

FEDERAL COURT OF APPEAL  
HOLDEN AT LAGOS  
12TH DECEMBER, 1979. FCA/L/201/77.  
CORAM:- S. A. OGUNKEYE, R. O. OKAGBUE,  
U. MOHAMMED, JJCA.

JOSEPH EDET AKINWALE WEY ..... PLAINTIFF/APPELLANT  
AND  
ANNE BASSEY WEY ..... RESPONDENT/RESPONDENT

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***COURTS*** - Evidence - Consideration by trial judge of evidence he ruled should be excluded - Is justified in view of a later contrary indication - And special circumstances of the case.

***EVIDENCE*** - Consideration of a party's evidence - Failure by a party to give evidence on a point - Cannot be a cause of complaint - Where he was given free scope to give evidence.

***MATRIMONIAL CAUSES*** - Separation - Evidence - Outside the fact of the 3 years separation - Was rightly admitted.

***MATRIMONIAL CAUSES*** - Maintenance - Awarded by the Court - That respondent did not complain about lower amount earlier received from appellant - Will not deny her the higher award made by court.

***MATRIMONIAL CAUSES*** - Maintenance - Claim for a higher amount than was awarded by trial court - Cannot be granted by appeal court - Without evidence of rate of inflation.

**FACTS**

Before the High Court Lagos the plaintiff/appellant in July, 1973, filed a petition for the dissolution of his marriage with the respondent. Summons for leave to discontinue the petition was later filed by the

appellant. But before then the respondent had filed a cross petition also asking for dissolution of the marriage. Whilst the matter was still pending, respondent filed an application for maintenance and alimony pending suit. The summons for leave to discontinue the petition was subsequently moved and granted while the answer and cross petition remained. The application for maintenance and alimony pending suit was still pending when in January, 1974, the appellant in another suit before the same court, filed a new petition asking for the dissolution of the marriage. The respondent again filed an answer and cross petition for the dissolution of the said marriage. The application for ancillary relief was heard on 4-3-74. The appellant was ordered to pay maintenance to respondent at the rate of N90.00 per month with effect from 1st March, 1974 .

Vide an application filed by the appellant, the cross petition in the previous suit was consolidated with the subsequent suit and the matter was tried. The marriage was dissolved for having broken down irretrievably. A lump sum of N2,000.00 and maintenance of N150.00 per month was awarded in favour of the respondent "until such further order or orders." The court also pronounced on custody of the 4 children of the marriage. But it is against the maintenance order that the appellant has appealed to the Court of Appeal on 2 grounds of appeal. Respondent also has one ground on which contended that the decision of the trial court be varied, thereby asking for higher maintenance.

### **ISSUES FOR DETERMINATION**

*(1) Whether the order of maintenance awarded by the trial court is unreasonable and has no evidence to support it.*

*(2) Whether the trial judge erred in receiving from the respondent evidence of certain facts alleged to be cause of the break down of the marriage, having earlier ruled that evidence be confined to only proving the separation for 3 Years.*

**HELD** (Unanimously dismissing the appeal per judgment of the court delivered by **OGUNKEYE JCA**)

### ***Evidence - Consideration by trial judge***

1. I have said above that the learned trial Judge did consider evidence

outside the ground of 3 years separation. It is equally true that he had ruled that such evidence should be excluded. But it must be remembered that when the appellant discontinued his first petition, the respondent did not discontinue her Answer and Cross petition. As a matter of fact, as has been quoted above, learned counsel for the appellant in moving the application to discontinue did say it was open to the respondent to pursue the Answer and cross petition. This was in fact later consolidated with the appellant's second petition, to which the respondent also filed an Answer and cross petition. The learned trial Judge was, in my view, quite aware of this position and the damage strict adherence to his earlier ruling might do to the case of the respondent when he indicated that it was open to the parties to lead evidence on the facts leading to the separation. (p. 2460 H)

### ***Consideration of a party's evidence***

2 If therefore the judge did give that indication which in all the circumstances of this case I believe he did, the appellant cannot be heard to complain that only the evidence of one side was considered. If a party is entitled to give evidence on a point and is given free scope to do so, his failure to exercise his unrestricted right cannot be a cause of complaint. (p. 2461 H)

### ***Separation - Evidence***

3. It is my view therefore that any evidence outside the fact of the 3 years separation that might have been admitted by the learned trial Judge was rightly admitted. The judgment based on such evidence cannot be said to be unsupported by the evidence or its weight. The appeal on the final award therefore fail and is dismissed. (p. 2462 A)

### ***Maintenance - Awarded by the Court***

4. That the respondent did not complain that the N30, and later N40 monthly given to her was inadequate cannot be used against her to prevent her from having a higher award. The N40 was not based on an order of any court and the respondent was within her right to ask for an award from the

court. The learned trial Judge considered all the relevant facts in coming to his decision with which I entirely agree. (p. 2462 C)

