

COURT OF APPEAL
BENIN DIVISION
9TH JUNE, 2005. CA/B/45/2004
CORAM:- P. I. AMAIZU, N. S. NGWUTA,
U. M. ABBA-AJI, JJCA

DR. AKINREMI ORITSEWETIN NANNA APPELLANT
V
MRS EKPEHOSE MARYANNE NANNA RESPONDENT

MATRIMONIAL CAUSES - Dissolution of marriage - Facts that must be proved under s. 15(2)(a)-(h) of the Act - Where not proved - Dissolution will not be granted - Notwithstanding that both parties desire divorce (H1)

MATRIMONIAL CAUSES - Divorce - Basis - Behaviour petitioner cannot reasonably live with s. 15(2)(c) - Is objective as itemized in s. 16(1)(a)-(g) of the Act - And appellant failed to establish any of the items (H2)

MATRIMONIAL CAUSES - Divorce - Desertion - Meaning - Irretrievable marriage breakdown - Living apart for continuous period of two years per se - Will not ground divorce (H3)

MATRIMONIAL CAUSES - Custody of children - Welfare of the children - Is of paramount consideration - Cosmetic arrangement for the children - Will not entitle a party to have custody (H4)

MATRIMONIAL CAUSES - Access to children - Was properly granted to appellant - Instead of joint custody with the respondent - And trial court's general finding - Did not affect the decision (H5)

MATRIMONIAL CAUSES - Maintenance order - Factors to be considered by court - Include means and earning capacity - Without giving room to speculation (H6)

MATRIMONIAL CAUSES - Maintenance - Assessment - Duty of the man - Right of wife and children - Is not contractual - Nor likened to special damages claim - Appellate court will reduce excessive award (H7)

MATRIMONIAL CAUSES - Divorce - Cruelty - Definition - Though not set out - In grounds of divorce - Under the Act - It can ground a finding of irretrievable breakdown of the marriage (H8)

MATRIMONIAL CAUSES - Cruelty - Proof - Where respondent's evidence were not discredited - Trial court rightly relied on them - To find matrimonial cruelty (H9)

MATRIMONIAL CAUSES - Desertion - Respondent's abandonment of the matrimonial home - Where caused by appellant's conduct - It is appellant that is in constructive desertion (H10)

JUDGMENTS - Perverseness - Matrimonial causes - Where trial court properly evaluated the evidence - Before finding in respondent's favour - The judgment is not perverse (H11)

FACTS

Before the Benin-City High Court, the appellant who is a medical practitioner filed a petition for the dissolution of his marriage with the respondent/cross petitioner. Appellant claimed that the marriage has broken down irretrievably as ground for seeking dissolution. He sought that custody of the two children of the marriage be granted unto him. Appellant averred that the respondent has behaved in such a way that he cannot reasonably be expected to live with her.. And that the respondent who had deserted him for a continuous period of at least 2 years does not object to a divorce being granted. The respondent filed an answer, cross petitioned for a dissolution of the marriage and custody of the 2 children.

The parties were married in 1991 and lived together for up to December, 1996, when the respondent left the matrimonial home and

had lived apart for a period of more than 4 years preceding presentation of the petition. The two children of the marriage have been living with the respondent. The parties testified before the trial court and called no additional witnesses. Several exhibits were tendered. At the conclusion of trial, the judge in a considered judgment delivered on 19-3-2002 dismissed the petition, and granted to the respondent decree NISI, custody of the children and other ancillary reliefs including N75,000 cumulative monthly maintenance and upkeep. Being dissatisfied with the judgment, appellant has now appealed to the Court of Appeal.

ISSUES FOR DETERMINATION

“ 1. Whether the learned trial Judge was right in concluding that the appellant did not prove that the marriage between the parties has broken down irretrievably, having failed to consider the evidence adduced by the petitioner as required by law.

2. Whether the learned trial Judge was right when she held that it was the conduct of the petitioner that led to the expulsion of the respondent/cross petitioner from the matrimonial home.

3. Whether the learned trial Judge was right in awarding custody of the children of the marriage solely to the respondent having held that no single parent can take care of children.

4. Whether the learned trial Judge was right in awarding the respondent the cumulative sum of N75,000.00 monthly as maintenance and upkeep when such sums were not proved as required by law.

5. Whether the learned trial Judge was right in holding that the cross petitioner (respondent herein) has sufficiently proved matrimonial cruelty on the part of the petitioner.”

HELD (Unanimously dismissing the appeal, save that the maintenance was reduced per **ABBA-AJI JCA**)

Dissolution of marriage - Facts that must be proved

1. In divorce proceedings, the petitioner must prove one of the facts contained in section I5(2)(a) - (h) of the Matrimonial Causes Act before he can succeed and where the petitioner fails to prove that, the petition for the dissolution of the marriage will be dismissed notwithstanding the

fact that the divorce is desired by both parties. See *Akinbuwa v. Akinbuwa* (1998) 7 NWLR (Pt. 559) 661. In the instant case therefore, the burden of proof is on the appellant who is alleging that the respondent has behaved in such a way that he cannot reasonably be expected to live with the respondent. Unless the petitioner satisfies the court on both of these matters the court will refuse to hold that the marriage has broken down irretrievably. Two sets of facts call for proof under section 15(2)(c) of the Act. They are (1) the sickening and detestable behaviour of the respondent and (2) that the petitioner finds it intolerable to live with the respondent. These two facts which are deduced from section 15(2)(c) of the Act are severable and independent. The petitioner must prove the detestable act or such condemnable conduct that the appellant find intolerable and then proceed to prove that he finds it intolerable to live with the respondent. (p. 1192 A)

Divorce - Basis

2. Now the question that arises is whether the appellant has proved the allegations contained in his amended petition? Paragraph 11(a) and (b) of the petition is equivalent to section 15(2)(c) and (e) of the Act. The provisions of sub-section (2) of the Act and paragraph 11(a) and (b) of the amended petition have all been reproduced in this judgment. Where in a petition for dissolution of marriage founded under section 15(2)(c) of the Act the court hearing the petition for the dissolution of marriage shall hold that the petitioner has satisfied the court of the fact mentioned in section 15(2)(c) if the petitioner satisfied the court with either of the items specified in the said section 16(1)(a) - (g) of the Act. None of these items as specified in the said section 16(1)(a) - (g) of the Act have been established by the appellant before the lower court. The appellant has not satisfied the lower court with any of those facts set out in section 16(1)(a) - (g). In fact, not an iota of such evidence was adduced by the appellant in support of this ground under section 15(2)(c) and I so find.

The test whether the petitioner can or cannot be expected to live with the respondent is objective. It is not therefore sufficient that the petitioner alleges that he cannot live with the respondent because of her

behaviour, the behaviour must be such that a reasonable man cannot endure. What would amount to behaviour which the petitioner cannot reasonably be expected to put up with, has been provided in section 16(1) of the Act. (p. 1192 F)

B

Divorce - Desertion - Meaning

3. On paragraph 11(b) of the amended petition which is equivalent to section 15(2)(c) of the Act, the fact that the parties have lived apart for continuous period of two years immediately preceding the presentation of the petition is not by itself conclusive proof upon which divorce could be granted on the ground that the marriage has broken down irretrievably. The evidence of desertion as adduced in the instant case, is not the desertion contemplated under section 15(2)(e) of the Act. Desertion within the meaning of section 15 (2) (e) of the Act must be one where any of the spouse abandons and forsakes without any justification, thus renouncing its responsibilities and evading its duties. Based on the foregoing therefore the learned trial Judge was right to have come to the conclusion that the appellant has not proved his case as required by law and I so hold. This issue is therefore resolved against the appellant. (p. 1194 G)

C

D

E

MATRIMONIAL CAUSES - Custody of children

4. Although there is no settled rule that a child of tender age should remain in the custody of the mother, I take the view that custody of a child of the marriage came along with it, the all important implications of the preservation and care of the child's person, morally, physically and mentally. I have stated above the evidential account of the arrangement of the appellant put together for the well-being of the children. If same is considered against the background of the evidence adduced by the respondent, can that be said to be sufficient as to warrant the grant of the custody of the children to the appellant? I think not. There is nothing therein to persuade the court to grant custody of the children to the appellant. I agree with the respondent's counsel that such arrangements are merely cosmetic in view of the antecedents of the petitioner during

F

G

H

the subsistence of the marriage. What the children need is not a mere endowment policy and a 5-bedroom apartment. The appellant's aunty cannot take the place of their mother. The antecedents of the appellant reveals it all. It will amount to a negation of the well settled principles that the welfare and the interest of the child or children of the marriage must be accorded paramountcy were an order of custody of the children of the marriage be made in favour of the appellant based on the said cosmetic arrangement. (p. 1200 D)

C Access to children - Was properly granted to appellant

5. The finding by the learned trial Judge that "No single parent can adequately take care of children" is only what ordinarily should be and does not make it absolute. That has not affected the decision of the lower court in granting custody of the children to the respondent. Ideally, the children need both their parents, but where this natural arrangement is disrupted and can no longer hold due to the uncompromising attitude of either of the parties to the marriage, then custody must be borne by either of the spouses taking into account the provisions of section 71(1) of the Act and other factors and circumstances. I therefore have no reason to disturb the findings of the lower court in this regard. On the alternative submission for joint custody, the learned trial Judge granted the appellant access to the children. I also find this arrangement ideal. It is not in the interest of the children to be shifting base from one place to the other. The appellant can have access to his children whenever he desires to see them. In view of the finding above, it will be against the interest of the children to grant joint custody. Issue 3 is consequently resolved against the appellant. (p. 1201 8)

