

SUPREME COURT OF NIGERIA
FRIDAY 16TH DECEMBER, 2016. SC. 241/2008
**CORAM:- W. S. N. ONNOGHEN Ag. CJN, M. U. PETER-
ODILI, O. ARIWOOLA, K. B. AKA'AHs,
K. M. O. KEKERE-EKUN, JJSC**

JOHNPHILIP OKECHUKWU TABANSI APPELLANT
AND
VIVIAN IFEOMA TABANSI RESPONDENT

MATRIMONIAL CAUSES - Maintenance - Award of - Court in granting prayer for maintenance - Is to ensure that party adversely affected by the order - Will have something left over to sustain himself (H1)

RULES OF COURT - Compliance - Rules of Court are meant to be followed but not blindly - As they are made to aid Court in the administration of justice (H2)

MATRIMONIAL CAUSES - Maintenance - Award of - Conditions - Court in giving order for maintenance - Must have regard to the means/earning capacity - And conduct of parties to the marriage (H3)

MATRIMONIAL CAUSES - Maintenance of child - Award of - Age limit - Power of Court to order for maintenance of child - Shall not be exercised for the benefit of child who has attained 21 years of age (H4)

FACTS

Petitioner/appellant instituted this action at the High Court of Anambra State, seeking for dissolution of his marriage to respondent. Appellant inter alia, sought for an unlimited access to the only child of the marriage. Respondent filed reply to the petition and also cross-petitioned. Respondent in the cross-petition is praying inter alia, for an order dismissing the petition, a decree of dissolution of the marriage, custody of the child of the marriage and monthly maintenance.

nance allowance for the child of the marriage at the rate of N80,000.00 subject to variation due to inflation rate or price instability. Appellant testified and called a witness, while respondent testified but called no witness.

At the end of hearing, the learned trial Judge delivered his judgment dismissing the petition but found that the cross-petition succeeded and granted a decree nisi dissolving the marriage on the ground that it was appellant who deserted respondent. The Court granted custody of the child to respondent and ordered appellant to pay N75,000.00 monthly for the education, maintenance and upkeep of the child, including feeding and medical treatment. This amount was subject to variation in due course taking into account the fluctuation of the currency and when the child entered a higher institution of learning. Aggrieved with the judgment of the Court, appellant appealed to the Court of Appeal Enugu Division. The appeal was dismissed. Aggrieved further, appellant appealed to the Supreme Court.

ISSUES FOR DETERMINATION

1. Who among the parties is guilty of desertion?
2. Is the award of N75,000.00 monthly against the appellant as maintenance allowance justifiable?
3. Whether the Court of Appeal was correct in allowing the award of permanent maintenance and permanent custody through the life of the child?

HELD (Unanimously allowing the appeal in part per

AKA'AH'S JSC)

MATRIMONIAL CAUSES - Maintenance - Award of

1. The lower court took the view that Order XXI Rules 2 and 3 of the Matrimonial Causes Rules allows a Judge to adopt a liberal attitude to non-compliance with the Rules which non-compliance does not vitiate the proceedings to the extent that such proceedings would be rendered void. I agree with this view. Order XIV Rule 4 is to guide the court in ensuring that in granting a prayer for maintenance, the party who is adversely affected by the order will have something left over to sustain

himself after settling the award. (p. 4573 G)

RULES OF COURT - Compliance

2. Rules of court are meant to be followed albeit not blindly as they are made to aid the court in the administration of justice. As they are subsidiary legislations and are not meant to be construed in the absolute without reference to or oblivious of the raison d'être for their coming into being. (p. 4574 A)

MATRIMONIAL CAUSES - Maintenance - Award of - Conditions

3. In making an order for maintenance the court must always have regard to the means/earning capacity and the conduct of the parties to the marriage and other relevant circumstances. In the instant case apart from the fact that the respondent claimed the only child of the marriage was a princess since the appellant was a prince, there is no discernible pattern as to how the parties lived. They cohabited for a very short period after the marriage before serious disagreements set in leading to the divorce proceedings. Because of the paucity of evidence as to the actual earning power of the appellant, this court will have to tamper with the award made and reduce it from N75,000.00 a month to N40,000.00. This is subject to an upward review because of the inflationary trends and the recession the country is presently undergoing. (p. 4575 A/C)

MATRIMONIAL CAUSES - Maintenance - Award of - Limit

4. By virtue of section 70(4) of the Matrimonial Causes Act, the power of the court to make an order on the maintenance of the child or children of the marriage shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of the opinion that there are special circumstances justifying the making of the order in that direction. No reason has been advanced by the court below in affirming the judgment of the learned trial Judge. The confirmation by the court below of the judgment of the High Court in its entirety which included the order of custody and maintenance is wrong since no reasons have been advanced

to justify the order. (p. 4576 A)

REPRESENTATION

Chudi Obieze, Esq for the Appellant with Udoka Odiamma, Ofunneka
Oсотule, Nnamdi Phil-Ebosie, F. O. Aniweta and Uche Arah
B Chief O. Ugola, SAN for the Respondent with F. A. R. Obi Okafor

CASES REFERRED TO

- Gaji v. Paye (2003) 8 NWLR (pt. 582)
C Leadway Assurance Co. Ltd v. Zeco (Nig.) Ltd (2004) 11 NWLR (pt. 884) 316
Unegbu v. Unegbu (2004) 11 NWLR (pt. 884) 332
Damulak v. Damulak (2004) 8 NWLR (pt. 874) 151
Agbonifo v. Aiyeroba (1988) 1 NWLR (pt. 70) 325
D Ayanru v. Mandilas Ltd. (2007) 10 NWLR (pt. 1043) 462
Orunengimo v. Egebe (2007) 15 NWLR (pt. 1058) 630
Dada v. Dosunmu (2006) 18 NWLR (pt. 1010) 134
Awoyolo v. Aro (2006) 4 NWLR (pt. 971) 481
Ajiboye v. Ishola (2006) 13 NWLR (pt. 998) 628
E Nanna v. Nanna (2006) 3 NWLR (pt. 966) 1
Ojoh v. Kamalu (2005) 18 NWLR (pt. 958) 523
Okoro v. Egboh (2006) 15 NWLR (pt. 1001) 1
C. S. S. Bookshops Ltd. v. R. T. M. C. R. (2006) 11 NWLR (pt. 992)
F 530
Araka v. Ejeagwu (2000) 5 NWLR (pt. 692) 684

