

UGANDA / JUDGMENT

Paul v Paul (Cause No. 41 of 1946)

[1947] EACA 83 (1 January 1947)

[1947] EACA 83**COURT**

East African Court of Appeal

BEFORE

Thacker, Ag. C.J

CASE / FILE NUMBER

Cause No. 41 of 1946

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DIVORCE JURISDICTION**Before THACKER, AG. C. J.****RUTH POWELL PAUL, Petitioner****v.****JOHN EDWARD PAUL, Respondent****Cause No. 41 of 1946.**

Divorce—Desertion—Continuance of desertion—Condonation—Resumption of cohabitation—Interruption of statutory period—Matrimonial Causes Ordinance. 1939. s. 7.

The petitioner's husband deserted her in 1943. On four occasions afterwards they resumed cohabitation for short periods, but there was never any intention or wish on the husband's part to resume cohabitation and his act in resuming cohabitation was due to pressure from other interested parties. No intercourse took place on any of the four occasions.

Held (22-4-47).—The fact that the parties had lived under the same roof since the desertion for four short periods against the wishes of the husband was not conclusive evidence of a resumption of cohabitation so as to condone the desertion and bring it to an end. In the special circumstances there had been neither condonation nor a resumption of cohabitation and a decree nisi of divorce ought to be granted.

Case referred to: *Mummery v. Mummery* (1942) 1 A. E. R. 553. Undefended petition
for divorce by the wife on the ground of her husband's desertion for three years
immediately preceding the presentation of the petition.

Stratton for the Petitioner.

JUDGMENT.—This petition has given me some anxiety and I have taken time to consider my judgment.

I am satisfied that the domicile of the parties is Kenya.

The parties were married in 1941, and cohabited upon different occasions at different places from 1942 to 1944. There is one child of the marriage.

The petitioner is a nursing sister and the respondent at all material times was serving in the Army. The allegation by the petitioner is that the respondent deserted her without just cause for a period of at least three years preceding the presentation of this petition, to wit from 12th May, 1943, to the presentation of the petition on the 24th August, 1946. The petition itself discloses that the parties lived and cohabited from 14th to 30th December, 1944, at the Lake Hotel, Naivasha, that is upon an occasion within the three years of alleged desertion. The wife, who, I say at once, gave her evidence with complete candour, and, I am satisfied, told me the whole truth about the case, whether it told for her or against her, satisfied me that from about the time of the birth of her child in June, 1943, the husband was inattentive. He was also interested in another woman. The husband has supplied the wife with various small amounts of money, but he has provided no matrimonial home.

The evidence for the petitioner discloses that since May, 1943, the parties had been living under the same roof for very short periods on four occasions, but it is clear, and I am satisfied from the evidence both of the petitioner and the respondent, that there was no sexual intercourse on any of those occasions, and that while the wife was willing to have sexual intercourse the husband refused. The husband, who voluntarily gave evidence on the following point, said to me that: "On all occasions that we were together during the previous three years no sexual relations took place. I refused relations. The last time I stayed under the same roof with my wife was December 19th, 1944. Matrimonial relations did not then take place. On no occasion within the period of alleged desertion did I share a home with my wife unless I was forced to do so by $\frac{1}{2}$ someone else or my wife came to me without my consent. My C. O. told me I should go back to my wife. Also my mother did the same. On none of the occasions had I any intention of resuming my married life with my wife". So that it would appear that during the important period of three years prior to the filing of the petition the husband came to the wife by reason of the persuasion of some other party against his own wish, and that he refused sexual intercourse.

With these facts before me the question arises whether there has been continuous desertion for the requisite period, or does the coming together on these four occasions raise an irrebuttable presumption that the parties have resumed cohabitation? Put in another way, does it raise an irrebuttable presumption that the wife, in consenting to that state of things, has condoned the

previous desertion? A case which is relevant as to the principle to be applied, and somewhat similar in point of fact, is **Mummery v. Mummery** (1942) 1 A. E. R. at p. 553. The two principal differences between that case and the present one are that in the **Mummery case** the parties came together for a single night and had matrimonial and sexual relations, whereas in the present case before me the parties came together on four occasions, living under the same roof, but did not have sexual relations on any one occasion. I quote the following from *Mummery's* case: $\rightarrow$