Maintenance order - Factors to be considered by court

6. I agree with the submission of both counsel that in making an order for maintenance, the court must always have regard to the means, earning capacity and in fact the conduct of the parties to the marriage and other relevant circumstances. Section 70(1) of the Matrimonial Causes Act provides:-

“Subject to this section, the court may in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regards to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.” B

By virtue of the above provisions, the court seized of a petition has the discretionary power to make an order that it deems proper for the maintenance of a party to the marriage, having regard to the means, C earning capacity and conduct of the parties to the marriage and all other relevant circumstances. The relevant circumstances must be gathered by the court itself from the pleadings and evidence of the parties at the trial. The appellant pleaded and testified as to his earning capacity. He D earns N115,941.35K per month and tendered his pay advice as exhibit 'H' in support. Even though the appellant is engaged in private medical practice in the evenings of the day, how much he realises from that is not in evidence before the court and it is not for the court to speculate. E
(p. 1203 C)

Maintenance - Assessment - Duty of the man

7. A man has a common law duty to maintain his wife and his children and such a wife and child or children then have a right to be so main- F tained. The right of a wife and child to maintenance is not contractual in nature. The husband is obliged to maintain his wife and child, and may by law be compelled to find them necessities, as meat, drink, clothes, et cetera, suitable to the husband's degree, estate or circumstance. In as- G sessing maintenance, section 70(1) gives the court the discretionary power to order and asses maintenance of a party. It is not likened to a claim for special damages where the claimant must strictly prove his entitlement to such award before same can be awarded by the court as submitted by the appellant's counsel. Now bearing this principle in mind, is the award H of N75,000.00k monthly maintenance allowance for respondent and two children excessive in view of the monthly income of the appellant? The learned trial Judge ordered the petitioner to pay cumulative sum of

N75,000.00K for the maintenance of the respondent and the two children. In addition the petitioner is also to pay the school fees, books and other expenses for the children as shown on the bills sent by the school from time to time. In the circumstances of the appellant's monthly income of only N115,947.35K and this additional responsibility, the monthly sum of N50,000.00k for maintenance of the two children as awarded by the lower court is excessive and is hereby reviewed to N30,000.00k while that of the respondent is reviewed from N25,000.00k per month to N20,000.00k thus bringing the monthly maintenance for the respondent and the two children to N50,000.00K only. In arriving at this figure, I have in mind the back ground of the standard of life which the appellant previously maintained before he and the respondent parted and the current economic trend. The court would have regard to what is fair and equitable based on the evidence adduced by the parties at the trial. This is also without prejudice to the other orders of the court. (p. 1204 A)

Divorce - Cruelty - Definition

8. In *Akinbuwa v. Akinbuwa* (supra) it was held that beating of a wife and causing her injury amounts to a cruelty or behaviour which she cannot reasonably be expected to bear. Cruelty is not ground set out in grounds of divorce. The facts can be used to show the conduct of the respondent in such a way that the petitioner cannot reasonably be expected to live with the respondent. Thus, a marriage can properly be held to have broken down irretrievably on the ground that one spouse has been proved to be guilty of cruelty to the other. In the instant case, from the evidence borne out from the records, according to the respondent, it is the cruel acts meted to her by the appellant that were intolerable. Cruelty is therefore regarded as a conduct which is grave and weighty as to make cohabitation virtually impossible coupled with the injury or a reasonable apprehension of injury physical or mental, to health. The accumulation of minor acts of ill-treatment causing or likely to cause the suffering spouse to break down under strain constitutes the offence of cruelty. (p. 1206 H)

MATRIMONIAL CAUSES - Cruelty - Proof

9. In the instant case, there is evidence before the trial court that the appellant used to harass and beat the respondent on the slightest provocation. There is evidence that there was a time the appellant was so worked up in anger and he wanted to apply fist blow on the respondent, B he missed and his hand landed on the door and broke through the door and left his hand dangling from the other side of the door. There was also evidence before the court that he gave the respondent 21 days ultimatum to pack out of the matrimonial home and after begging to allow her stay C in the matrimonial home as she has no where to go, the appellant reduced the ultimatum to 7 days. These and others are all borne out by evidence from the records of the court. These pieces of evidence by the respondent were not denied or contradicted by the appellant. Evidence that is not successfully challenged or discredited and that is relevant to the issues in controversy ought to be admitted and relied upon by a trial court D for it is for all intents and purposes credible and reliable. These are clearly acts that constitute matrimonial cruelty. Though not specifically identified or classified as constituting acts of cruelty by learned trial Judge, E they are clearly borne out by the evidence before the lower court. (p. 1207 F)

It is appellant that is in constructive desertion

10. Assuming it was the respondent that abandoned the matrimonial F home, the circumstance of her leaving the matrimonial home as found in her evidence before the lower court cannot be construed to mean desertion within the meaning of the Matrimonial Causes Act. The respondent leaving or abandoning the matrimonial home was necessitated by the G conduct of the appellant caused by his beating and constant harassment of the respondent to leave the matrimonial home and at times she had to return to the matrimonial home on her own as the appellant never looked H for her. The respondent's leaving the matrimonial home under such circumstances can only be best described as constructive desertion. It is constructive desertion in the sense that it was the conduct of the appellant that compelled the respondent to abandon the matrimonial home.

Section 18 of the Matrimonial Cause Act defines constructive desertion as:-

“A married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart, and occasions that other party to the marriage to live separately or apart, shall be deemed to have willfully deserted that other party without just cause or excuse, notwithstanding that that person may not in fact have intended the conduct to occasion that other party to live separately or apart.”

A proper construction of this provision with the evidence abound from the records, clearly established that it was the appellant that was in desertion. On the conduct the appellant finds intolerable to live with the respondent, the appellant has not succeeded in proving any of the requirements that is required to be established under section 16(1)(a) - (g) of the Matrimonial Causes Act to ground a divorce under section 15(2)(c). From the totality of the evidence adduced before the trial court, it is my considered view that the learned trial Judge was right in holding that the appellant has not proved his petition as required by law. I have no reason based on the evidence abound from the records to hold otherwise. It is also my considered view that the learned trial Judge properly evaluated the evidence adduced by the parties before it before arriving at its conclusion that the appellant has not proved his case under section 15(2)(c) Matrimonial Causes Act that the marriage has broken down irretrievably. (p. 1209 F)

JUDGMENTS - Perverseness - Matrimonial causes

11. In a civil case, where the parties call evidence, before the trial Judge accepts or rejects evidence of either of the parties, he is enjoined to set up an imaginary scale by putting the evidence of the plaintiff who invariably has the burden to succeed in a civil case by preponderance of evidence on one side of the imaginary scale and then proceed to put the evidence adduced by the defendant on the other side of the imaginary scale and weigh the two together to see where the imaginary scale tilts. Ordinarily, the court performs its task of evaluation of evidence by placing the evidence called by either side to the conflict on every material

issue on either side of the imaginary scale and weighing them together and whichever outweighs the other in terms of probative value ought to be accepted. See *Whyte v. Jack* (supra). In the instant case, the learned trial Judge considered the pleadings of the parties as contained in the amended petition and the amended answer and the cross-petition, re- B
stated the evidence adduced by the parties and the addresses of their respective counsel and went on to consider whether the appellant has led evidence on all material issues that needs to be proved. It then went on to find that the appellant has not led evidence to sufficiently prove his case or that he has not made out a prima facie case. It then went on to con- C
sider the respondent's cross-petition, whether the respondent made out a prima facie case. Then after evaluating the evidence together the learned trial Judge went on to make its finding, having regard to the party on whom the onus of proof lies before coming to the conclusion that the D
appellant has not proved his case in accordance with the provision of section 15(2)(c)(e) of the Matrimonial Causes Act. It is my considered view in the circumstances of this case that the learned trial Judge adequately considered the case of the parties before it and properly evalu- E
ated the evidence before reaching its decision. The judgment is not per- verse and I so hold. The judgment demonstrated in full, a dispassionate consideration of all the issues properly raised and heard and it is a result of such an exercise. (p. 1211 C) F

CASES REFERRED TO

Akinbuwa v. Akinbuwa (1998) 7 NWLR (Pt. 559) 661

Damulak v. Damulak (2004) 8 NWLR (Pt. 874) 151

Anyaso v. Anyaso (1998) 9 NWLR (Pt. 564) 150 G

Williams v. Williams (1987) 2 NWLR (Pt. 54) 66

UBN v. Fajebe Foods Ltd. (1998) 6 NWLR (Pt. 554) 380

Morah v. Okwuayanga (1990) 1 NWLR (Pt.125) 225

UBA v. Achoru (1990) 6 NWLR (Pt. 156) 254 H

Adaramaja v. Adaramaja (1962) 1 SCNLR 376

Ciroma v. Ali (1999) 2 NWLR (Pt.590) 317

Erhahon v. Erhahon (1997) 6 NWLR (Pt.510) 667

Ajero v. Ugorji (1999) 10 NWLR (Pt. 621)1 at 19 - 20

A.C.B. Plc v. Ndoma Egba (2000) 10 NWLR (Pt. 675) 229 at 242

REPRESENTATION

- B J. I. Odibeli, Esq. -for the Appellant
S. Iredia Osifo, Esq. -for the Respondent

STATUTES REFERRED TO

- C Evidence Act, Cap. 112, Laws of the Federation of Nigeria 1990, s. 136
Matrimonial Causes Act, 1970 Cap. 220, Laws of the Federation of Nigeria, 1990 ss. 15(2)(a)-(h), 16(1)(a)-(g), 18, 70 & 71

BOOKS REFERRED TO

- D Black's Law Dictionary 6th Edition p. 377
Laws of Matrimonial Causes by Prof. S. A. Adesanya, 1st Edition p. 227

LEAD JUDGMENT BY ABBA-AJI JCA

- E This appeal is against the decision of Hon. Justice F.O. Akinbami
of the Edo State High court holden at Benin City in suit No. B/875/2000
delivered on the 19th day of March, 2002 wherein the learned trial Judge
dismissed the petitioner's petition for dissolution of marriage, but granted
F the cross petition of the respondent for decree NISI and other ancillary
reliefs.