STATUTE & RULES REFERRED TO

- Matrimonial Causes Act, s. 70(4)
G Matrimonial Causes Rules, O. XXI r. 3, O. XIV r. 4(1)(2)(4)(6)(7)(8)

LEAD JUDGMENT BY AKA'AHs JSC

- In his Notice of Petition is Suit No: OT/ID/2005 dated 2nd
March, 2005 the Appellant as Petitioner sought for a dissolution of
H his marriage to the Respondent and prayed for the following orders:-
(a) A decree of dissolution of marriage between the Petitioner
and the Respondent.
(b) Unlimited access to the child of the marriage to be granted

to the Petitioner, whereby the child shall spend her holidays with the Petitioner and also spend some weekends with the Petitioner, until such a time the child attains the age of ten years.

(c) An order granting custody of the child of the marriage to the Petitioner, upon the child attaining the age of ten years, the Petitioner's house being her natural and traditional home and birth right. B

(d) Access to the child of the marriage to be granted to the Respondent, upon the child's attainment of ten years of age, to visit the child at the Petitioner's house and also for the child to visit Respondent on holidays. C

On 24th May, 2005 the Respondent filed an answer to the Petition and also cross-petitioned. The Petitioner filed a Reply to the cross-petition and settlement of issues on 31st May, 2005. The settlement of issues was adopted by the Respondent. The Answer and Cross-Petition were however amended on 16th November, 2015. In the said Amended Answer and Cross-Petition the Respondent sought for the following orders:- D

(a) An order dismissing the petition.

(b) A decree of the dissolution of the marriage between the Petitioner and the Respondent. E

(c) Custody of the child of the marriage.

(d) Monthly maintenance of the only child of the marriage by the Petitioner at the rate of N80,000.00 (Eighty thousand naira) per month subject to variation due to inflation rate or price instability. F

(e) Return of the Respondent's properties listed in the schedule to this Answer and Cross-Petition by the Petitioner to the Respondent or alternatively for the Petitioner to pay to the Respondent the sum of N500,000.000 (Five Hundred Thousand Naira) as appreciated value of the properties of the Respondent seized by the Petitioner. G

The Petitioner testified and called a witness before closing his case. The Respondent also testified but called no witness. On 15th March, 2006 the learned trial Judge delivered his judgment dismissing the petition but found that the cross-petition succeeded and granted a decree nisi dissolving the marriage on the ground that it was the Petitioner who deserted the Respondent. He granted cus- H

today of the child to the Respondent and ordered the Petitioner to pay N75,000.00 (Seventy-Five Thousand Naira) monthly for the education, maintenance and upkeep of the child, including feeding and medical treatment. This amount was subject to variation in due course taking into account the fluctuation of the currency and when
B the child entered a higher institution of learning.

The Petitioner felt dissatisfied with the judgment and appealed to the Court of Appeal, Enugu. The appeal was dismissed on 8th July, 2008. This prompted the further appeal to this court in the Notice of
C Appeal dated and filed on 4th August, 2008 containing four grounds. Additional grounds of appeal were later filed on 16th October, 2008.

The appellant distilled six issues for determination as follows:-

1. Can the Respondent be allowed to lead evidence in support of her Cross-Petition upon facts which she failed to cross-examine the Petitioner on when the Petitioner was giving evidence?
D

2. Whether Order XXI Rules 2, 3 and 4 of the Matrimonial Causes Rules waived the need for the Respondent to plead and lead evidence as required by Order XIV Rule 4(1) (2) (4) (6) (7) and (8) of the Matrimonial Causes Rules and what is the effect of non-compliance in this case?
E

3. Whether both parents are liable to contribute under the law for the maintenance and upkeep of the child and whether the Respondent is gainfully employed as to contribute towards the maintenance of the child?
F

4. What is the monthly or annual income of the Appellant and is the award of N75,000.00 (Seventy-five Thousand Naira) monthly, as maintenance allowance, justified from the facts led in evidence in this suit and whether the income can sustain the amount
G awarded?

5. Was the Court of Appeal correct when they upheld the finding of the trial court that it was the appellant that deserted the respondent?

6. Whether the Court of Appeal was correct in allowing the
H ward of permanent maintenance and permanent custody throughout the life of the child?

The Respondent's issues are the same as the appellant issues though slightly different in the wordings.

I am of the view that the issues that call for determination in this appeal are as follows:-

1. Who among the parties is guilty of desertion?
2. Is the award of N75,000.00 monthly against the appellant as maintenance allowance justifiable?
3. Whether the Court of Appeal was correct in allowing the award of permanent maintenance and permanent custody through the life of the child? B

On issue 1 Learned Counsel for the appellant submitted that it is common position between the appellant and the Respondent C that it was the Respondent who deserted the matrimonial home on the 7/2/2004. Learned counsel argued that even though the Respondent filed a cross-petition, the failure of the respondent to cross-examine the appellant witness on material issues is a tacit acceptance of the truth of the evidence of the witness and the defendant will not D be allowed to call evidence on the matter after the plaintiff has closed his case. He submitted that the lower court's stand that the Respondent who filed a cross-petition cannot in law be prevented from giving evidence on his or her cross-petition runs contrary to the principle enunciated by the Supreme Court in Gaji v. Paye (2003) 8 E NWLR (Pt. 582 and followed in Leadway Assurance Coy. Ltd V. Zeco (Nig.) Ltd (2004) 11 NWLR (Pt. 884) 316.

Learned counsel for the Respondent argued that contrary to the submission of the appellant's counsel, the appellant as PW1 was F duly cross-examined on the issue of desertion and referred to pages 166-168 lines 23-29 of the records and that what was being contested was the issue of desertion.

