49)\$.—(1) That the facts disclosed constructive desertion by the appellant-petitioner rather than desertion by the respondent.

- (2) The onus was on the appellant to prove that respondent, his wife, deserted him without just cause, and the appellant had not discharged that onus.
- Cases referred to: Russell v. Russell (1895), P. 315; Dunn v. Dunn (1948), A. E. R. Vol. 2 at 823.

Slade for the Appellant.

Respondent absent, unrepresented.

JUDGMENT (delivered by SIR BARCLAY NIHILL, C. J.).—This is an appeal from a judgment of Bourke, J., in the Supreme Court of Kenya by which he dismissed a petition for dissolution of marriage brought by the husband on the ground of his wife's alleged desertion. The suit was undefended but the learned Judge on the evidence of the petitioner which he accepted, felt unable to say that the matrimonial offence of desertion had been established. Mr. Slade for the appellant has urged us to hold that taking all the circumstances into account this was an unreasonable decision.

The facts in this case reveal a state of things, unhappily by no means uncommon in times of war. The parties who were young people in their early twenties were married in England on 5th May, 1944. The husband was in the Army and could only see his wife when on leave. Towards the end of 1944 he was sent to Italy, returning to England in February, 1945. The wife seems to have lived partly with her parents at Worthing and partly on a farm in Wales, but it is clear that at no time did the young couple have a chance of setting up a common matrimonial home. On the husband's return from Italy the wife, according to the former's evidence refused to live with him, and told him that she wanted to have nothing more to do with him. In July, however, she did visit him at Swindon where he was stationed and they spent two nights together in an hotel. The husband discovered that his wife was pregnant and seems to have come to the conclusion that he was not the putative father. There was a row and the husband seems to have put this dilemma to his wife: "Have the child adopted and come to Kenya. Otherwise I will not live with you." The wife left Swindon on the next day, that is on 15th July, 1945, and since then the parties have not met or have had any communication with each other. The wife has never asked for maintenance nor has the husband ever sent her anything. On 15th December the wife gave birth to a male child at the Memorial Hospital, Cardigan.

These facts the learned Judge thought might disclose an instance of constructive desertion on the part of the petitioner rather than desertion by the respondent. "At the very least", the learned Judge said, "I do not think the evidence goes further than to disclose that there was a separation by mutual consent at the time when the respondent left."

Mr. Slade has urged that it is implicit on the petitioner's evidence that the wife deserted him in February, 1945, and that it is a safe inference to draw that the parties never cohabited after the husband's return from Italy until the attempt at reconciliation in Swindon in July. I wish I felt it safe to assume this but I do not. Nothing is said in the petition about any act of desertion in February, 1945. That the parties were soon at loggerheads in February is clear but the petitioner has not said that they did not meet even for a night under a common matrimonial roof. The appellant of course could not give evidence of his own non-access following the rule in *Russell v. Russell*, but he might have given evidence of his own movements on his return from Italy from which certain inferences might have been drawn. As it is I feel quite unable to say whether the appellant's attitude to his wife's pregnancy was based on sure and solid grounds or whether it was the outcome of suspicion founded only on the admittedly unfriendly conduct of his wife towards him. To put it another way, had the wife just cause to resent a proposal that she should abandon

her child and so just cause to leave a man who made such a proposition to her, or was the husband acting reasonably when he required her to come to Kenya and to leave her child behind? The wife has never admitted adultery and efforts to discover evidence of adultery made by the appellant's solicitors in England failed.

We have been invited to say that the wife's action in not defending the petition should resolve any doubt that the Court may feel, but to do this to my mind would be to ignore the fact that the onus lay on the appellant to prove that his wife has deserted him without just cause. This burden to prove the matrimonial offence is not shifted because the other spouse does not defend. In this case it has been proved that the wife has refused to come to Kenya but the further question as to whether she had just cause to refuse to come on the condition laid down remains in the air. It is for the husband to prove that she had no just cause; not for the wife to prove affirmatively that she had. Particularly is this so where as here it is the wife's adultery on which the husband founds his allegation that she had no just cause for refusing his condition about the adoption of the child. As was said by Denning, L. J., in **Dunn v. Dunn**, 1948, A. E. R., Vol. 2, at 823: "Even if she (the wife) does not affirmatively prove just cause the Court has still at the end of the case to ask itself: 'Is the legal burden discharged? Has the husband proved that she deserted him without just cause?'" This is what the learned Judge has done in the present case and I do not see how he could have resolved the matter in any other way.

I would therefore dismiss this appeal.

SIR GRAHAM PAUL, C. J. (Tanganyika).—I concur and have nothing to add.

SIR JOHN GRAY, C. J. (Zanzibar).—I also concur and have nothing to add.

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