- The appellant who is a medical practitioner was the petitioner in
the lower court. He petitioned the lower court for the dissolution of his
marriage with the respondent/cross petitioner on the ground that the mar-
G riage has broken down irretrievably. He claimed inter alia in paragraph 17
of his amended petition, the following orders:-

- “(a) A decree for dissolution of marriage on the ground that the
marriage has broken down irretrievably.
H (b) An order of the court granting the custody of the 2(two) chil-
dren namely; Orode Nanna and Mofe Nanna to the petitioner as ad-
equate arrangement has been made in this regard..... Alternatively an
order granting the custody of the children to the petitioner whenever they

are on holidays or the petitioner be allowed unrestricted access to the children without any interference from any body whatsoever.”

The grounds upon which the petition is founded is as contained in paragraph 11(a) and (b) of the amended petition. Paragraph 1 (a) and (b) reads:-

“11. That the marriage between the petitioner and the respondent has broken down irretrievably upon the following:-

(a) That since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

(b) That the respondent has deserted the petitioner for a continuous period of at least 2 years immediately preceding the presentation of the petition and the respondent does not object to a divorce being granted.”

The respondent in response to the above, not only filed an answer but also cross petitioned on the ground inter alia for a dissolution of the marriage and custody of the two children.

The facts of the case was that the petitioner and the respondent/cross petitioner were married on the 9th day of November, 1991 at the St. James Anglican Church, Akpakpava Road, Benin City.

After the marriage, they both cohabited and lived together at the Petroleum Training Institute, Warri until October, 1992. From October, 1992 to October, 1993, they lived and cohabited in London. They returned to Nigeria in October, 1993 and lived together until sometime in December, 1996 when the respondent left the matrimonial home and have lived apart for a period of more than four years preceeding the presentation of the petition. The two children of the marriage have been living with the respondent.

The petitioner at the trial testified in support of his claim and tendered several exhibits. He did not call any witness. Also the respondent/cross petitioner testified and also tendered several exhibits to support her position. She too did not call any other witness. At the conclusion of H evidence, the respective counsel addressed court. In a considered judgment delivered on the 19/3/2002, the learned trial Judge dismissed the petition and granted the respondent/cross petition decree NISI, custody

of the children and other ancillary reliefs. This is what the trial Judge said in giving judgment to the respondent/cross petitioner :-

“I hereby dismiss the petition of the petitioner which has not been proved and grant a decree Nisi to the respondent on the basis of success-fully proving the cross g petition.

(i) It is hereby ordered that the petitioner should pay a monthly sum of N50,000.00 (fifty thousand naira) for the maintenance and up-keep of the children,

(ii) To pay the school fees, books and other school expenses for the children as shown on the bills sent by the school from time to time.

(iii) A monthly sum of N25,000.00 (twenty-five thousand naira) for the maintenance and upkeep of the respondent/cross petitioner until she gets married to another man.

(iv) It is hereby ordered that custody of the children is granted to the respondent/cross petitioner with access to the petitioner only at reasonable times of the day.”

It is against this judgment that the appellant has now appealed to this court upon five (5) grounds of appeal vide a notice and grounds of appeal dated the 18/6/2002. The grounds of appeal without their particulars are hereby reproduced.

“1. The learned trial Judge failed to consider the evidence adduced by the petitioner as required by law before reaching a conclusion that “The petitioner has not proved according to the provisions of section 15 of the Matrimonial Causes Act that they (sic) marriage has broken down irretrievably.

2. The learned trial Judge misdirected herself when she held that “I agree with the learned counsel that the conduct of the petitioner led to the expulsion of the respondent/cross petitioner from the matrimonial home.

3. Having held that “No. single parent can adequately take care of children the learned trial Judge erred in law when she proceeded to award custody of the children solely to the respondent.

4. The learned trial Judge erred in law by awarding the respondent cumulative sum of N75,000.00 monthly as maintenance and up keep for

herself and the children which sums were not proved as required by law.

5. *The learned trial Judge erred in law when she held that*

“the cross petitioner has sufficiently proved matrimonial cruelty on the part of the petitioner.”

In compliance with the rules of this court, briefs of argument were duly filed and exchanged by the respective counsel. In the appellant’s brief settled by J.I. Odibeli, Esq. deemed filed on the 15/9/2004, five issues were identified for the determination of the appeal. The issues are:-

“ 1. *Whether the learned trial Judge was right in concluding that the appellant did not prove that the marriage between the parties has broken down irretrievably, having failed to consider the evidence adduced by the petitioner as required by law.*

2. *Whether the learned trial Judge was right when she held that it was the conduct of the petitioner that led to the expulsion of the respondent/cross petitioner from the matrimonial home.*

3. *Whether the learned trial Judge was right in awarding custody of the children of the marriage solely to the respondent having held that no single parent can take care of children.*

4. *Whether the learned trial Judge was right in awarding the respondent the cumulative sum of N75,000.00 monthly as maintenance and upkeep when such sums were not proved as required by law.*

5. *Whether the learned trial Judge was right in holding that the cross petitioner (respondent herein) has sufficiently proved matrimonial cruelty on the part of the petitioner.”*

In the respondent’s brief settled by S. Iredia Osifo, Esq. dated the 29/9/2004, and filed on the 30/9/2004. The respondent adopted the five issues formulated by the appellant for determination of the appeal.

At the hearing of the appeal, learned counsel adopted and relied on his brief dated 19/8/2004 and deemed filed on the 15/9/2004. Learned counsel urged us to allow the appeal, to reverse the judgment of the lower court and substitute therefrom, granting the divorce on the basis of the amended petition and to also make an order giving ‘ custody of the children to the appellant or joint custody to both the appellant and the

respondent.

The respondent has urged us to dismiss the appeal and affirm the judgment of the trial court. This appeal will be resolved on the 5 issues as formulated by the appellant. On issue one in the appellant brief of argument, it is submitted that the learned trial Judge erred in law when she concluded that the appellant did not prove that the marriage had broken down irretrievably according to the provision of section 15 of the Matrimonial Causes Act. He submitted that in coming to the above conclusion, the learned trial Judge failed to consider the evidence adduced by the petitioner as required by law. Learned counsel referred to paragraph 11 of the amended petition and submitted that the petitioner stated expressly that the marriage between the petitioner and the respondent has broken down irretrievably on the following grounds:-

D “(a) That since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

(b) That the respondent has deserted the petitioner for a continuous period of at least 2 years immediately preceding the presentation of this petition and the respondent does not object to a divorce being granted.”

Learned counsel referred to section 15(2)(a)-(e) of the Matrimonial Causes Act Cap. 220, Laws of the Federation of Nigeria, 1990 for the facts to be satisfied by a petitioner for the court to hold the marriage to have broken down irretrievably. He referred to the case of Akinbuwa v. Akinbuwa (1998) 7 NWLR (Pt.559) 661 at 669 wherein it was held that:-

G “A petitioner for the dissolution of a marriage must prove one of the facts contained in section 15(2)(a)-(e) of the Matrimonial Causes Act 1970 before such petition can succeed.”

Learned counsel referred to paragraph 7(a) of the amended petition wherein he averred to the fact that cohabitation between him and the petitioner ceased sometime in 1996 when the respondent voluntarily and without consent of the petitioner or any just cause left the matrimonial home. He submitted that the petitioner led evidence to the effect that the respondent left the matrimonial home in 1996 and that she did so without

his permission. That these pieces of evidence by the petitioner were not denied nor contradicted by the respondent. It was further submitted that the petitioner by this evidence has established that the petitioner and the respondent have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition as contemplated by section 15(2)(e) of the Act. Furthermore, that the respondent did not object to a decree being granted. It was also submitted that the appellant led evidence to show that they have lived in separation for more than 4 years when the appellant testified at page 34 of the record lines 19-23 that:-

"I have never seen her or discuss with her since then. She has never gotten in touch with my home since she left home with the children."

It is contended by the appellant's counsel that the petitioner has established compliance with section 15(2)(e) and (f) of the act. It is further submitted that the evidence of the petitioner having not been contradicted by the respondent, the court is enjoined to accept it as correct, citing Union Bank of Nigeria Plc v. Fajebe Foods & Poultry Farm Ltd. (1998) 6 NWLR (Pt. 554) 380 at 405. It is also argued that the learned trial Judge did not review the evidence adduced by the parties and went on to hold at page 117 lines 18-21 of the record, that:-

"The petitioner has not proved according to the provision of section 15 of the Matrimonial Causes Act that the marriage has broken down irretrievably."