***Maintenance - Claim for a higher amount***

B 5. Though it is possible to take judicial notice of inflation, I am unable to hold, without evidence, that it is now about 30%. Consequently, I am unable to say that at the time the award was made, N400 and not N150 was adequate. It is for the same reason that I am unable to hold that as of  
C now N700 or indeed any sum higher than the award should be awarded. I observe however that the award of 150 when made was made "until such further order or orders." It is therefore open to the respondent to apply to the court of trial for a review of the order if there are facts on which such an application could be made. (p. 2463 F)

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**REPRESENTATION**

Chief F.R.A. Williams, S.A.N. with O. A. Williams for the Appellant.  
Kehinde Sofola, S.A.N. with Miss O. Sofola for the Respondent.

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**CASES REFERRED TO**

Grenfell v Grenfell (1978) L.R. (Family Division) 128 (137 etc.)

Wey v Wey. (1975) 11 S.C.1

F Cumbers v Cumbers (1975) 1 All E.R.1

Jones v. Jones (1975) 2 All E.R. 12

O'Donnell v O'Donnell (1975) 2 All E.R. 993

Pritchard v Pritogard (1975) 3 All E.R. 721

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**LEAD JUDGMENT BY OGUNKEYE JCA**

In the High Court of Lagos State, the appellant in Suit HD/63/73 filed a petition for the dissolution of his marriage with the respondent solemnised in the Saint Dominic Catholic Church Yaba, Lagos on the 30th  
H day of March 1954. The petition was filed on the 27th July 1973. On the 13th September 1973, summons for leave to discontinue petition was filed in the said court on behalf of the petitioner. But before the summons was heard, the respondent filed on the 27th September 1973, an answer and

Cross Petition. She was also asking for a dissolution of the marriage. Whilst the matter was still pending, an application for maintenance for herself and alimony pending suit was filed on behalf of the respondent/wife. It was mentioned in court on November 5, 1973 when it was adjourned till the 19th November 1973. On that date, it was further adjourned till the 17th December 1973. The application remained unheard till the 21st January 1974 when it was further adjourned till the 18th February 1974. Immediately thereafter on the same day, Kehinde, appearing for the petitioner referred to the Summons for leave to discontinue the petition already filed by the Petitioner and asked for leave to move it. He was allowed and he moved it in the following words:

*"I want to move it now, and discontinue the petition. The respondent is free to continue with her cross prayer if she likes."*

Mrs. Edozie, appearing for the respondent was recorded as saying:-

*"That is alright."*

The order of the Court was:

*"The petition filed by the Petitioner on 13/9/73 is hereby struck out."*

I wish to observe here that the petition was not filed on the 13th September 1973 but on the 27th July 1973. It is the Summons for leave to discontinue the petition that was filed on the 13th September 1973. But none of the parties was misled by this error. The position therefore is that the petition filed on the 27th July 1973 by the petitioner was struck out on the 21st January 1974 after the respondent had filed an answer thereto. The Answer and Cross petition remained.

The application for maintenance and alimony pending suit was still pending when, on January 12, 1974, the petitioner, in another suit-No. HD/4/74 filed another petition in the same Court, asking for the dissolution of the said marriage. To this new petition, the respondent filed an Answer and Cross Petition for the dissolution of the said marriage.

On the 4th March 1974, the application for ancillary reliefs was heard and the husband (respondent to the said application) was ordered to pay maintenance to the wife/applicant at the rate of N90.00 per month with effect from 1st March 1974. The husband appealed from that Order

and it is one of those in respect of which this judgment is given.

Thereafter, an application was brought by the appellant for the cross petition in Suit HD/63/73 to be consolidated with Suit HD/4/74. In making an order on this application on the 28th May 1974, the learned trial Judge said:

*"The parties are the same. Their solicitors are the same. I order therefore that Suits Nos. HD/63/73 & HD/4/74 be consolidated for trial. In the two petitions, petitioner seeks divorce and there are cross prayers by the respondent also seeking divorce apart from the ancillary relief. Common to both petitions is the allegation that parties have lived apart for three years, preceding presentation of the petition. It is simple therefore to isolate this issue of divorce for trial, and therefore direct that evidence that the marriage has irretrievably broken down be led on the fact of the separation for three years. The matter of maintenance and custody will be taken later."*

The matter later went to trial and the marriage was dissolved on the ground that the marriage has irretrievably broken down. A lump sum award of N2000 was made in favour of the respondent and she was also given maintenance of N150 per month "until such further order or orders." This was on June 8, 1974. At a later date, precisely on July 13, 1974, in a judgment delivered by the same learned trial judge, custody of 3 of the children of the marriage was awarded to the appellant while care and control for the youngest child was ordered to remain in the respondent "until such time as she is admitted to a secondary school or the respondent ceases to be employed in Adrao International School, Victoria Island whichever is earlier. In that event the petitioner shall have the custody, care and control of Barbara Wey as well." The respondent was given "Liberal access to all the children while they are in the custody of the petitioner."

