**JOHN ENUJEKO ELUMEZE**

**V.**

**FANNY EZENWA ELUMEZE**

SUPREME COURT

18TH JULY, 1969

**LEX (1969) – SC. (1 ALL NLR 311)**

OTHER CITATIONS

3PLR/2001/277 (SC)

(1969) 1 ALL NLR 311.

**BEFORE THEIR LORDSHIP**

ADETOKUNBO ADEMOLA, C.J.N.,

GEORGE BAPTIST COKER, J.S.C

CHARLES OLUSOJI MADARIKAN, J.S.C

**REPRESENTATION**

Mr. SIKUADE - For the Appellant

NA – For the Respondent

**ORIGINATING COURT**

HIGH COURT OF LAGOS STATE

**ISSUES FROM THE CAUSE(S) OF ACTION**

FAMILY LAW - MATRIMONIAL CAUSES:- Petition for divorce on grounds of adultery and cruelty – How determined - Adultery which evidence is inadmissible as a matter of law – Adultery tending to deny legitimacy of child born during pendency of marriage – Effect of Section 147 of the Evidence Act – whether parent is allowed to give such evidence – Effect on ground of Adultery – When cruelty is deemed not proved – relevant considerations

FAMILY LAW - MATRIMONIAL CAUSES:- Grant of order for Custody and maintenance of child – Whether applicable to young person over 16 years old – Where granted unilaterally by court – Duty of appellate court thereto

CHILDREN AND WOMEN LAW:- Children/Women and Divorce – Petition on ground of adultery resulting in birth of child – Whether evidence of same is admissible as to bastardize a child born during pendency of marriage – Effect on petition based on adultery - Children and Custody/Maintenance – Young person of 16 years – Whether court can unilaterally make order for custody and maintenance of same without parties asking for same – How treated

HEALTHCARE AND LAW:- Presumption of premature birth – Whether an inference requiring medical evidence or of law – Whether court can dismiss suggestion of premature birth of child in the absence of medical evidence – Implication for legitimacy of child born during pendency of marriage whose father has proved absence of access to sexual relations with mother within the biological cycle of gestation

**PRACTICE AND PROCEDURE ISSUES**

INTERPRETATION OF STATUTE:- Section 32 of the Matrimonial Causes Act 1950 – Implication for the operation of Section 147 of the Evidence Act – Meaning

**MAIN JUDGMENT**

**ADEMOLA, C.J.N.: [**DELIVERING THE JUDGMENT OF THE COURT]

The husband petitioner has appealed in this matter stating that his petition before the High Court of Lagos State seeking dissolution of his marriage with the respondent on grounds of adultery, cruelty and desertion was wrongly dismissed. Also that the cross-petition of the wife/respondent charging adultery was granted although she did not give any evidence nor called witnesses. Further that she was given custody of the child which she did not ask for in the cross-petition.

At the hearing before us, counsel stated he was abandoning the appeal on grounds of desertion; the other two grounds, namely, adultery and cruelty were duly argued. It was submitted on behalf of the appellant that the learned Chief Justice was wrong in arriving at the conclusion, on the petitioner/appellant’s evidence “that the marriage had broken down completely and irrevocably.”

Four grounds of appeal were argued. Counsel arguing ground 3 stated that the cross-petition not having prayed for the custody of the child, it was wrong for the learned Chief Justice to have granted this. It would appear that the learned Chief Justice in granting a decree nisi on the grounds of the petitioner’s adultery, which he found proved, made an order, although not asked for, for the custody of the child of the marriage. The concomitant evil of this order, it was stated, was the money for the upkeep of the child, the arrears of which have exceeded £550 and for which a writ had been issued. Counsel for the wife/respondent however said he was not happy about the order which he agreed should not have been made. As a matter of fact had it occurred to the learned Chief Justice that the child was over sixteen years of age at the time he made the order, he would not have made it. The child, according to the petition, was born on 21st February 1951 whilst the order for her custody was made on 16th April 1967. The order was clearly wrong and will have to be annulled. The order for maintenance will also be set aside.