"The question, then, is: Does coming together for a single night raise an irrebutable presumption that the parties have resumed cohabitation even for that short time. Put in another way, does it raise an irrebutable presumption that the wife, in consenting to that state of things, has condoned the previous desertion? I am bound to say that I think that it would lead to an absurd state of things if one were bound to hold that that is so. Quite clearly, it can be nothing but praiseworthy on the part of a deserted wife to make every legitimate attempt to regain her husband's affection, company and support. It would, for example, be quite ludicrous if, because during a period of desertion the parties met by arrangement to talk over their difficulties, and the deserted wife did her very best to persuade her husband to come back, while he remained obdurate, one were bound to hold that meetings of that sort, however protracted, and even if they involved spending the night under the same roof together or several nights under the same roof together, interrupted or brought to an end the state of desertion. Why, then, should a wife who goes a step further in the hopes of effecting a reconciliation, and allows her husband to sleep the night with her, be held to have condoned the offence and to have resumed cohabitation when it is clear, beyond the slightest shadow of doubt, that the husband at the same time had no intention whatever of resuming cohabitation? I do not think that I am obliged so to hold. I think the law is that, as regards the wife at any rate, an act of sexual intercourse is not conclusive on the question of condonation; and that it does not raise an irrebutable presumption that cohabitation has been resumed. I think I am justified in holding, if not obliged so to hold, on the authority of **Rowell v. Rowell**.

It is perfectly true, as counsel pointed out, that that case raised a question whether a deed had been brought to an end by three or four intermittent acts of sexual intercourse, and therefore does not necessarily raise the same questions, at any rate, not in precisely the same form. As is well known, deeds of separation take various forms. It is quite possible to enter into a deed of separation in a form which does not involve any question of continued separation, or which does not necessarily involve that the parties will even remain husband and wife; but on a deed of separation in the ordinary form, and with no special clauses, it is settled law that it is put an end to by the resumption of cohabitation. There was some argument

in *Rowell v. Rowell* as to the effect of the deed, but, once the court had decided, as it plainly did decide, to treat it as being merely an ordinary deed of separation, then the sole question was whether these casual and intermittent acts of intercourse had or had not amounted to a resumption of cohabitation. That brings the case very much to the point which I have got to decide.

It is not necessary for me to quote extensively, but on that issue Lord Russell of Killowen, L. C. J., said, at p. 13:-

'In my judgment, if the court comes to the conclusion that there was an intention by both parties to come together again, there would be an end of the deed \$\ldots\$

Let it be observed that he stressed intention, and says that it must be the intention of both parties which puts an end to the deed. Dealing with the acts of intercourse, he said, at p. 14:\$ —

'I agree that such acts are strong evidence unless explained; but it is not a necessary conclusion from them that it was intended to put an end to the deed of separation.'

I think I am entitled to interpret that passage as meaning that it is not a necessary conclusion from them that both parties intended to resume cohabitation.

At p. 13, A. L. Smith, L. J., said: \$-\$

'I agree that the proof of intercourse between the parties if unexplained is strong evidence to show that they had come together, so as to put an end to the deed; but it is going too far to say, as the defendant's counsel was driven to say, that one act of intercourse, no matter what the surrounding circumstances were, would necessarily put an end to the deed. No case has gone that length. They have gone to the length of saying that if there is reconciliation the covenant to pay money to the wife comes to an end. In this case has there been reconciliation? It is plain on the uncontradicted evidence of the wife that there had been no reconciliation in the full sense of that term, and that neither party intended that there should be.

I can adopt every word of that last passage as applicable to this case with the substitution in the last sentence of the phrase 'and that one of the parties never intended that there should be' for the phrase 'neither party intended that there should be'. Having regard to the fact that Lord Russell of Killowen, L. C. J., had said that the resumption of cohabitation bringing the deed to an end is something which depends upon the intention
of both parties, I think that I am justified in holding here that there had been neither condonation nor a resumption of cohabitation which interrupts this period of desertion, and that the wife is entitled to her decree."

Applying what I think is the principle in *Mummery's case* to the facts of the present case, in my opinion I am justified in holding that there has been neither condonation nor a resumption of cohabitation which interrupts this period of desertion, and that the wife is entitled to her decree. I therefore pronounce a decree nisi with costs against the respondent, and custody of the child to petitioner.

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