There is constructive desertion where the petitioner is the cause of the Respondent leaving the matrimonial home. In her answer to the petition, the Respondent averred in paragraphs 2, 8(d) and 8(j) as follows:-

"2. The Respondent admits that the marriage between the Petitioner and Respondent has broken down irretrievably and adds that it is the Petitioner who has deserted the Petitioner (sic Respondent) and also behaved in such a manner that the Respondent cannot reasonably be expected to live with the Petitioner any longer. H

8(d) On 7/2/2004 the Petitioner drove away the Respon-

dent from his house and the Petitioner has never since that day lived together with the Respondent.

(j) On 4/2/2004, Petitioner brutally assaulted the Respondent and in the night of the same day Petitioner attempted to murder the Respondent by strangling her to death and on 7/2/2004 Petitioner drove away the Respondent from his house and has never since that date approached the respondent for reconciliation."

The learned trial Judge found that it was the Petitioner who deserted the Respondent. The lower court in its judgment at pages 166-167 reproduced the cross-examination of the petitioner/appellant by learned counsel for the respondent and arrived at the same conclusion which the learned trial judge reached that it was the petitioner/appellant that deserted the respondent. There is therefore a concurrent finding of fact by the two lower courts which are not perverse or not borne out by the evidence adduced at the trial.

The cross-examination of the petitioner/appellant dealt with the issue of what led to the respondent abandoning the matrimonial home and since she also cross-petitioned, she was entitled to call evidence. The respondent did not fail to cross-examine the petitioner/appellant on this material point and even though she admitted packing out of the matrimonial home, she was compelled by circumstances to do so but from the surrounding circumstances; it was the behaviour of the petitioner/appellant that forced the respondent to move out of the matrimonial home; hence he is the one who is guilty of constructive desertion.

The principle of law enunciated by this court in *Gaji v. Pave* (2003) 8 NWLR (Pt. 823) 583 to the effect that a defendant who fails to cross-examine a witness on material issues raised by the plaintiff will not be allowed to call evidence on the matter after the plaintiff has closed his case does not apply in this case.

The appellant is questioning the rationale for the award of N75,000.00 monthly as maintenance allowance. He argued that by virtue of the provisions of Order XIV Rule 4(1)(2)(4)(6)(7) and (8) of the Matrimonial Causes Rules, the respondent was expected to comply with certain conditions, plead certain facts and lead evidence in order to be granted the prayer for maintenance sought by her. He pointed out that the respondent did not plead her income or her

capability to earn income; how she came to know the source of income of the appellant and whether the order sought is a permanent one or for a stated period; the financial arrangement between herself and the appellant and the ownership of where she is living. He submitted that the non compliance with Order XIV Rule 4 of the Matrimonial Causes Rules by the respondent cannot amount to technical argument since it goes to the root of the order of maintenance and without knowing the earning capacity of the claimant and her spouse, the Court will not be in a position to make any justifiable order for maintenance and before making such an award, the court should ensure that the appellant will be able to afford it and have something left over to sustain himself. B
C

The response by learned counsel for the Respondent is that this court should not allow the issue of technicalities to becloud the justice of the case and Order XXI Rule 3 of the Matrimonial Causes Rules has relieved the respondent from the consequences of non-compliance with the said Rules. The learned trial Judge made a finding which was upheld by the court below and this Court should not disturb the concurrent findings of the two lower courts. D

The crux of this appeal lies in the interpretation of Orders XIV Rule 4 and Order XXI Rules 3 and 4 of the Matrimonial Causes Rules which I reproduce as follows:- E

“Order XIV Rule 4-(1), A claimant shall, in his application for ancillary relief state-

(a) particulars of the order sought by him; and by the facts upon which the court may be asked to make the order. F

(b) the facts upon which the court maybe asked to make the order.

(2) Where a claimant is by his application for ancillary relief, seeking an order with respect to the maintenance of the claimant or of children of the marriage, the application shall specify –

(a) the persons in respect of whom maintenance is sought;

(b) whether the order sought in respect of each of those persons is a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order; and H

(c) the amount of the lump sum or the weekly, monthly,

yearly or other periodic sum, as the case may be, sought in respect of each of those persons.

(4) In proceedings for ancillary relief, being proceedings, with respect to the maintenance of a party to the proceedings or of a child of the marriage, the claimant shall state in his application for ancillary relief particulars of-

(a) the property, income and financial commitments of the claimant;

(b) the capability of the claimant to earn income;

(c) The property, income and financial commitments of the spouse of the claimant, so far as they are known to the claimant:

(d) the capability of the spouse of the claimant to earn income, so far as that capability is known to the claimant;

(e) any financial arrangements in operation between the claimant and the spouse of the claimant.

(f) any order of a court under which one of the parties to the marriage is liable to make payments to the other; and

(g) the ownership of the home in which the claimant is residing and the terms and conditions upon which the claimant is occupying or otherwise residing in that home.

(6) A claimant to whom either of the last two preceding sub-rule (4) of this rule applies shall not be taken to have complied with those sub-rules unless he states in his application for ancillary relief-

(a) that he has no property other than particulars of which are stated in the application, or that he has no property, as the case may be; and

(b) that he has no income other than the income particulars of which are stated in the application, or that he has no income, as the case may be.

(7) Where any particulars referred to in paragraph (c) or (d) of sub-rule (4) of this rule are included in a petition or answer, particulars of the claimant's means of knowing those first-mentioned particulars shall be stated in the petition or answer, as the case may be.

(8) Where any particulars referred to in paragraph (c) or (d) of sub-rule (4) of this rule are included in an affidavit, the person swearing to the affidavit shall state in the affidavit particulars of his

means of knowing those first-mentioned particulars”.

Order XXI of the Matrimonial Causes Rules deals with the effect of non-compliance with these Rules or with an order and Rules 3 and 4 provide:-

“3. Subject to the Act and to these Rules:-

(a) a court may at any time, upon such terms as the court B thinks fit, relieve a party from the consequences of non-compliance with these Rules, with a rule of practice and procedure of the court applicable to the proceedings or with an order made by the court;

(b) a court may, upon such terms as the court thinks fit, dis- C pense with the need for compliance by a party with any provision of these Rules

4(1) An application to set aside proceedings for irregularity shall not be allowed -

(a) if the application is not made within a reasonable time; or D

(b) if the party making the application has taken a reason- able step after knowledge of the irregularity.