Ground 5 of the appeal deals with the issue of cruelty. On this ground, the husband gave evidence before the learned Chief Justice of various acts of the wife respondent which he asked the court to consider as cruelty. They include leaving the matrimonial home to the United Kingdom without consulting him or obtaining his consent; adoption, without his consent, of a child in England whom she brought to Nigeria; denying him sexual intercourse; beating up the husband and his mother at different times. All these were considered by the learned Chief Justice and he said they do not amount to legal cruelty. Counsel for the appellant has argued that since the learned Chief Justice relied on these facts when he said that “the marriage had broken down completely and irrevocably”, he ought to have found that they constitute acts of cruelty on the part of the wife. It was argued that the learned judge did not direct his mind to this issue. In his judgment on this issue the learned Chief Justice said -

“In support of the ground of cruelty the petitioner himself gave evidence of an occasion on the 22nd August 1964 when the respondent came to his office and behaved in a disgraceful manner, tore the petitioner’s dress and tore up papers in his office...... He was supported in this by his witness Raphael Okafor Iwegbu and the medical practitioner, Dr. Wilfred Akibo Akinyemi who treated him two days later. I accept the petitioner’s evidence as to what took place, but I find it hard to hold that that evidence of the adoption of the boy against wishes of the petitioner and the assault by the respondent on the petitioner’s mother as deposed to by Joseph Elumeze is sufficient to constitute legal cruelty. I have taken into account the allegation that the respondent would not have sexual intercourse with the petitioner after June 1960.... I am not satisfied that legal cruelty has been proved and I dismiss the allegation.”

On the face of the above it will be incorrect to say that the learned Chief Justice did not direct his mind to the issue. As Lord Reid said in Gollins v. Gollins [ 1963] 3 W.L.R. 176 (H.L.) and [1963] 2 All E.R. at p. 969 no one has ever attempted to give a comprehensive definition of cruelty, and it appears it is not easy to reconcile some of the decisions on cruelty. In that case (Gollins v. Gollins).an extensive examination of the authorities was made. The earlier cases of cruelty dealt in the main with acts of physical violence and were not concerned with motives and intentions. The case Kelly v. Kelly (1870) L.R. 2 P. & D. 59 was described by Lord Merriman in Jamieson v. Jamieson [1952] 1 All E.R. at p.881 as “the leading case in England on the subject of cruelty without physical violence.” In the former case at p. 72 of the Teport, Lord Penzance said “the husband said he had no desire to injure her (the wife) and it has never been asserted that he does.” Shortly after thus case, various cases show that intention to injure or to be cruel was not a necessary ingredient in cruelty. In Squire v. Squire [1948] All E.R. 51 the court observed that without the intention of being cruel some intentional acts may amount to cruelty. And in Jamieson v. Jamieson (supra) Lord Norman said -

“In cases of mental cruelty the guilty spouse must either intend to hurt the victim or at least be indifferent as to the consequences to the victim.”

On the other side of the scale are cases like Westall v. Westall (1949) 65 T.L.R. at p. 337, and Kaslefsky v. Kaslefsky [1950] 2 All E.R. 398 laying it down that to establish cruelty, it is necessary to prove intention to injure. Although Gollins v. Gollins (supra) attempted to solve some of the difficulties envisaged in this labyrinth of the law, it recognised, as indeed we do in the present case, that the question whether a spouse has been guilty of cruelty to the other spouse must be determined as an issue of fact. We therefore see no reason to disturb the findings of the learned Chief Justice on this issue.