It is further submitted that the learned trial Judge did not place the evidence on any imaginary scale and no finding was made in respect thereof before reaching the conclusion that the appellant's petition was not proved; that such a conclusion is perverted citing Shamaki v. Baba (2000) 13 NWLR (Pt. 685) 566 at 569; Mogaji v. Odofoin (1978) 4 SC. 91; Whyte v. Jack (1996) 2 NWLR (Pt. 431) 407 at 574 and Sanusi v. Ameyogun (1992) 4 NWLR (Pt. 237) 527. The court was thus asked to resolve this issue in favour of the appellant.

In his response to this issue, the learned respondent's counsel submitted that the learned trial Judge was right when he held that the

petitioner/appellant did not prove his case as to entitle him to be granted a divorce on the basis of his petition. Learned counsel referred to paragraph 7(a) of the petition wherein it was pleaded that:-

B “7(a) Cohabitation ceased sometimes in 1996 when the respondent voluntarily and without the consent of the petitioner or any just cause left the matrimonial home without giving the petitioner any reason for her departure despite repeated appeals from the petitioner’s friends and well wishers, the respondent has refused to return to the matrimonial home and resume cohabitation.”

C Learned counsel also referred to the evidence of the appellant under cross-examination at page 40 of the records wherein the appellant stated that his separation from the respondent was consensual wherein he stated at page 40 line 24 that,

D “Two of us agreed on that.”

It is submitted that whichever version of the appellant’s stories the court believed, none was capable of proving the allegation contained in paragraph 11 of the amended petition. That it was not the duty of the court to resolve contradictions in the evidence of the appellant and that the only conclusion which the trial court was entitled to draw was that the appellant who had the burden to prove this case did not discharge that burden. He submitted that for a petitioner to succeed in proving his entitlement to a decree for dissolution of marriage under section 15(2)(c) of the Act as pleaded in paragraph 11(a) of the appellant’s amended petition, the appellant must satisfy the court in respect of any of the provisions set out in section 16(1)(a) -(g) of the Matrimonial Causes Act. It is submitted that the appellant did not satisfy the lower court with any of these facts set out in section 16(1)(a) - (g). That the petitioner/appellant did not also prove matrimonial cruelty on the part of the respondent which is essential ingredient of section 16(1)(a) - (g). It is also submitted that the facts pleaded in paragraph 11(b) of the amended petition is not one of these facts set out in section 15(2) of the Act and which the appellant can rely in proof of the irretrievable break down of a marriage. That pleadings do not constitute proof unless supported by evidence which is satisfactory and therefore capable of belief. It is submitted that in the circum-

stances, the learned trial Judge was right in holding that the petitioner did not prove his case. We are urged to resolve this issue against the appellant.

By virtue of section 15(2) of the Matrimonial Causes Act (Supra) a petitioner for the dissolution of a marriage must prove one of the facts B contained in section 15(2)(a) - (f) of the Act before such petition can succeed. The section provides

“15(2) The court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if, C but only if, the petitioner satisfies the court of one or more of the following facts;

(a) That the respondent has wilfully and persistently refused to consummate the marriage;

(b) That since the marriage the respondent has committed adultery D and the petitioner finds it intolerable to live with the respondent.

(c) That since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. E

(d) That the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition;

(e) That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted. F

(f) That the parties to the marriage; have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition. G

(g) That the other party to the marriage has for a period of not less than one year failed to comply with a decree or restitution of conjugal rights made under this Act” H

(h) That the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.”

In paragraph 11(a) and (b) of the amended petition, the appellant averred that the marriage between the petitioner and the respondent has broken down irretrievably upon the following grounds:-

(a) That since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with respondent; (section 15(2)(c) of the Act).

(b) That the respondent has deserted the petitioner for a continuous period of at least 2 years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted. (section 15 (2)(e) of the Act).

The facts relied upon by the appellant as constituting the ground for the dissolution of the marriage are as contained in sub paragraph (i) (ii) (iii) and (iv) of paragraph 11. They are:-

“(i) That from the inception of the marriage, the respondent had conducted herself in a manner unworthy of a married woman when sometimes in 1994 she abandoned the matrimonial home only to come back afterwards,

(ii) That during the cohabitation period, the petitioner got information that the respondent was committing adultery through Mrs. Imasuen.

(iii) That after the respondent deserted/abandoned the matrimonial home in 1996, despite repeated intervention by the petitioner and other well meaning people to make her return to the matrimonial home, she refused threatening that she was finished with the marriage.

(iv) That there was no consummation of the marriage for a greater period of cohabitation between the petitioner and the respondent, as love, affection and conjugal kindness was virtually non existence between the parties for a greater part of the cohabited period.

Now the question is, has these facts been established by the appellant before the lower court and if they are so established, are they sufficient facts to ground a dissolution of marriage under any of the sub paragraph of section 15(2) of the Act? There was evidence before the lower court no doubt from the appellant that the respondent packed out of the matrimonial home sometimes in 1996. See page 20(b) lines 20 of the record. It is also a fact that respondent has no objection to a decree

being granted. It is contended that the appellant has established section 15(2)(e) and (f) of the Act that they have lived apart for a continuous period of at least two and three years immediately preceding the presentation of the petition. The appellant led evidence in support of these facts before the lower court. Whether these pieces of evidence by the appellant were not denied or contradicted by the respondent will also be considered. But there is more to it than meets the eye. However, I consider paragraphs 5, 6 and 7 of the respondent's further amended answer to the petition relevant. They are hereby reproduced.

5. In specific answer to paragraph 7 of the amended petition the respondent avers as follows:-

(a) That it was the misconduct of the petitioner that compelled the respondent to leave the matrimonial home. To that extent, therefore, the petitioner was in constructive desertion.

(b) That the petitioner insisted persistently that the respondent should leave the matrimonial home. And to press home his demand he sometime threatened to use violence to remove the respondent from the home.

(c) It is not true as alleged in the petition that the respondent absconded from the matrimonial home in 1994 and that each time she left the home he would make several appeals to the respondent to return.

(d) Sometime after Mrs. Imasuen began maligning her character, respondent was compelled to file an action against her which action was withdrawn after the intervention of the Benin branch of the Nigerian Bar Association. She even wrote a letter of apology to the respondent. The respondent is not aware if there was any form of inter-action between the said Mrs. Imasuen and the petitioner.

(e) After respondent was forced out of the matrimonial home the petitioner only came to her office once on 13/2/97. On that occasion he demanded to know from the respondent the whereabouts of the children of the marriage. Respondent immediately left the office to go and bring the children but by time she came back with the children the petitioner had gone leaving a handwritten note behind. Petitioner returned to respondent's office again on 27/2/97 but he met the respondent absent.

Petitioner also left a note on that occasion.

(f) It is the respondent that has single-handedly paid the school fees of the children of the marriage and has been responsible solely for their upkeep. The only occasion petitioner felt like giving his children some money he gave them postal orders to go to the post office to cash them. The children have always been adequately cared for. They have been doing very well in school.

(g) The petitioner has never been denied access to the children. He has refused to see the children as a way of avoiding his responsibilities to them.

6. In further answer to paragraph 11 of the petition, the respondent avers to the contrary that the petitioner is the one that has rather behaved in a way that the respondent cannot reasonably be expected to live with him. He it was, that deserted the respondent for a period of at least 4 years immediately preceding the presentation of the petition and the petitioner does not object to a decree being granted.

7. The respondent specifically denies the averments in paragraph 11(b) (i) - (iv) and avers to the contrary that it was the petitioner that conducted himself in an unworthy manner and denies abandoning the matrimonial home in 1994. The information which the petitioner alleged he received that the respondent was committing adultery is not only unfounded but exists only in the imagination of the petitioner. It was the petitioner who refused to accede to the pleas of the respondent's relations, including her father, mother and sisters including one Miss Sara Jacob and the petitioner insisted that he was no longer interested in the marriage with the respondent. In fact it was the petitioner that was not a friendly partner."

The respondent testified in support of the facts averred in paragraphs 5, 6 and 7 above, she testified as follows:-

"We lived at Petroleum Training Institute at Warri till 1992 October, went to England in October, 1992. We lived there till 1995 about April or May, 1995 when the petitioner injured me seriously and drove me out of the house...

He was beating the house girl and I held him and he beat me and I

fell to the ground. I felt pains in my jaw. He threaten that if I was there that night that it was my corpse that my parents will come and carry.

He went back inside and the way he came back outside and the way he was corning back I ran away. I was away for 6 months till December, 1995. I stayed till December, 1996. Then we lived till November/December, 1996, by then he had become violent and was putting me through (page 42 lines 10 - 30 of the record of appeal). She continues further.

“Around the end of November/December, 1996 I came home from work, he came from work and asked why there was a wire on the floor. He called the house girl and the house girl said it was my daughter that was playing there ...

That she should demonstrate how the wire was brought down. He was shouting on the little girl and she was shivering. I went far away from him. He came to call me that this is the end. That he was no longer interested in the marriage. I must pack out of the house. I told him I had no where to go to. He gave me 3 weeks. When he saw I did not move he changed it to 7 days. I called my sister in Lagos told her what had happened. My sister said she could come and beg him. She came and she pleaded. We knelt down. He refused. On the very day I p packed my things. He started to threaten my life. I got a bus and removed my things, before I got to the gate he asked people to stop me that he wanted to inspect the things I earned in the bus. I showed him that they were fans that the children would need. I took my suit case and the surfcare (Sic) and the children and the house girl and left. He forced me out of the matrimonial home.”

The respondent also stated her experience with the appellant while they were in London when the appellant attempted to hit her with his fist when the blow missed her and his hand came out through the door. (Page 52 lines 14-16 of the record).