(2) Nothing in the last-preceding sub-rule shall be taken to prevent a court from exercising, of its own motion, any of the powers E conferred on it by the last two preceding rules.

(3) Where application is made to set aside proceedings for irregularity, the several objections intended to be relied upon shall be stated in the application”.

The argument by learned counsel for the appellant is that the respondent did not place before the court sufficient materials, F either by way of pleadings or evidence to justify the award made by the trial court and upheld by the Court of appeal and without knowing the income and earning capacity of the claimant and her spouse, the Court cannot be in a position to make a justifiable order for maintenance. G Learned Counsel further contended that it is not the purpose of an order for maintenance to punish the appellant but rather that any amount awarded ought to be affordable to the appellant.

In her Amended Answer and Cross-Petition, the respondent averred in paragraphs 4 and 5 of the Cross-Petition as follows:- H

“(4) PROPOSED ARRANGEMENT FOR THE CHILD:-

The respondent has been taking care of the of the child of the marriage since birth and has been managing her with affection, love and

devotion and will always continue to insist on only the best for the child.

(a) The child of the marriage is lucky to have a wealthy father and she is cared for as a princess, which she is.

(b) The child attends ST & T. Regency International School G.R.A, Ikeja, Lagos State and pays a total fee of fifty thousand naira per term.

(c) On the whole, an average of eighty thousand naira is spent for maintenance of the child of the marriage per month, the father is wealthy enough and can easily cater for the education, maintenance and upkeep of his child in the best schools and hospitals etc.

5. ORDER SOUGHT

The respondent seeks the following orders from the Court

(c) Custody of the child of the marriage
(d) Monthly maintenance of the only child of the marriage by the Petitioner at the rate of eighty thousand naira (N80,000.00) per month subject to variation due to inflation rate or price instability.

(e) Return of the Respondent's properties listed in the schedule to this Answer and Cross-Petition by the Petitioner to the Respondent or alternatively for the Petitioner to pay to the Respondent the sum of five hundred thousand naira (N500,000.00) value of the properties of the Respondent seized by the Petitioner”;

From the pleadings and the evidence led it is crystal clear that the respondent/cross petitioner did not comply with Order XIV Rule 4 of the Matrimonial Causes Rules in her amended answer and cross-petition. During the course of her evidence in-chief she stated clearly that she was not after the petitioner's money.

This is what she said at page 77 lines 12-14 of the records:-
“I am not after the petitioner's money. Let him take care of his child, whatever the court deems fit to order him to pay me for my upkeep I shall accept it”.

The learned trial Judge dealing with the issue of monthly allowance for the maintenance of the child of the marriage stated as follows at pages 96-97 of the records:-

“The respondent/cross-petitioner had claimed N80,000.00 monthly inclusive of the feeding education and medical care of the child. According to the respondent the petitioner is a prince and his

child is a princess and should live as a royal princess. She was born in America. She should attend the best school and best hospital. She was born at 6 months and so needs monitoring and constant medical attention. The petitioner said that he had been providing the child's needs including feeding, school fees and hospital treatment and would continue to provide them. That he cannot afford to pay N80,000.00^B monthly because that is about his salary. However, evidence of PW2 shows or confirmed that apart from being a Director in Tabansi Motors the Petitioner owns his own transport company, I must say that exhibits C-C5, E, F and G-G6 provide useful guide for assessment. C^C For instance exhibits G5 and G6 were receipts for medical treatment for November 2004 and they amounted to N10,500.00. Exhibits C-C5 are purchases for the child. C2 was for the month of June 2004 N22,000.00, C3 was for December 2004 for N25,300.00 E was school fees for one term N52,000.00. It is naturally expected that as D the child-grows older her needs will correspondingly-increase. Such needs as food items, toiletries and cosmetics as well as school fees and text books will obviously increase. It is pertinent to note that it is more convenient and advantageous to both parties that provision be made for regular monthly allowance than for the petitioner to be E catering for the child as he used to. This is because he may not readily know at all times what the child needs and how and when she needs it. But if regular monthly allowance is made, the respondent will be in a position to attend to each need as it arises. I therefore hold that F notwithstanding the technical argument of learned counsel for the petitioner that the respondent failed to comply with Order XIV Rule 4(1)(2)(4)(6)(7) and (8) of the Matrimonial Causes Rules, it is more convenient and proper to make an order for payment of monthly allowance for the welfare, education and upkeep of the child of the G marriage”.

The lower court took the view that Order XXI Rules 2 and 3 of the Matrimonial Causes Rules allows a Judge to adopt a liberal attitude to non-compliance with the Rules which non-compliance does not vitiate the proceedings to the extent that H such proceedings would be rendered void. I agree with this view. Order XIV Rule 4 is to guide the court in ensuring that in granting a prayer for maintenance, the party who is adversely

affected by the order will have something left over to sustain himself after settling the award.

Rules of court are meant to be followed albeit not blindly as they are made to aid the court in the administration of justice. As they are subsidiary legislations and are not meant to be construed in the absolute without reference to or oblivious of the raison d'être for their coming into being. See *Unegbu v. Unegbu* (2004) 11 NWLR (Pt. 884) 332. The lower court noted that the education, maintenance and upkeep of a child are serious and sensitive matters which should not be hamstrung by technicalities and what is best for the child should be the paramount consideration of the court. Perhaps the only adverse effect which the non adherence to Order XIV Rule 4 of the Matrimonial Causes Rules would have in this case is the amount that should be awarded as the allowance for the maintenance of the only child of the marriage. The N75, 000.00 which the learned trial Judge awarded to be paid monthly for the education, maintenance and upkeep of the child including feeding and medical treatment and upheld by the lower court has been considered an outrageous award considering the fact that the appellant's monthly income is N80,000.00. Evidence was not adduced to show how appellant earned more than N80,000.00 a month.