We now come to consider the appeal on the issue of adultery. For the appellant it was argued that the issue before the court was one of adultery simpliciter and not one of the legitimacy of the child born of the respondent but that the learned Chief Justice had concerned himself with legitimacy in his judgment and for this reason he has excluded evidence of non-access. In his original petition the appellant did not charge adultery. Later, and indeed on 1/4/65 with eave, an amended petition was filed. Paragraphs 6, 14, 15, 17, 18 & 19 of this amended petition charged adultery with known and unknown persons, but the relevant paragraphs for the purposes of this case are as follows -

“15. That on the 21st February, 1951, at Cincinnati, United States of America the respondent gave birth to a female child, now named Pearl, of whom the petitioner disputes paternity.”

“17. That the petitioner left Nigeria for the United States of America, in August 1948, leaving in Nigeria the respondent who joined the petitioner in the United States in October, 1950. Between August 1948 and October 1950, the respondent frequently committed adultery with diverse unknown persons resulting in pregnancy.”

“18. Between August 1948 and list February, 1951, the petitioner had no intimacy with the respondent.”

The respondent filed series of supplemental answers in which she alleged that their marriage was never consummated because the petitioner has always refused to have intimacy with her and that he had agreed to her taking a lover with a view to having an issue. She also swore in her answer that there are no children of the marriage. In the original answer to the original petition, however, she swore to the fact that there is an issue of the marriage and the child was named Pearl Ifeyinwa.

It was this confused and embarrassing state of affairs the learned Chief Justice and Counsel had to contend with in the court below. Mr. Sikuade for the petitioner/appellant before us has attacked the judgment of the learned Chief Justice on the ground that he did not look at the issue before him as one of adultery but considered the matter of legitimacy, it is hard for us to see how the learned judge could do otherwise when in paragraph 15 of the amended petition aforesaid there was clear pleading indicating an intention to bastardize the child of the marriage. Clearly there is the undisputed evidence that the husband petitioner (appellant) left Nigeria for the U.S. of America in August 1948 and the wife respondent did not join him until October 1950, a period of 2 years and 2 months. The child Pearl was born 5 months later and indeed in February 1951. There can be no doubt that by the laws of nature and relying on decided cases (see Preston-Jones v. Preston-Jones [1951] A.C. 391) it would be repugnant that a court should hold that the husband was the father of such child. The learned Chief Justice however, was put to consider the question of the child being a premature child if one draw the inference from the evidence before the court that sexual intercourse took place between the husband and wife when the latter arrived in the United States of America in October 1950, the child having been born in February 1951; but he dismissed this suggestion of premature birth, rightly in our view, because there was no medical evidence before him in that regard.

But it is not on all these considerations that this case was ‘decided. It was argued before us, and indeed before the learned Chief Justice, that despite all the aforesaid considerations this matter is governed by section 147 of the Evidence Act. The section reads -

“The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown -

(a) either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being bad both to the date of the birth and to the physical condition of the husband; or

(b) that the circumstances of their access, if any, were such as to render it highly improbable that sexual intercourse took place between them when it occurred:

Provided that neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercourse with each other where the legitimacy of the woman’s child would be affected, even if the proceedings in the course of which the question arises are proceedings instituted in consequence of adultery, nor are any declarations by them upon that subject deemed to be relevant, whether the mother or her husband can be called as a witness or not,”

It was argued that in effect the provisions of section 147 of the Evidence Act above reiterates the rule in Russell v. Russell [1924) A.C. 687 that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child born during the subsistence of the marriage as against this we heard arguments that section 147 of the Evidence Act does not apply to cases of adultery and should be limited to cases of legitimacy only.

Now, section 32 of the Matrimonial Causes Act 1950 in England has altered the rule in Russell v, Russell. This Act admits evidence to be given to bastardize the issue of a marriage. The question is how far does section 32 of the Matrimonial Causes Act affect section 147 of the Evidence Act? Section 16 of the High Court of Lagos Act lays it down that -

“The jurisdiction of the High Court in probate, divorce, and matrimonial causes and proceedings, and in relation to admiralty matters may, subject to the provisions of this Act and in particular of section 27, and to rules of court, be exercised by the court in conformity with the law and practice for the time being in force in England.”