It is against the maintenance order that the husband/petitioner has appealed on the following grounds:-

#### GROUND OF APPEAL

1. *"The order is unreasonable and cannot be supported having that there was no trial or proper trial of the issues and (in the alternative) such evidence as there was before the Court cannot reasonably*

support the award.

2. *"The learned trial judge erred in law in receiving in evidence from the Respondent certain facts alleged to be the cause of the break down of the marriage between the petitioner/Appellant and the Respondent after the learned trial Judge had ruled on a motion by the Petitioner/Appellant that evidence be confined to only proving the separation for three years, which facts affected the mind of the learned trial Judge in making the said Order."*

The respondent also filed a Notice of Intention to contend that decision of court below be varied under order V11 rule 13 on 4 grounds, 3 of which, on an objection taken at the hearing of the appeal were struck out. The remaining grounds is as follows:-

4. *"The awards in respect of the lump sum and maintenance are inadequate and fail to take into consideration the petitioner's sufficient capital assets, respondent's contribution during the period of acquisition of the said capital assets, the old age of the Respondent, the standard of living to which the Respondent was accustomed during the marriage, the present day costs of living in Lagos, the conduct of the parties and the incomes for the Petitioner."*

Arguing the grounds under the notice of appeal against the award of alimony pending suit both of which are to the effect that the award was unreasonable and not supported by the evidence, Chief Williams S.A.N. , for the appellant submitted that the court did not consider the means of the appellant in making the award; that before the award was made, the appellant was giving the respondent N30 per month which was later increased to N40 and that the respondent did not complain that the amount was inadequate. He further submitted that under Section 70(2) Matrimonial Causes Decree 1970, all relevant circumstances must be considered. He also referred to Rayden on Divorce, 13th edition, page 715 Volume 1 on the same point.

On the second notice of appeal, the main complaint is that since the appellant relied on irretrievable breakdown as the ground for asking for dissolution, and because that was admitted by the respondent, the learned trial Judge was wrong to have admitted evidence outside proving the 3

years separation necessary to establish that ground, which evidence influenced his decision on the award of maintenance, particularly because the learned Judge had earlier ruled that evidence shall be confined to the fact of the separation for 3 years. He referred to some passages were matters outside the separation for 3 years were considered. He referred to the case of Grenfell v Grenfell (1978) L.R. (Family Division) 128 (137 etc.). He submitted further that it was wrong to consider the conduct of the parties when only one side gave evidence on that point. Finally he submitted on the award of lump sum that the formula used by the lower court was not known and that this court cannot fix an amount.

I wish to say straight away that the learned trial Judge did consider evidence outside the 3 years separation but he gave his reason for doing so which I will deal with later in this judgment.

Mr. Sofola, learned S.A.N. for the respondent submitted that the award of maintenance pending suit has been superseded by a final order and that no useful purpose will therefore be served entertaining the appeal.

It is true that at the conclusion of the trial, a final order under which the respondent was awarded N150 maintenance and a lump sum of N2000.00 was made. An application for stay of execution in respect of the order was brought in the Supreme Court as reported in Wey v Wey. (1975) 11 S.C.1. But this, in my view is no ground why the appeal should not be entertained since it has not been withdrawn. Though it is true as submitted by Mr. Sofola that the final order superseded the interlocutory, the result of an appeal from the interlocutory order may well have effect on the final award. I shall come back to this later in this judgment.

Continuing Mr. Sofola submitted that in spite of the ruling that the evidence will be limited to the 3 years separation both parties adduced evidence outside that ground. He referred to several passages in the record to justify the submission.

I may say here again that I agree with this submission. The fact that such evidence might have been obtained under cross examination is of no consequence.