When cross-examined; the appellant denied being the sole owner of Tabansi Motors Limited. He said it was a family business where he is a director and has 10% share holding in the Company. PW2 who is an Accounting Officer in Tabansi Motors confirmed that the appellant was a director in Tabansi Motors but denied knowledge of the appellant's ownership of Trans - Tabansi Company. He however agreed that the appellant has his own transport company. In the appellant's brief learned counsel pointed out that the respondent did not plead her income or her capability to earn income; neither did she plead ownership of where she is living or the financial arrangement she had made with the appellant. Despite the fact that she stated she was earning between N30,000.00 -N40,000.00 a month as a movie producer while she spent N10,000.00 on feeding and the annual rent was N80,000.00, the award of N80,000.00 or more would have been justified if there was evidence of the company owned by the appellant and possibly the audited accounts of

the said company. There was no evidence that the appellant owned 22 trailers and was making about N1,000,000.00 a month apart from what the respondent said.

In making an order for maintenance the court must always have regard to the means/earning capacity and the conduct of the parties to the marriage and other relevant circumstances. In *Damulak v. Damulak* (2004) 8 NWLR (Pt. 874) 151 it was held that all the other relevant circumstances which the court may consider in ordering maintenance may include standard of living to which the parties are accustomed, the requirements of the wife and even the public interest or demand. ***In the instant case apart from the fact that the respondent claimed the only child of the marriage was a princess since the appellant was a prince, there is no discernible pattern as to how the parties lived. They cohabited for a very short period after the marriage before serious disagreements set in leading to the divorce proceedings. Because of the paucity of evidence as to the actual earning power of the appellant, this court will have to tamper with the award made and reduce it from N75,000.00 a month to N40,000.00. This is subject to an upward review because of the inflationary trends and the recession the country is presently undergoing.***

The only child of the marriage was born on 7/2/2003; so she is presently 13 years of age. The respondent asked for custody of the child until she is 18 years of age.

The learned trial Judge stated his award for the maintenance of the only child of the marriage in these terms:-

“The petitioner shall pay to the respondent the sum of Seventy-Five Thousand Naira N75,000.00 monthly for the education, maintenance and upkeep of the child, including feeding and medical treatment; provided that this figure shall be varied when the child enters into Higher Institution of learning, taking into consideration the currency situation at the time”.

The appeal was dismissed by the lower court. Learned counsel for the appellant has described the custody and award granted to the respondent as permanent custody and permanent maintenance through the life of the child and therefore queried whether the Court

of Appeal was correct in allowing such orders to stand.

By virtue of section 70(4) of the Matrimonial Causes Act, the power of the court to make an order on the maintenance of the child or children of the marriage shall not be exercised for the benefit of a child who has attained the age of twenty-one years unless the court is of the opinion that there are special circumstances justifying the making of the order in that direction. No reason has been advanced by the court below in affirming the judgment of the learned trial Judge. The confirmation by the court below of the judgment of the High Court in its entirety which included the order of custody and maintenance is wrong since no reasons have been advanced to justify the order. The said orders as they relate to the custody and maintenance are varied as follows:-

1. That the custody of the child of the marriage, Somtochukwu Tabansi, be and is hereby granted to the respondent until the said child reaches 21 years of age provided that the petitioner shall have the right to visit his child at the respondent's residence and from age 10 the child may spend part of her long vacation with the petitioner.

2. The petitioner shall pay to the respondent the sum of Forty thousand Naira (N40,000.00) monthly for the education, maintenance and upkeep of the child, including feeding and medical treatment provided that this figure shall be varied from time to time depending on the inflationary rate and purchasing power of the Naira until the child reaches 21 years or upon the completion of her education in a Higher Institution of learning.

The appeal partially succeeds and it is hereby allowed as stated above. The appeal against the dissolution of the marriage based on desertion by the appellant lacks merit and it is hereby dismissed.

Parties are to bear their respective costs.

ONNOGHEN AG. CJN

I have had the benefit of reading in draft the lead judgment of my learned brother, AKA'AHS, JSC just delivered.

I agree that the appeal has merit in part and should therefore

be so allowed.

The facts of this case have been stated in detail in the lead judgment making it unnecessary for me to repeat them herein except as may be needed for the point being discussed.

On the 1st issue, which is, whether the respondent can be allowed to lead evidence in support of a cross petition upon facts, which she failed to cross-examine the petitioner on, it should be noted that a cross-petition is an independent action such as a counter-claim. In such a circumstance, each party is entitled to adduce evidence in support of his case as pleaded and the trial court is at liberty, in evaluating the evidence so adduced, to come to a proper conclusion as to which case is preferred or proved either the petitioner's or cross-petitioner's. Where, however, there is no counter-claim or cross petition and a defendant or respondent failed or neglected to cross-examine the opponent or his witness on a relevant fact germane to the issues as joined in the pleadings, the failure to so cross-examine the witness may have the effect suggested by learned counsel for appellant.

In the instant case, however, both parties are not contesting the issue of dissolution of the marriage but the issue of desertion which the lower courts concurrently found in favour of the respondent i.e that it was the appellant that deserted the respondent.

I find nothing to make it necessary for this court to interfere with the concurrent findings of facts by the lower courts on the issue of desertion and consequently affirm same and resolve the issue against appellant.

In respect of issue 2, order xiv Rule 4(1), (2), (4), (7) and (8) of the Matrimonial Causes Rules provides that a respondent should plead certain facts and lead evidence in proof thereof if he/she desires to be granted the prayer for maintenance. The said order xiv Rule 4(1) (2) (4) (6) (7) and (8) of the Matrimonial Causes Rules enact thus:-

“(1) A claimant shall, in his application for ancillary relief, state:-

- (a) Particulars of the order sought by him; and*
- (b) The facts upon which the Court will be asked to make the order.*

(2) Where a claimant is, by his application for ancillary relief, seeking an order with respect to the maintenance of the claimant or children of the marriage, the application shall specify -

(a) The persons in respect of whom maintenance is sought;
(b) Whether the order sought in respect of each of those
B *persons is a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order; and*

(c) The amount of the lump sum or the weekly, monthly,
C *yearly or other periodic sum, as the case maybe, sought in respect of each of those persons.*

(4) In proceedings for ancillary relief, being proceedings with respect to the maintenance of a party to the proceedings or of a child of the marriage, the claimant shall state in his application for ancillary
D *relief particulars by:-*