and section 90 of the High Court of Lagos Act provides that –

“Nothing in this Act and, subject as hereinafter in this section expressly provided, nothing in rules of court made under this Act, shall affect the mode of giving evidence by the oral examinations of witnesses, or the tales of evidence, or the law relating to jurymen or juries.“

The combined effect of these two sections of the Act is, to our mind, that despite the fact that in Nigeria we adopt the Matrimonial Causes Act and Rules in force in England for the time being, we must give effect to our own law of evidence - section 147 of the Evidence Act. That being so, we cannot take notice of section 32 of the Matrimonial Causes Act 1950 which altered the rule in Russell v. Russell (supra), and section 147 of the Evidence Act must prevail.

Now, it remains for us to interpret the section (Section 147).

The section means no more than it says

“anyone born by the wife of a valid marriage is the legitimate child of the husband, or even if he were born within 280 days after the dissolution of the marriage, unless it can be proved that the husband and wife had no access to each other or that sexual intercourse could not have taken place”.

This is the general rule: but the proviso states that neither the husband nor the wife could be a competent witness of the non-access where the legitimacy of the child is concerned, nor can any declaration upon that subject made by either party be of any effect. This is a brief interpretation of the section.

Counsel for the appellant had complained that although the case before him raises issue of adultery, the learned Chief Justice had concerned himself with the question of legitimacy. It seems to us that the answer to this is simple. The proviso to section 147 of the Evidence Act makes it clear that either party will not be a competent witness as to non-access where the legitimacy of the child would be affected, “even if the proceedings in the course of which the question arises are proceedings instituted in the consequence of adultery”. It was therefore the duty of the learned Chief Justice to concern himself, as indeed he did, with the question of legitimacy.

It is to be observed that section 147 of the Evidence Act precludes admission of evidence of non-access altogether. Neither the husband nor the wife can give such evidence; but it is clear that the evidence can be procured in other ways: See Preston Jones w. Preston Jones (supra).

It is therefore quite clear that in the instant case the evidence of husband and wife about non-access is inadmissible since it will affect the legitimacy of the child Pearl. As there is no other evidence adduced by the petitioner/appellant on the issue of adultery, we are satisfied that the learned trial judge rightly dismissed the petitioner’s petition on the ground of adultery.

In regard to the cross-petition, it is enough to say that the learned Chief Justice was within his rights to grant a *decree nisi* on the evidence of the appellant alone and without hearing the respondent if there was enough in the evidence of the petitioner/ appellant to justify this. We are satisfied from the record before us that the petitioner has provided enough material in his evidence to justify a decree against him. He confessed to an adulterous union with Edith Martins resulting in the birth of two children. He did not ask the court to exercise its discretion in his favour. His appeal against the grant of a *decree nisi* will therefore be dismissed.

In the event we make the following order -

(1) The appeal of the plaintiff in regard to his petition for dissolution of his marriage with the respondent on grounds of adultery, cruelty and desertion is hereby dismissed.

(2) The appeal in respect of the order made by the learned Chief Justice regarding the custody of the child Pearl is allowed and the order is hereby set aside.

(3) All consequential Writs flowing from aforesaid Order including the order for maintenance of the child are hereby set aside and are of no effect.

(4) The appeal against the grant of decree nisi on the cross-petition is hereby dismissed.

Costs of this appeal in favour of the Respondent is assessed at 2 guineas.

Appeal of petitioner save as to custody dismissed.

Appeal against decree nisi or cross-petition dismissed.

**CASES CITED:**

Gollins v. Gollins [ 1963] 3 W.L.R. 176 (H.L.); [1963] 2 All E.R. 969

Kelly v. Kelly (1870) L.R. 2 P. & D. 59

Jamieson v. Jamieson [1952] 1 All E.R. 881

Squire v. Squire [1948] All E.R. 51

Westall v. Westall (1949) 65 T.L.R. 337

Kaslefsky v. Kaslefsky [1950] 2 All E.R. 398

Preston-Jones v. Preston-Jones [1951] A.C. 391