Now, if all the evidence as adduced by the respondent is put on the imaginary scale, would the evidence adduced by the appellant out weigh that adduced by the respondent? Under Nigerian law, he who asserts in the affirmative and would fail if no evidence is called has the burden

under section 136 of the Evidence Act to prove the assertion. In the instant case, the burden of proving whether the marriage has broken down irretrievably lies on the appellant.

In divorce proceedings, the petitioner must prove one of the facts contained in section 15(2)(a) - (h) of the Matrimonial Causes Act before he can succeed and where the petitioner fails to prove that, the petition for the dissolution of the marriage will be dismissed notwithstanding the fact that the divorce is desired by both parties. See *Akinbuwa v. Akinbuwa* (1998) 7 NWLR (Pt. 559) 661. In the instant case therefore, the burden of proof is on the appellant who is alleging that the respondent has behaved in such a way that he cannot reasonably be expected to live with the respondent. Unless the petitioner satisfies the court on both of these matters the court will refuse to hold that the marriage has broken down irretrievably. Two sets of facts call for proof under section 15(2)(c) of the Act. They are (1) the sickening and detestable behaviour of the respondent and (2) that the petitioner finds it intolerable to live with the respondent. These two facts which are deduced from section 15(2)(c) of the Act are severable and independent. The petitioner must prove the detestable act or such condemnable conduct that the appellant find intolerable and then proceed to prove that he finds it intolerable to live with the respondent. See *Damulak v. Damulak* (2004) 8 NWLR (Pt. 874) 151.

Now the question that arises is whether the appellant has proved the allegations contained in his amended petition? Paragraph 11(a) and (b) of the petition is equivalent to section 15(2)(c) and (e) of the Act. The provisions of sub-section (2) of the Act and paragraph 11(a) and (b) of the amended petition have all been reproduced in this judgment. Where in a petition for dissolution of marriage founded under section 15(2)(c) of the Act the court hearing the petition for the dissolution of marriage shall hold that the petitioner has satisfied the court of the fact mentioned in section 15(2)(c) if the petitioner satisfied the court with either of the items specified in the said section 16(1)(a) - (g) of the Act. None of these

items as specified in the said section 16(1) (a) - (g) of the Act have been established by the appellant before the lower court. The appellant has not satisfied the lower court with any of those facts set out in section 16(1)(a) - (g). In fact, not an iota of such evidence was adduced by the appellant in support of this ground under section 15(2)(c) and I so find. B

The test whether the petitioner can or cannot be expected to live with the respondent is objective. It is not therefore sufficient that the petitioner alleges that he cannot live with the respondent because of her behaviour, the behaviour must be such that a reasonable man cannot endure. What would amount to behaviour which the petitioner cannot reasonably be expected to put up with, has been provided in section 16(1) of the Act. The section provides:- C

“Without prejudice to the generality of section 15(2)(c) of this Act, the court hearing a petition for a decree of dissolution of marriage shall hold that the petitioner has satisfied the court of the fact mentioned in the said section 15(2)(c) of this Act if the petitioner satisfies the court that:- D

(a) since the marriage, the respondent has committed rape, sodomy or bestiality; or E

(b) since the marriage, the respondent has, for a period of not less than two years; F

(i) been a habitual drunkard; or

(ii) habitually been intoxicated by reason of taking or using to excess any sedative, narcotic or stimulating drug or preparation, or has for a part or parts of such a period, been a habitual drunkard and has, for the other part or parts of the period, habitually been so intoxicated; or G

(c) since the marriage, the respondent has within a period not exceeding five years:

(i) suffered frequent convictions for crime in respect of which the respondent has been sentenced in the aggregate to imprisonment for not less than three years; and H

(ii) habitually left the petitioner without reasonable means of support; or

(d) since the marriage, the respondent has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life or for a period of five years or more, and is still in prison at the date of the petition; or

B (e) since the marriage and within a period of one year immediately preceding the date of the petition, the respondent has been convicted of:

(i) having attempted to murder or unlawfully to kill the petitioner;

or

C (ii) having committed an offence involving the intentional infliction of grievous harm or grievous hurt on the petitioner or the intent to inflict grievous harm or grievous hurt on the petitioner; or

(f) The respondent has habitually and wilfully failed, through out the period of two years immediately preceding the date of the petition, to D pay maintenance for the petitioner:

(i) ordered to be paid under an order of, or an order registered in a court in the federation; or

E (ii) agreed to be paid under an agreement between the parties to the marriage providing for their separation; or

(g) the respondent:-

(i) is, at the date of the petition, of unsound mind and unlikely to recover; and

F (ii) since the marriage and within the period of six years immediately preceding the date of the petition, has been confined for a period of, or for periods aggregating, not less than five years in an institution where persons may be confined for unsoundness of mind in accordance with law, or in more than one such institution.”

G **On paragraph 11(b) of the amended petition which is equivalent to section 15(2)(c) of the Act, the fact that the parties have lived apart for continuous period of two years immediately preceding the presentation of the petition is not by itself conclusive proof**
H **upon which divorce could be granted on the ground that the marriage has broken down irretrievably. The evidence of desertion as adduced in the instant case, is not the desertion contemplated under section 15(2)(e) of the Act. Desertion within the meaning of**

section 15 (2) (e) of the Act must be one where any of the spouse abandons and forsakes without any justification, thus renouncing its responsibilities and evading its duties. Based on the foregoing therefore the learned trial Judge was right to have come to the conclusion that the appellant has not proved his case as required by law and I so hold. This issue is therefore resolved against the appellant.

No argument was advanced by the appellant in support of issue (2) two and is therefore deemed to have been abandoned and I so hold. It is accordingly struck out.

I now move to issue three, whether the learned trial Judge was right in awarding custody of the children of the marriage solely to the respondent having held that no single parent can take care of children. Learned counsel for the appellant referred to paragraph 17(b) of the amended petition where he prayed the court for the custody of the two children, Orode Nanna and Mofe Nanna as adequate arrangement has been made for them by the appellant in terms of Education Endowment Policy, enrollment into the educational institution of high standard in Effurun Delta State and bringing them up in accordance with strict societal norms and values and according to the religion they may choose to belong. Other arrangements are for them to be taken care of by an aunty in a five bedroom apartment and a standard medical attention. See paragraph 7(J)(a) - (c) of the appellants amended petition. It is submitted for the appellant that, the appellant led evidence in support of the above averments and tendered exhibits B. L. D. E. in support. It is also, contended that the appellant's evidence was not shaken by way of cross-examination neither was it discredited in any manner. Further that the respondent stated under cross-examination that the children need both parent, that she alone cannot take care of them. It is contended that notwithstanding these facts before the lower court, the court proceeded to award custody of the children solely to the respondent. It is also argued that throughout the entire pleading and the evidence of the respondent, no mention was made of any arrangement put in place for the children to warrant the award of the custody of the children solely to the respondent and that is so not-

withstanding the finding of the learned trial Judge that no single parent can adequately take care of children. That having a mother who is a senior magistrate is not a recognised ground for deciding on which spouse can take care of the children as found by the trial Judge. Learned counsel B referred to section 71(1) of the Act and submitted that in deciding whom to grant custody of the children of a marriage to, the court will take into consideration certain factors which include the ages of the children, the arrangements made for their accommodation, education, welfare and C general upbringing. Learned counsel also referred to S.A.A Adesanya, Law of Matrimonial Causes, page 227 and submitted that no reason whatsoever was given by the learned trial Judge for rejecting all the detailed proposals of the appellant for the children's welfare. On the attitude of D court to unchallenged evidence, learned counsel referred to Union Bank of Nigeria Plc. v. Fajebe Foods & Poultry Farm Ltd. (1998) 6 NWLR (Pt. 554) 380 at 405; and Towoeni v. Towoeni (2001)12 NWLR (Pt. 727) 445 at 463.

It is also further submitted that custody should have been given to E the appellant who has shown that he is capable of taking care of the children citing Nzelu v. Nzelu (1997) 3 NWLR (Pt. 494) at 472. In the alternative, learned counsel urged us to grant joint custody of the two children of the marriage to the parties which he submitted would have F been more in the interest of a stable upbringing of the children and more in accord with dictate of equity.

For the respondent, it is submitted that the lower court was right in awarding custody of the two children of the marriage to the respondent. It is submitted that the arrangements made by the appellant in his G petition was merely cosmetic having regard to the antecedents of the appellant during the subsistence of the marriage and after the spouses separated. It is contended that the respondent's evidence about the attitude of the appellant towards the children of the marriage were neither H denied nor contradicted and that it was therefore not sufficient for the appellant to put in place a so called educational endowment policy for the children of the marriage. It is submitted that there was evidence before the court by the respondent that although the appellant had private cars

he deliberately refused to use them to carry his children to school and instead he used his employer's ambulance to carry them to school. That when the ambulance breaks down, the respondent would resort to the use of taxi to carry children to school. Sometimes too, they would not go to school at all because the ambulance had broken down. It is argued, B if these things happened to the children while their mother was still around, what would have happened after the respondent was divorced from the appellant? It is submitted that the interest and welfare of the children is of paramount importance in determining custody of the children of a marriage, citing *Damulak v. Damulak* (2004) 8 NWLR (Pt. 874) 151, *Williams v. Williams* (1987) 2 NWLR (Pt. 54) 66 and *Hayes v. Hayes* (2000) C 3 NWLR (Pt. 648) 276. It is further submitted that the expression "no single parent can adequately take care of the children" used by the learned trial Judge has nothing to do with custody of the children. It includes D maintenance, upbringing and educational advancement among others, while custody means physical presence of the children in particular. That the holding that "no single parent can adequately take care of the children" is completely misplaced by the appellant. It is submitted that in E deciding custody, a number of factors are taken into consideration which also include the conduct of the appellant. Learned counsel also referred to a book, *Laws of Matrimonial Causes* 1st edition at page 227 by Prof. S. A. Adesanya, and submitted that a court should not grant custody of F children in their formative years to a man who did not care about the future of such children. Learned counsel referred to the conduct of the appellant towards his children and submitted that these are not consistent with those of a caring and loving father to whom the trial court can grant G custody of the children. It is submitted that before granting custody to the respondent, the learned trial Judge adequately and meticulously reviewed the evidence before it. Learned counsel urged us to resolve this issue against the appellant.