(a) The property, income and financial commitments of the claimant;

(b) The capability of the claimant to earn income;

(c) The property, income and financial commitments of the
E *spouse of the claimant, so far as they are known to the claimant;*

(d) The capability of the spouse of the claimant to earn income so far as that capability is known to the claimant;

(e) Any financial arrangements in operation between the
F *claimant and the spouse of the claimant;*

(f) An order of court under which one of the parties to the marriage is liable to make payments to the other; and-

(g) The ownership of the house in which the claimant is residing and the terms and conditions upon which the claimant is occupying or otherwise residing in that house.
G

(6) A claimant to whom either of the last two preceding sub-rules applies shall not be taken to have complied with those sub-rules unless he states in his application for ancillary relief:-

(a) That he has no property other than the property particulars of which are stated in the application or that he has no property as the case may be; and
H

(b) That he has no income other than the income particulars of which are stated in the application or that he has no income, as the

case may be.

(7) *Where any particulars referred to in paragraph (c) or (d) of sub-rule (4) of this rule are included in a petition or answer, particulars of the claimant's means of knowing those first mentioned particulars shall be stated in the petition or answer, as the case may be.* B

(8) *Where any particulars referred to in paragraph (c) or (d) of sub-rule (4) of this rule are included in an affidavit the person swearing to the affidavit shall state in the affidavit particulars of his means of knowing those first mentioned particulars."* C

I have carefully gone through the record of appeal and it is very clear that respondent did not plead her income or her capability to earn any income, neither did she plead the ownership of where she is living or the financial arrangement between her and appellant, etc, etc. In short, respondent did not comply with the above reproduced provisions of Order xiv Rule 4(1) (2) (4) (6) (7) and (8) of the Matrimonial Causes Rules. D

However, under Proposed Arrangement For The Child, respondent pleaded at paragraph 4(e) of the cross petition thus:

" On the whole, an average of eighty thousand naira is spent for maintenance of the child of the marriage per month the father is wealthy enough and can easily cater -for the education, maintenance and upkeep of his child in the best schools and hospitals etc.... " E

Under the sub-head "ORDER SOUGHT, at paragraph 5(d) respondent pleaded thus:- F

" Monthly maintenance of the child of the petitioner at the rate of eighty thousand naira per month subject to variation due to inflation rate or price instability." G

Apart from not pleading the relevant facts as required, respondent also failed to adduce evidence to establish the relevant facts for the reliefs sought.

The attitude of learned Counsel for respondent to the argument of Counsel for appellant on the issue under consideration which position was adopted by the lower courts is to treat the issue as involving technicalities which should not be encouraged at the expense of substantial justice. I am not persuaded by that trend of argument H

particularly as rules of court, particularly as they relate to pleadings, have to be obeyed because they are designed to ensure fair hearing and justice between the parties.

I, in the circumstances, agree with the submission of learned Counsel for appellant that non compliance with the provisions of Order XIV Rule 4 of the Matrimonial Causes Rules by respondent goes to the root of an order' for maintenance as it is the facts as pleaded and evidence thereon that the court relies on in making the award of maintenance.

However, the record shows that appellant, in response to the respondent's pleading that appellant is wealthy enough and can easily afford N80,000.00, pleaded that he earns N80,000:00 (Eighty Thousand Naira) monthly at Tabansi Motors Ltd. To me, that much is admitted by appellant and can be the basis of the assessment of the sum to be awarded as maintenance for the child of the marriage.

I hold the view that the award of N75,000.00 monthly maintenance allowance out of the sum of N80,000.00 is rather on a very high side having regard to the facts and circumstance of this case as the sum awarded ought to be affordable by appellant and to enable him sustain himself in the processes. It is for the above reasons that I agree that the sum of N40,000.00 is more reasonable in the circumstance and consequently set aside the award of N75,000.00 and substitute same with N40,000.00 by way of maintenance allowance for the only child of the marriage.

It is for the above reasons and the detailed reasons contained in the lead judgment of my learned brother, AKA'AH'S, JSC that I agree that the appeal be and is hereby allowed in part.

I abide by the consequential orders made in the said lead judgment including the order as to costs.

Appeal allowed in part.

PETER-ODILI JSC

I agree with the judgment just delivered by my learned brother, Aka'ah's JSC and in support of the reasoning I shall make some comments.

The Petitioner/Appellant filed a petition at the Anambra State

High Court for the dissolution of his marriage to the respondent. The respondent filed her answer to the petition and a cross-petition. At the end of hearing at the High Court the petition was dismissed and a judgment in favour of respondent upholding the cross petition. The petitioner/appellant appealed to the Court of Appeal or lower court which dismissed the appeal hence, this further appeal to the Supreme Court. The fuller details are well captured in the lead judgment. B

Chudi Obieze of counsel for the appellant on the 26th day of September, 2016 adopted his Brief of Argument filed on the 20/3/09 and deemed filed on the 20/11/12. In it were drafted six issues for determination which are stated below thus: C

1. Can the respondent be allowed to lead evidence in support of her cross-petition, upon facts which she failed to cross-examine the petitioner on when the petitioner was giving evidence? D

2. Whether Order XXI Rules 2, 3, and 4 of the Matrimonial Causes Rules, waived the need for the respondent to plead and lead evidence as required by Order XIV Rules 4(1), (2), (4) (6) (7) and (8) “ of the Matrimonial Causes Rules, and what is the effect of non-compliance in this case? E

3. Whether both parents are liable to contribute under the law, for the maintenance and upkeep of the child and whether the respondent is gainfully employed as to contribute towards the maintenance of the child? F

4. What is the monthly or annual income of the appellant and is the award of N75,000 (Seventy Five Thousand Naira) monthly, as maintenance allowance, justified from the facts led in evidence in this suit and whether the income can sustain the amount awarded? G

5. Was the Court of Appeal correct when they upheld the finding of the trial court that it was the appellant that deserted the respondent? H

6. Whether the Court of Appeal was correct in allowing the award of permanent maintenance and custody, throughout the life of the child.