**I have said above that the learned trial Judge did consider evidence outside the ground of 3 years separation. It is equally true**



that he had ruled that such evidence should be excluded. But it must be remembered that when the appellant discontinued his first petition, the respondent did not discontinue her Answer and Cross petition. As a matter of fact, as has been quoted above, learned counsel for the appellant in moving the application to discontinue B did say it was open to the respondent to pursue the Answer and cross petition. This was in fact later consolidated with the appellant's second petition, to which the respondent also filed an Answer and cross petition. The learned trial Judge was, in my view, quite aware C of this position and the damage strict adherence to his earlier ruling might do to the case of the respondent when he indicated that it was open to the parties to lead evidence on the facts leading to the separation. It is not clear at what stage this indication was given but in his judgment, the learned trial Judge said: D

*"As I said, the respondent is cross petitioning for divorce also on the ground that the marriage has irretrievably broken down because among other things, the husband has deserted her for a continuous period of at least one year immediately preceding the presentation of her E cross-petition, namely from 26th November 1970. On the facts of this case, as I see them, I believe that she has made out this ground. The husband is clearly guilty of constructive desertion when he prevented the wife from entering the matrimonial home. The fact that she attempted F to return home earlier than the husband expected is no just cause for him. In fairness to the husband, he did not allude to this incident in his own evidence, and this may be due to my earlier ruling that the evidence ought profitably be confined to the three year's separation. But I did G indicate that the facts leading to the separation could be given in evidence, and there is this allegation in the wife's answer which I could not possibly prevent her from giving evidence in support of." (Underlining mine).*

This passage has not been challenged. If therefore the judge did give H that indication which in all the circumstances of this case I believe he did, the appellant cannot be heard to complain that only the evidence of one side was considered. If a party is entitled to give evidence on a

point and is given free scope to do so, his failure to exercise his unrestricted right cannot be a cause of complaint.

It is my view therefore that any evidence outside the fact of the 3 years separation that might have been admitted by the learned trial Judge was rightly admitted. The judgment based on such evidence cannot be said to be unsupported by the evidence or its weight. The appeal on the final award therefore fail and is dismissed. Since the appeal on the final award has failed, no useful purpose will be served even if the appeal from the award pending suit is allowed. But I have considered it as it stands and I can find no merit in it. That the respondent did not complain that the N30, and later N40 monthly given to her was inadequate cannot be used against her to prevent her from having a higher award. The N40 was not based on an order of any court and the respondent was within her right to ask for an award from the court. The learned trial Judge considered all the relevant facts in coming to his decision with which I entirely agree. That appeal also fails and is dismissed.

On the respondent's Cross Appeal, on the only ground quoted above, Mr. Sofola submitted that the respondent should have been given 50% of the two properties of the appellant. He cited the following cases in support of the contention:-

Cumbers v Cumbers (1975) 1 All E.R.1, Jones v. Jones (1975) 2 All E.R. 12., O'Donnell v O'Donnell (1975) 2 All E.R. 993 and Browne (formerly Pritchard v Pritogard (1975) 3 All E.R. 721.

On the question of maintenance, Mr. Sofola submitted that judicial notice should be taken of about 30% inflation to come to the conclusion that N150 was rather small. That at the time the award was made, N400 would have been adequate. But now, the award should not be less than N700. That the basis of the award should be the type of living to which the respondent was used before the separation.

In reply Chief Williams submitted that what the Court should concern itself with is the justice of the matter. That evidence which goes to no issue should be disregarded. That in making the award, the income and assets of the respondent ought also to have been considered.

He finally urged this Court to send the case back for retrial on the issue of maintenance.

I have read all the cases cited by learned counsel for the respondent and I am unable to find any support in any of them for his submission, that the respondent is entitled to 50% of the properties owned by the appellant. None of the cases laid down a firm principle that in cases of lump sum award, the respondent/wife is entitled to 50% of the husband's properties. Each of them was decided on its own facts. This, in my view, is as it should be. In the first case, a lump sum award of \$800 was reduced to \$500. That was a case in which the Court of Appeal (Lord Denning MR) was of the view that the wife had really played a part in the marriage which deserves compensation of a capital nature. The court, holding that \$800 was too large said "The better figure would be one - third or thereabouts."

The second case decided that the conduct of the husband in attacking the wife should be considered in determining what award should be made to the wife. The third case was decided on Section 25 of the Matrimonial Causes Act of 1973 (an English Act which does not apply in this Court). In any case all it decided was that an order for lump sum should be made in appropriate circumstances to effect an equitable redistribution of property in accordance with Section 25 of the 1973 Act. And the fourth case, also on Section 25 of the Matrimonial Causes Act of 1973 decided that the court's duty under that section is, so far as practicable, to place the parties, in the financial position in which they would have been had the marriage not broken down.

**Though it is possible to take judicial notice of inflation, I am unable to hold, without evidence, that it is now about 30%. Consequently, I am unable to say that at the time the award was made, N400 and not N150 was adequate. It is for the same reason that I am unable to hold that as of now N700 or indeed any sum higher than the award should be awarded. I observe however that the award of 150 when made was made "until such further order or orders." It is therefore open to the respondent to apply to the court of trial for a review of the order if there are facts on which such an application**

could be made.

For the foregoing reasons the Cross Appeal also fails and is dismissed.

Costs of the appeals are awarded to the respondent assessed at  
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