By virtue of section 71(1) of the Matrimonial Causes Act 1970, H the court regards the interest of the children as the paramount consideration in the award of custody of children to a party. Section 71(1) of the Act which relates to custody order provides:-

"In proceedings with respect to the custody, guardianship, welfare, advancement or education of the children of a marriage, the court shall regard the interests of those children as the paramount consideration; and subject thereto, the court, may make such order in respect of
 B *these matters as it thinks proper."*

The importance of custody of the children of marriage in matrimonial proceedings need not be over emphasised. In *Hayes v. Hayes* (2000) 3 NWLR (Pt. 648) 276, this court per Aderemi, JCA, said at 290,
 C thus:-

"Throughout the gamut of matrimonial proceedings, the interest of the child of the marriage, as to the custody and welfare is held paramount. See (1) Anyaso v. Anyaso (1998) 9 NWLR (Pt. 564) 150, 2 Oyelowo v. Oyelowo (1987) 2 NWLR (Pt. 56) 239 4 S.C. 32. Such is the para-
 D *mounty that it has been held that a decree shall not be made absolute until the court is satisfied as to arrangements made for the care and upbringing of the child of the marriage; and a decree absolute made on an inadvertent non-compliance with the custody and maintenance of the*
 E *child shall be declared void."*

What is paramount in all matters relating to custody and welfare of the child of marriage, and the dominant issue that calls for careful examination and consideration is what is in the absolute interest of that
 F child or those children. The appellant averred in paragraph 7(J) of his amended petition regarding the arrangement of the children as follows:-

"7(J) The petitioner state that he has made adequate arrangements for the children of the marriage such as:

(a) *Educational Endowment Policy with the Industrial and General Insurance Company Nigeria with policy No. 5, 182188 and 182189 for Orode Nanna and Mofe Nanna respectively. The Policy has been in*
 G *force since 1997 or thereabout.*

(b) *The petitioner has worked out modalities to register/enroll them*
 H *in the educational institution of high standard in Effurun, Delta State.*

(c) *The petitioner is determined to bring his children up in strict accordance with societal room (sic) and values and according to the religion they may choose to belong to.*

(d) *For the children to be taken good care of by an aunty of the petitioner to stay with the children in a 5 bedroom apartment allocated to the petitioner in PTI Effurun.*

(e) *For the children to receive standard medical attention from the petitioner's employer clinic (PTI Clinic) Effurun, or any of their reputable medical center/clinic/hospital. As the clinic has modern equipments and a specialised and experience personel."*

The appellant gave evidence in support of the averment of the adequate arrangements for the education, general well-being and upbringing of the children. It is contended that the learned trial Judge overlooked his evidence which was predicated on his pleadings wherein he set out his arrangements and plans for the children, while agreeing with ?? that without such plans properly laid down. What then is the evidence in support of the grant of custody in favour of the appellant?

The appellant in his evidence stated at page 35 lines 18-21 of the records as follows:-

"I have arranged for their schooling. My daughter's secondary school and my son's primary school. There is an aunty that stay with me presently. I had arranged education insurance policy for them."

The educational endowment plan policy and the life assurance premium certificates were admitted in evidence as exhibits B, C, D, & E. He also stated at page 35 line 29 that,

"I presently reside in a 5 bedroom bungalow."

He stated further at page 35 lines 31 - 32 as follows:-

"They are entitled to free medical service from my place of work petroleum training institute."

The above is the testimony of the appellant upon which he founded his prayer for an order of custody of the two children.

The respondent also testified that since she moved out of the matrimonial home in 1996 with the children, the appellant only came once to ask of them. That they were attending school and she was responsible for paying their school fees. She tendered several receipts for payment of school fees for the children. That her daughter is now in a secondary school. That she has met all the financial requirements for the children.

That their father was going to their school to see them after he filed the petition in 2000 and he gave them postal orders. That the appellant cannot take care of the children because he has never shown enough interest in their education. That when she registered their daughter in school he never used any of his cars to take the children to school. The children were taken to school in ambulance after much plea. Any time the ambulance was going for burial he could say that the children should stay at home. If the ambulance breaks down he would ask the children to stay at home. That she would have to take the children in a taxi. That the petitioner does not care about their welfare. The best he can do is to promise them money. That their daughter did very well in school and he said he could not afford N7,000.00 school fees. That the appellant brought expired drugs to their son in the school in May, 2001. A bottle of ventolin that expired in March, 1998.

The above also is the testimony of the respondent upon which she founded her prayer for the custody of the two children and which was granted in her favour. **Although there is no settled rule that a child of tender age should remain in the custody of the mother, I take the view that custody of a child of the marriage came along with it, the all important implications of the preservation and care of the child's person, morally, physically and mentally. I have stated above the evidential account of the arrangement of the appellant put together for the well-being of the children. If same is considered a against the back ground drop of the evidence adduced by the respondent, can that be said to be sufficient as to warrant the grant of the custody of the children to the appellant? I think not. There is nothing therein to persuade the court to grant custody of the children to the appellant. I agree with the respondent's counsel that such arrangements are merely cosmetic in view of the antecedents of the petitioner during the subsistence of the marriage. What the children need is not a mere endowment policy and a 5-bedroom apartment. The appellant's aunty cannot take the place of their mother. The antecedents of the appellant reveals it all. It will amount to a negation of the well settled principles that the welfare and the in-**

terest of the child or children of the marriage must be accorded paramountcy were an order of custody of the children of the marriage be made in favour of the appellant based on the said cosmetic arrangement. See *Damulak v. Damulak* (2004) 8 NWLR (Pt. 874) 151; *Akinbuwa v. Akinbuwa* (1998) 7 NWLR (Pt. 559) 661; *Anyaso v. Anyaso* B (1998) 9 NWLR (Pt. 564) 150. The finding by the learned trial Judge that “No single parent can adequately take care of children” is only what ordinarily should be and does not make it absolute. That has not affected the decision of the lower court in granting custody of the children to the respondent. Ideally, the children need both their C parents, but where this natural arrangement is disrupted and can no longer hold due to the uncompromising attitude of either of the parties to the marriage, then custody must be borne by either of the spouses taking into account the provisions of section 71(1) of D the Act and other factors and circumstances. I therefore have no reason to disturb the findings of the lower court in this regard. On the alternative submission for joint custody, the learned trial Judge granted the appellant access to the children. I also find this ar- E rangement ideal. It is not in the interest of the children to be shifting base from one place to the other. The appellant can have access to his children whenever he desires to see them. In view of the finding above, it will be against the interest of the children to grant F joint custody. Issue 3 is consequently resolved against the appellant.

This takes me to issue 4 which is whether the learned trial Judge erred in law by awarding the respondent a cumulative sum of N75,000.00K G monthly as maintenance and up-keep for herself and the children which sums were not proved as required by law. Learned counsel for the appellant referred to section 70 of the Matrimonial Causes Act 1970 and submitted that the means and earning capacity of the appellant ought to be taken into consideration before awarding the cumulative sum of H N75,000.00K monthly as maintenance for the respondent and the children. He referred us to the case of *Akinbuwa v. Akinbuwa* (supra) at page 676 where the court held:-

"The relevant consideration in an award of maintenance of a wife is the background of the standard of life which the husband previously maintained before he and the wife parted."

It is submitted that the appellant in his testimony gave detailed evidence of his earning capacity and his standard of life before the respondent left the matrimonial home. He submitted that the appellant answered that he cannot afford N14,000.00K a month for feeding. That his average expenditure before the respondent left the matrimonial home was N8,000.00 per month. He stated that the appellant denied earning N200,000.00K a month and tendered exhibit 'H' his pay advice. That there was no contrary evidence regarding the earning capacity of the appellant and that the appellant should not go borrowing or perpetually live in penury in order to comply with the demand of the respondent. It is also submitted that the award of cumulative sum of N75,000.00K monthly as maintenance and up-keep for herself and the children was made without the respondent discharging the onus of proof as required by law the various heads of claim for maintenance being claims in the nature of special damages which requires strict proof citing A.C.B. Plc v. Ndoma Egba (2000) 10 NWLR (Pt. 675) 229 at 242, where it was held that a claim for special damages must be proved strictly. That the claimant must establish his entitlement for an award of special damages by credible evidence. Learned counsel referred to the respondent's further amended answer and cross-petition, paragraph 22(b) and submitted that there was no evidence whatsoever in support of the financial reliefs claimed by the respondent in her pleadings. That having not led evidence in support of her financial reliefs, they are deemed abandoned. That pleadings cannot take the place of evidence referring to the case of Ajero v. Ugorji (1999) 10 NWLR (Pt. 621)1 at 19 - 20. Based on the above premise, the court was urged to resolve this issue in favour of the appellant.