Learned counsel for the respondent, Chief O. Ugolo SAN adopted her brief of argument filed on the 18/12/12 Itemed tissues for detection which are hereunder, viz:

1. Whether the respondent was rightly allowed to lead evidence in support of her cross petition and whether a cross petition operates as an independent action.

2. Whether the provisions of Order XIV Rule 4(1), (2), (6) (7) and (8) of the Matrimonial Causes Rules as invoked by the appellant is a technical objection and whether the provision of Order XXI Rules 2, 3, and 4 of the said Rules ameliorates the effect of the above Rules in the light of the current trend of doing substantial justice.

3. Whether the respondent is liable to contribute to the upkeep of the child of the marriage in view of the petitioner's averments and the facts before the Honourable Court.

4. Whether there is evidence to sustain the averment of the appellant that he earns N80,000.00 monthly and whether the award made by the court is justified in view of the non ability of appellant to establish his income.

5. Whether the Court of Appeal was right in law and fact when it upheld the decision of the trial court that it was the appellant that deserted the respondent.

6. Whether there is anything on Record in the Judgment of the two lower courts to lead to the inference that permanent custody of the child of the marriage was granted to the respondent?

I shall utilise the issues as raised by the appellant for ease of reference though without Issue 3 which I hereby strike out as not arising from any part of the judgment of the court below.

ISSUE NOs 1 & 5

Can the respondent be allowed to lead evidence in support of her cross-petition, upon facts which she failed to cross-examine the petitioner on when the petitioner was giving evidence. Whether the Court of Appeal was correct when they upheld the finding of the trial court that it was the appellant that deserted the respondent.

Learned counsel for the appellant said the effect in law of the failure of the respondent to cross-examine the appellant on the material issues raised by the appellant, is that it is not proper for the respondent in that failure to set about calling evidence after the appellant had dosed his case as plaintiff. That what has happened is that respondent had abandoned his defence. He cited *Agbonifo v Aiyeroba* (1988) 1 NWLR (Pt. 70) 325; *Gaji v Paye* (2003) 8 NWLR (Pt. 823)

583 etc. That the matter of who deserted the other can be elicited from the evidence.

Responding, learned counsel for the respondent contended that the appellant as PW1 was duly cross-examined as to the issue of desertion and so the appellant's contentions in that regard should be disregarded. B

That the respondent led ample evidence in support of her cross-petition. Also that all the facts put across by the appellant do not constitute desertion for a continuous period of one year as demanded by the Matrimonial Causes Act and this will not avail the appellant, That the appellant is stopped from contesting that it was the respondent that deserted him having admitted under cross-examination that the reason for filing the petition was infidelity. C

Appellant is contending that two courts below were wrong to make the finding of desertion on his part. D

The appellant has not in any way established why a contrary finding ought to have been found since from the evidence as evaluated by the trial court and upheld by the court below there is no doubt of a constructive desertion which in my humble view has laid the issue of desertion to rest as I go along with the concurrent findings of the two courts below which I see no reason to interfere with. This is all the more since the appellant under cross-examination countered his earlier posture that it was respondent that deserted him. As this court per Tobi JSC had held in *Gaji v Pave* (2003) 8 NWLR (Pt. F 823) 583, that is valuable piece of evidence, and admissible. E

These issues are resolved against the appellant.

ISSUE NO 2.

Whether Order XXI Rules 2, 3, and 4 of the Matrimonial Causes Rules, waived the need for the respondent to plead and lead evidence as required by Order XIV Rules 4(1), (2), (4) (6) (7) and (8) of the Matrimonial Causes Rules, and what is the effect of non-compliance in this case? G

It was submitted for the appellant that respondent failed completely to comply with Order XIV Rule 4 of the Matrimonial Causes Rules. That the respondent did not plead-her income or her capability to earn income and also ownership of her place of abode or the financial arrangement between herself and the appellant Also that H

the respondent did not plead whether the order sought is a permanent one or for a stated period as required by Order XIV Rule 4(2) b. Also not pleaded y respondent is how she came about the source of income of the appellant mat the none compliance with Order XIV Rule 4 of the said Rules by the respondent is not technical but goes to the root of an order for maintenance since there is need for leading of evidence alluding thereto. He cited *Ayanru v Mandilas Ltd. (2007) 10 NWLR (Pt. 1043) 462 at 485; Orunengimo v Egebe (2007) 15 NWLR (Pt. 1058) 630 at 644; Dada v Dosunmu (2006) 18 NWLR (Pt. 1010) 134 at 166.*

Learned counsel for the respondent canvassed the point that the provisions of Order XXI Rules have relieved the respondent of consequences of non-compliance with the said Rules. That the appellant had not shown the findings of the two lower courts to be perverse warranting interference with their concurrent findings. He cited *Awoyolo v Aro (2006) 4 NWLR (Pt 971) 481 at 497; Ajiboye v Ishola (2006) 13 NWLR (Pt. 998) 628 at 657.*

The appellant contends forcefully that the respondent had not complied with the Rule of the Matrimonial Causes Rules and so renders fatal the outcome of her proceedings. That is that whether the respondent had Order XXI Rules 2, 3 and 4 of the Matrimonial Causes Rules was to plead and lead evidence as required by Order XIV Rules 4(2) (4) (6) (7) and (8) of the Matrimonial Causes Rules. That these Rules cannot be waived off as mere technical Rules which are not mandatory.

The respondent's counter is that the appellant was coming from a wrong angle as what is on ground has nothing to do with voiding the proceedings, rather it is a matter of the maintenance and custody of the child of both parties.

Indeed the appellant is taking us outside the scope of what is before court in this appeal as the issue of whether or not there is compliance with the Matrimonial Causes Rules was not contested at the trial court and has become moot and academic at this arena. There is no useful purpose in getting into those technical discourses now. What is in issue here is the evaluation of evidence as made by the trial court and agreed upon by the court below and what this court has to say with what those courts did.