For the respondent it is submitted that under section 70(1) of the Act, the court has a lot of discretion to exercise in making an order for the maintenance and conduct of the parties citing Erhahon v. Erhahon (1997) 6 NWLR (Pt.510) 667. It is submitted that the complaint of the appellant is not that he cannot afford the sum awarded but that the award

is too high and it was not proved as a special damage. It is contended that the law does not require a wife to prove an amount claimed for her maintenance as special damages before it can be awarded by a court. He contended that, that will in effect be taking away from the court its discretion that is built in section 70(1) of the Act, citing *Damulak v. Damulak* B (supra) and *Akinbuwa v. Akinbuwa* (supra). Learned counsel argued that if the appellant spends about N60,000.00k for himself alone per month, that N75,000.00k is not too much for him to spend on the respondent and the two issues of the marriage and the court was urged not to disturb C the award made by the trial court.

I agree with the submission of both counsel that in making an order for maintenance, the court must always have regard to the means, earning capacity and in fact the conduct of the parties to the marriage and other relevant circumstances. Section 70(1) of the Matrimonial Causes Act provides:- D

“Subject to this section, the court may in proceedings with respect to the maintenance of a party to a marriage, or of children of the marriage, other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, E having regards to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances.”

By virtue of the above provisions, the court seized of a petition F has the discretionary power to make an order that it deems proper for the maintenance of a party to the marriage, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances. The relevant G circumstances must be gathered by the court itself from the pleadings and evidence of the parties at the trial. The appellant pleaded and testified as to his earning capacity. He earns N115,941.35K per month and tendered his pay advice as exhibit 'H' in support. Even H though the appellant is engaged in private medical practice in the evenings of the day, how much he realises from that is not in evidence before the court and it is not for the court to speculate. I will not on this issue delve into the argument that if the appellant spends

N60,000.00K on himself a month then N75.000.00K is not too much for him to spend on the respondent and the issues of the marriage. That has not been the criteria for determination in the award of maintenance by the courts. The law has clearly provided for the criteria to be followed. **A** man has a common law duty to maintain his wife and his children and such a wife and child or children then have a right to be so maintained. The right of a wife and child to maintenance is not contractual in nature. The husband is obliged to maintain his wife and child, and may by law be compelled to find them necessities, as meat, drink, clothes, et cetera, suitable to the husband's degree, estate or circumstance. In assessing maintenance, section 70(1) gives the court the discretionary power to order and assess maintenance of a party. It is not likened to a claim for special damages **D** where the claimant must strictly prove his entitlement to such award before same can be awarded by the court as submitted by the appellant's counsel. Now bearing this principle in mind, is the award of N75,000.00k monthly maintenance allowance for respondent and **E** two children excessive in view of the monthly income of the appellant? The learned trial Judge ordered the petitioner to pay cumulative sum of N75,000.00K for the maintenance of the respondent and the two children. In addition the petitioner is also to pay the school fees, books and other expenses for the children as shown on **F** the bills sent by the school from time to time. In the circumstances of the appellant's monthly income of only N115,947.35K and this additional responsibility, the monthly sum of N50,000.00k for maintenance of the two children as awarded by the lower court is excessive and is hereby reviewed to N30,000.00k while that of the respondent is reviewed from N25,000.00k per month to N20,000.00k **G** thus bringing the monthly maintenance for the respondent and the two children to N50,000.00K only. In arriving at this figure, I have **H** in mind the back ground of the standard of life which the appellant previously maintained before he and the respondent parted and the current economic trend. The court would have regard to what is fair and equitable based on the evidence adduced by the parties at

the trial. This is also without prejudice to the other orders of the court. I hereby set aside the award of the cumulative sum of N75,000.00k for the maintenance of the respondent and the two children of the marriage and substitute same with N50,000.00k per month. Issue 4 subject to monthly maintenance of N75,000.00k per month been reduced to B N50,000.00K monthly is resolved in favour of the appellant.

I now come to the last issue that is issue 5, whether the learned trial Judge was right in holding that the respondent cross-petitioner has sufficiently proved matrimonial cruelty on the part of the petitioner. In C his brief of argument, learned counsel for the appellant reviewed the pleadings of the parties before the trial court and the evidence adduced in support of the petition and the cross-petition thereof. Learned counsel particularly referred to paragraph 11(i)(ii)(iii) & (iv) of the amended petition which he submitted the petitioner led copious evidence in support D which evidence was neither shaken nor contradicted by the respondent. He also submitted that the appellant in his evidence in chief and cross-examination denied the respondent's averment that the appellant used to beat her. He submitted that inspire of the evidence of the appellant the E trial court held that the respondent sufficiently proved matrimonial cruelty on the part of the appellant. That the learned trial Judge did not state which acts or conduct of the appellant amounted to matrimonial cruelty and that no reason was given whatsoever for coming to that conclusion. F He submitted that the learned trial Judge merely pronounced the case of the appellant before that of the respondent without evaluating the evidence of the parties and/or assessing their probative value. Learned counsel referred to the case of Ciroma v. Ali (1999) 2 NWLR (Pt.590) 317 on G what a good judgment should be and submitted that the finding of the trial court on this point is perverse and urged the court to reverse the same and resolve this issue in favour of the appellant.

In the respondent's brief, learned counsel referred to definition of matrimonial cruelty as defined in decided cases citing Damulak v. Damulak H (Supra); Adaramaja v. Adaramaja (1962) 1 SCNLR 376 and Williams v. Williams (1966) 1 SCNLR 60 (1966) 1 All NLR 36 at 41 - 42 and submitted that based on the cases cited, the learned trial Judge came to the

conclusion that the respondent had sufficiently proved matrimonial cruelty on the part of the appellant. It is submitted that the respondent's answers to some questions form part of the back ground facts from which the learned trial Judge drew her conclusion that the appellant was guilty of matrimonial cruelty. Learned counsel itemised the following as matrimonial cruelty from the evidence of the respondent more particularly at page 55 lines 3 -5 and page 57 lines 22-27:-

"(1) A situation in which a woman is harassed and beaten by the husband at the slightest provocation or where not beaten there is a serious threat of violence.

(2) A situation in which a husband was so worked up in anger and decided to apply fist blow on his wife the blow missed her and landed on the doors of the matrimonial home. The blow broke through the door and left his hand dangling from the other side of the door.

(3) A situation where a husband gives his wife 21 days ultimatum to leave the matrimonial home and because the wife was hesitant he reduced the ultimatum to 7 days and almost immediately threw her out together with her belongings."

He submitted that the learned trial Judge had the singular advantage of hearing and seeing the parties testify before her. He urged the court not to disturb the findings and conclusions of the trial court. The court was urged to resolve this issue against the appellant.

Blacks law dictionary sixth edition defines "cruelty" at page 377 as follows:-

"The intentional and malicious infliction of physical and mental suffering upon living creatures particularly human beings; or, as applied to the latter, the wanton, malicious and unnecessary infliction of pain upon the body, or the feelings and emotions, abusive treatment; inhumility; outrage. Chiefly used in the law of divorce, in such phrases as "cruel and abusive treatment", "cruel and barbarous treatment", or "cruel and inhuman treatment..."

In Akinbuwa v. Akinbuwa (supra) it was held that beating of a wife and causing her injury amounts to a cruelty or behaviour which she cannot reasonably be expected to bear. Cruelty is not

ground set out in grounds of divorce. The facts can be used to show the conduct of the respondent in such a way that the petitioner cannot reasonably be expected to live with the respondent. Thus, a marriage can properly be held to have broken down irretrievably on the ground that one spouse has been proved to be guilty of cruelty to the other. In the instant case, from the evidence borne out from the records, according to the respondent, it is the cruel acts meted to her by the appellant that were intolerable. Cruelty is therefore regarded as a conduct which is grave and weighty as to make cohabitation virtually impossible coupled with the injury or a reasonable apprehension of injury physical or mental, to health. The accumulation of minor acts of ill-treatment causing or likely to cause the suffering spouse to break down under strain constitutes the offence of cruelty. See *Adammaja v. Adaramaja* (supra) and *Williams v. Williams* (1987) 2 NWLR (Pt. 54) 66. In considering what constitute matrimonial cruelty, the Supreme Court per Idigbe, JSC, in *Williams v. Williams* (1966) 1 All NLR, 36 held at pages 41 - 42; (1966) 1 SCNLR 60 at 67 paras B-C as follows:-

“The court should consider the entire evidence before it, and although no specific instance of actual violence is given in evidence it should be able, on an objective appraisal of the evidence before it, to say whether or not the conduct of the respondent is of such a character as is likely to cause or produce reasonable apprehension of danger to life, limb or health (bodily or mental) on the part of the petitioner.”

In the instant case, there is evidence before the trial court that the appellant used to harass and beat the respondent on the slightest provocation. There is evidence that there was a time the appellant was so worked up in anger and he wanted to apply fist blow on the respondent, he missed and his hand landed on the door and broke through the door and left his hand dangling from the other side of the door. There was also evidence before the court that he gave the respondent 21 days ultimatum to pack out of the matrimonial home and after begging to allow her stay in the matrimonial home as she has no where to go, the appellant reduced the

ultimatum to 7 days. These and others are all borne out by evidence from the records of the court. These pieces of evidence by the respondent were not denied or contradicted by the appellant. Evidence that is not successfully challenged or discredited and that
 B **is relevant to the issues in controversy ought to be admitted and relied upon by a trial court for it is for all intents and purposes credible and reliable.** See UBN v. Fajebe Foods Ltd. (1998) 6 NWLR (Pt. 554) 380; Morah v. Okwuayanga (1990) 1 NWLR (Pt.125) 225; UBA v. Achoru (1990) 6 NWLR (Pt. 156) 254. **These are clearly acts**
 C **that constitute matrimonial cruelty. Though not specifically identified or classified as constituting acts of cruelty by learned trial Judge, they are clearly borne out by the evidence before the lower court.**

On the other hand the appellant alleged acts as testified by him
 D which he finds intolerable to stay with the respondent or the conduct of the respondent that the appellant cannot reasonably be expected to live with was as averred in paragraph 11(i),(ii),(iii),(iv) of the amended petition. This paragraph has already been reproduced in this judgment. For
 E the avoidance of doubt, I will repeat them. It provide:-

“11(i) That right from the inception of the marriage, the respondent has conducted herself in a manner worthy of a marriage (sic) woman when sometimes in 1994 she abandoned the matrimonial home only to come back afterwards.
 F

(ii) That during the cohabitation period, the petitioner got information that the respondent was committing adultery through Mrs. Imasuen.

(iii) That after the respondent deserted/ abandoned the matrimonial home in 1996, despite repeated intervention by the petitioner and other well meaning people to make her return to the matrimonial home, she refused threatening that she was finished with the marriage.
 G

(iv) That there was no consummation of the marriage for a greater period of cohabitation between the petitioner and the respondent as love, affection and conjugal kindness was virtually non existence between the parties for a greater part of the cohabited period.”
 H

These averments are the grounds upon which the petition was founded; that since the marriage, the respondent has behaved in such a

way that the petitioner cannot reasonably be expected to live with the respondent and (2) that the respondent has deserted the petitioner for continuous period of at least 2 years immediately preceeding the presentation of this petition and respondent does not object to a decree being granted. As stated earlier in this judgment, these are grounds founded B under section 15(2)(c) of the Act which have not been sufficiently established by the appellant to entitle him to the judgment of the lower court and also as found by this court. The facts as averred in 11(i), (ii), (iii), (iv) have been countered by the respondent and succinctly explained by C the respondent. The appellant in his evidence in chief on the conduct of the respondent as unworthy of a married woman, did not seek to rely on the ground of adultery for the proof of irretrievable break down of marriage. Information that the respondent was committing adultery through D one Mrs. Imasuen is not by itself proof that the respondent committed adultery to warrant the dissolution of the marriage. On the ground that the respondent has abandoned the matrimonial home only, to come back after 6 months has been explained by the respondent both in her pleadings and evidence adduced before the lower court. The ground of deser- E tion has not also been sufficiently established by the appellant as it is in evidence before the trial court both parties agreed to separate i.e. the separation was consensual. This fact has been confirmed by the appellant in his evidence in chief. The appellant sent the respondent out of the F matrimonial home. The appellant cannot therefore rely on desertion as a ground. **Assuming it was the respondent that abandoned the matrimonial home, the circumstance of her leaving the matrimonial home as found in her evidence before the lower court cannot be construed to mean desertion within the meaning of the Matrimonial G Causes Act. The respondent leaving or abandoning the matrimonial home was necessitated by the conduct of the appellant caused by his beating and constant harassment of the respondent to leave the matrimonial home and at times she had to return to the matrimonial home on her own as the appellant never looked for her. The H respondent's leaving the matrimonial home under such circumstances can only be best described as constructive desertion. It is**

constructive desertion in the sense that it was the conduct of the appellant that compelled the respondent to abandon the matrimonial home. Section 18 of the Matrimonial Cause Act defines constructive desertion as:-

B *“A married person whose conduct constitutes just cause or excuse for the other party to the marriage to live separately or apart, and occasions that other party to the marriage to live separately or apart, shall be deemed to have willfully deserted that other party without just cause or excuse, notwithstanding that that person may not in fact have*
C *intended the conduct to occasion that other party to live separately or apart.”*

A proper construction of this provision with the evidence
abound from the records, clearly established that it was the appel-
D lant that was in desertion. On the conduct the appellant finds intolerable to live with the respondent, the appellant has not succeeded in proving any of the requirements that is required to be established under section 16(1)(a) - (g) of the Matrimonial Causes Act to
E ground a divorce under section 15(2)(c). From the totality of the evidence adduced before the trial court, it is my considered view that the learned trial Judge was right in holding that the appellant has not proved his petition as required by law. I have no reason
F based on the evidence abound from the records to hold otherwise. It is also my considered view that the learned trial Judge properly evaluated the evidence adduced by the parties before it before arriving at its conclusion that the appellant has not proved his case under section 15(2)(c) Matrimonial Causes Act that the marriage
G has broken down irretrievably.

Judgment writing is a matter of style, there is no one common format or standard of how a judgment should be written. In the instant case, the appellant argued that the learned trial Judge in his judgment
H restated the evidence adduced by the parties and the address of their counsel and without reviewing the evidence went on to hold that the appellant has not proved his petition according to the provisions of section 15 of the Matrimonial Causes Act that the marriage has broken down

irretrievably. It is contended that the learned Judge did not review the evidence, the evidence were not placed on any imaginary scale and that the court did not make any finding in respect thereof before reaching the conclusion that the appellant's petition was not proved. It is also argued that the learned trial Judge did not take into consideration the pleadings and evidence adduced by the appellant before coming to the said conclusion. That such conclusion is perverse. The following cases were cited in support of the above proposition; Shamaki v. Baba (2000) 13 NWLR (Pt. 685) 566 at 569; Mogaji v. Odofin (1978) 4 SC. 91; Whyte v. Jack (1996) 2 NWLR (Pt. 431) 407 at 574 and Sanusi v. Ameyogun (1992) 4 NWLR (Pt. 237) 527. **In a civil case, where the parties call evidence, before the trial Judge accepts or rejects evidence of either of the parties, he is enjoined to set up an imaginary scale by putting the evidence of the plaintiff who invariably has the burden to succeed in a civil case by preponderance of evidence on one side of the imaginary scale and then proceed to put the evidence adduced by the defendant on the other side of the imaginary scale and weigh the two together to see where the imaginary scale tilts. Ordinarily, the court performs its task of evaluation of evidence by placing the evidence called by either side to the conflict on every material issue on either side of the imaginary scale and weighing them together and whichever outweighs the other in terms of probative value ought to be accepted. See Whyte v. Jack (supra). In the instant case, the learned trial Judge considered the pleadings of the parties as contained in the amended petition and the amended answer and the cross-petition, restated the evidence adduced by the parties and the addresses of their respective counsel and went on to consider whether the appellant has led evidence on all material issues that needs to be proved. It then went on to find that the appellant has not led evidence to sufficiently prove his case or that he has not made out a prima facie case. It then went on to consider the respondent's cross-petition, whether the respondent made out a prima facie case. Then after evaluating the evidence together the learned trial Judge went on to make its finding, having regard to**

the party on whom the onus of proof lies before coming to the conclusion that the appellant has not proved his case in accordance with the provision of section 15(2)(c)(e) of the Matrimonial Causes Act. It is my considered view in the circumstances of this case that
B the learned trial Judge adequately considered the case of the parties before it and properly evaluated the evidence before reaching its decision. The judgment is not perverse and I so hold. The judgment demonstrated in full, a dispassionate consideration of all the
C issues properly raised and heard and it is a result of such an exercise. This is demonstrated by the learned trial Judge at page 117 of the judgment when she said;

*"I have carefully listened during the hearing of the evidence of the petitioner and the respondent, I have also read carefully the petition,
D answer and cross petition. I have studied the exhibits in this case and also the address of counsel and the cases they cited. I have a duty to put all the evidence adduced on the imaginary scale of justice, and carefully evaluate the evidences decide on whose side the scale of justice tilts."*

E This issue is also resolved against the appellant.

In the final analysis, subject to what I have said as to the maintenance of the respondent and the two children, it is my view that this appeal is unmeritorious. It must be dismissed in substance and I do dismiss it. The respondent is entitled to costs which I assess at N5,000.00k
F only.

AMAIZU JCA

G I have had the privilege of a preview of the lead reasons for judgment just delivered by my learned brother, Abba Aji JCA. I am in agreement with the reasons she adduced. I hereby adopt same as mine.

H The evidence before the lower court shows that the respondent leaving or abandoning the matrimonial home was caused by the conduct of the appellant. In the light of the foregoing, subject to reducing the maintenance from N75,000.00, to N50,000.00, order made in the lead judgment, including the order as to cost.

NGWUTAJCA

I have read before now the judgment just delivered by my learned brother, ABBA-AJI, JCA and I agree with the reasoning and the consequent conclusion that the appeal is devoid of merit. B

It is the exclusive province of the trial Judge who had the opportunity denied the appellate court of seeing and hearing the witness testify in court to evaluate and ascribe probative value to the evidence and arrive at a finding of fact. See *Usman v. Garke* (2003) 14 NWLR (Pt.840) 261 SC. Appellate court ought not to disturb the finding of fact by a trial court unless such finding is perverse. See *F.A.T.B. Ltd. v. Partnership Inv. Co Ltd.* (2003) 18 NWLR (Pt.851) 35 SC. C

In this case the court properly evaluated and ascribed probative value to the evidence before it before arriving at its decision. D

Based on the above and the fuller reasons in the lead judgment, I also dismiss the appeal. I adopt the orders in the lead judgment, including order as to costs.

Appeal dismissed. E

F

G

H