In answering the nagging question, this court has decided that in appraising evidence given at a trial the duty is that of the trial court who saw and heard the witnesses. That pre-eminency is not for any other court but the trial court as in this case and so once that court of first instance has unequivocally evaluated the evidence and appraised the facts which the Court of Appeal in this case has agreed with not seeing anything upon which it can deviate, it behaves this court there being no perversity to uphold same. This is because even if this court would have chartered another course in the journey to arrive at the same findings it is obligated not to interfere. See *Awoyoolu v Aro* (2006) 4 NWLR (Pt 971) 481 at 501; *Ajiboye v Ishola* (2006) 13 NWLR (Pt 998) 628 at 657. B
C

This issue is resolved against the respondent who ought to have supplied sufficient materials on which the issue of the income of the appellant would have been effectively rested. D

ISSUE NO 4

What is the monthly or annual income of the appellant and is the award of N75,000 (Seventy Five Thousand Naira) monthly, as maintenance allowance, justified from the facts led in evidence in this suit and whether the income can sustain the amount awarded. E

Learned counsel for the appellant contended that before the court can direct a spouse of claimants to pay a certain sum monthly as maintenance allowance that income of the spouse ought to be known and ascertained. He cited Order XIV Rule 4 (4) (c) and (d) of the Matrimonial Causes Rules. That the situation in this case is different since what has occurred here stems from speculation by the trial High Court which the court below upheld. A situation not provided for by the law. He cited *Nanna v Nanna* (2006) 3 NWLR (Pt 966) 1 at 40 - 41. F
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For the respondent it was submitted that the claimant can only state the financial capacity of the other party as far as is known to the claimant. That the onus of proving that the appellant earns N80,000.00 lies with the appellant and the respondent can lead evidence to disprove that fact and so when the court below held that appellant proved he earned N80,000.00 a month which finding is sound and unimpeachable in law. He referred to *Ojoh v Kamalu* (2005) 18 NWLR (Pt 958) 523 at 549. H

The appellant is contesting the basis of the award to the re-

spondent of N75,000.00 for maintenance when no facts justified same or that the respondent had not provided the necessary material, from which the court would assess the income of the appellant.

This position of the appellant goes against what the appellant himself admitted in his evidence that he earns N80,000.00 a month at Tabansi Motors. Again the pleadings of the respondent alluded to the earnings of the appellant which he did not controvert and so, the respondent urges the court to accept that as admitted. For a fact this contention of the respondent is acceptable in line with what is known to be trite in law as to admissions by a party against interest and an assertion in pleadings of the other side not contested in another pleading. It therefore is of no moment, a beautiful address of counsel attempting to shake such assertions. See *Ojoh v Kamalu* (2005) 18 NWLR (Pt. 958) 523 at 549.

This issue is resolved against the respondent since it is not what the appellant provided but what the respondent admitted that is utilized.

ISSUE NO 6

Whether the Court of Appeal was correct in allowing the award of permanent maintenance and permanent custody, throughout the life of the child.

For the appellant, it was contended that the order of maintenance was in perpetuity and did not stipulate who determines the school the child attended. Also that the order granted permanent custody of the child to the respondent which is unfair.

Respondent answered by submitting that the issues raised by the appellant did not arise in any of the two courts below and so this court cannot entertain them. He cited *Okoro v Egboh* (2006) 15 NWLR (Pt. 1001) 1 at 23; *C. S. S. Bookshops Ltd v R. T. M. C. R.* (2006) 11 NWLR (Pt. 992) 530.

The contention of the appellant is that the court below made an order of permanent maintenance in perpetuity and the permanent custody of the child of the marriage. It is to be said that it is settled that a ground of appeal must be confined to the ratio decidendi of the decision of the court and in this regard, the appellant failed to show the link between the issue here raised on the permanency and perpetuity for maintenance and custody of the child of the marriage. Clearly the question here raised is outside the ambit

of the judgment of the Court of Appeal. Also some of the issues canvassed at the court below were unrelated to the areas of conflict fought at the court of trial; a situation contrary to the well settled and trite principle that an appeal is not a new or separate procedure rather it is a continuation of the case at the trial court, from there to Court of Appeal and to the Supreme Court. That is that there is only one case in a chain that might terminate at the court of first instance but where there is an appeal, the link continues until at the final appellate destination. This therefore dictates that a party cannot at any stage of the appeal change the case that was commenced at the court of trial. See the cases of *Araka v Ejeagwu* (2000) 5 NWLR (Pt. 692) 684 at 699; *Okoro v Egboh* (2006) 15 NWLR (Pt.1001) 1 at 23; *C. S. S. Bookshops Ltd v R. T. M. C. R. 5.* (2006) 11 NWLR (Pt. 992) 530 at 563. B C

It is therefore in the light of the above that the appellant not appealing against what *Omage JCA* said at the court below that same cannot now be revisited herein as an issue since it is not founded from a ground of appeal. This issue is resolved against the appellant. D

In conclusion, I go along with the reasoning in the lead judgment and also allow the appeal in part as I also award, the N40,000.00 maintenance to the respondent as I abide by the consequential orders made. E

KEKERE-EKUN JSC

I have read before now, in draft, the judgment of my learned brother, *KUMAI BAYANG AKA'AH*S, JSC, just delivered. His Lordship has painstakingly considered and ably resolved the issues in contention in this appeal. I adopt the reasoning and conclusion that this appeal deserves to be allowed in part. F G

One of the issues in contention in this appeal is whether the lower court was right in upholding the finding of the trial court that the appellant was guilty of desertion. While it is true that it was the respondent who physically left the matrimonial home, the evidence accepted by the trial court and affirmed by the court below was that it was the conduct of the appellant that compelled her to leave the matrimonial home. H

Section 18 of the Matrimonial Causes Act Cap. M7 Laws of the Federation 2004 provides as follows:

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

I agree with my learned brother, AKA’AHS, JSC that in the instant case, the appellant has not advanced any cogent reasons to warrant interference by this court with the concurrent findings of fact by the two lower courts that it was the appellant who deserted the respondent. I accordingly dismiss the appeal against the dissolution of the marriage on this ground.

I agree entirely with the manner in which the remaining issues have been resolved in the lead judgment. I therefore allow the appeal in part by varying the orders relating to the custody and maintenance of the only child of the marriage in the terms set out in the lead judgment.

The parties shall bear their respective costs in the appeal.
Appeal allowed in part.

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