**BADEJOKO ADETOUN LAWSON**

**V.**

**CHARLES OLATUNDE LAWSON**

SUPREME COURT OF NIGERIA

11TH OCTOBER, 1968.

SUIT NO. SC 527/1966.

**LEX (1968) - SC 527/1966.**

**OTHER CITATIONS**

3PLR/1968/58 (SC)

**BEFORE:**

COKER, J.S.C.

LEWIS, J.S.C.

MADARIKAN, J.S.C.

**REPRESENTATION**

SIKUADE - for the Respondent/Appellant

SOWEMIMO - for the Petitioner/Respondent

**ORIGINATING COURT**

LAGOS HIGH COURT (CAXTON-MARTINS J. Presiding)

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

FAMILY LAW - MATRIMONIAL CAUSES:- Divorce proceedings - Doctrine of volenti non fit injuria – Rule in Statham v. Statham (1929) 45 T.L.R. 127 and Thompson v. Thompson [1961] All N.L.R. 496 - Applicability – Scope – Whether extends to conduct condoned before the marriage or exclusively to conduct after the marriage – How treated

CHILDREN AND WOMEN LAW:- Matrimonial proceedings – Petition for divorce on ground of cruelty against wife – Relevant considerations – Conduct capable of bringing on illness to spouse - Neglect of spouse during spell of illness – How treated

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HEALTHCARE AND LAW: - Matrimonial proceedings – Diagnosis of ill-health and implications for justice administration – Testimonies of two doctors that petitioner’s illness in 1964 might have been caused “by domestic worries or by “anxiety’ or psychological imbalance caused or exacerbated by conduct of wife - Long-term Ill-health and neglect of spouse – Whether relevant in founding cruelty as a ground for grant of divorce petition

HEALTHCARE AND LAW: - Adultery – Whether a likely cause of illness – Finding of trial court thereto without evidence adduced by any party – Attitude of appellate court

**PRACTICE AND PROCEDURE ISSUES**

MATRIMONIAL CAUSES:- Court and Divorce proceedings – Discretion of judge to grant Order of Divorce – Rule in Blunt v. Blunt – Proper application – Proper exercise of Court discretion – Need for discretion to be considered or only exercised where petitioner has proved ground for divorce application but was shown to have also committed a matrimonial offence like adultery – Duty of court not to exercise discretion where petitioner failed to prove case alongside the commission of a matrimonial offence

WORDS AND PHRASES - LATIN MAXIMS: - “volenti non fit injuria” – Applicability in matrimonial proceedings

**MAIN JUDGEMENT**

**LEWIS, J.S.C**.: (Delivering the Judgment of the Court):

In suit HD/19/1965 in the Lagos High Court, Caxton-Martins J. on the 19th of September, 1965, exercised his discretion in the husband’s favour and granted the husband/petitioner a decree nisi of divorce with 50 guineas costs to the wife/respondent, and against that decision the wife has appealed and the husband has sought to have the decision affirmed on grounds other than those relied on by the learned trial judge.

The husband’s petition was based on the alleged cruelty of his wife and the learned trial judge found that the petitioner had not substantiated his allegations of cruelty against the respondent but nonetheless, purporting to follow the principles laid down in Blunt v. Blunt [1943] 2 All E.R.76 and [1943] A.C. 517, he held that as the wife had condoned the petitioner’s adultery he was entitled to exercise his judicial discretion in favour of the petitioner and to dissolve the marriage.

In Obayemi v. Obayemi (1967) N.M.LR. 212 at 216 we indicated that, where another judge had thought, also purporting inter alia to rely on Blunt v. Blunt (supra) that he had a discretion, whether or not to grant a divorce when a petitioner had established that the respondent was guilty of a matrimonial offence, this was an error, so here in the converse situation the learned trial judge was equally in error in thinking that when a matrimonial offence had not been established against a respondent, he still had a residual discretion to grant a divorce because a respondent had condoned the petitioner’s own adultery. The judicial discretion here only arises, as a proper examination of Blunt v. Blunt (supra) shows, when the petitioner has made out a matrimonial offence against the respondent, but nonetheless, has to disclose adultery of his own and so to seek the court’s discretion to grant a divorce notwithstanding the petitioner’s own adultery. It is only when the judicial discretion arises and that the principles of exercising that discretion enunciated in Blunt v. Blunt (supra) come into play. It cannot arise when a petitioner has failed to establish in the first place a matrimonial offence of the respondent.

The learned trial judge was therefore equally wrong here, having rejected the allegations in the petition founded on cruelty, to grant a divorce in purported exercise of a discretion which he did not then possess. Certainly if a matrimonial offence of the respondent has been proved then so far as a petitioner’s adultery, for which he asks the court’s discretion, is concerned if this has been condoned by the respondent then that is one of the considerations in the petitioner’s favour for the court’s discretion to be exercised, as is shown by Apted v. Apted and Bliss [1930] P.246, but though the learned trial judge found the respondent had condoned the petitioner’s adultery here, as the petitioner had not established the respondent’s cruelty in the first place, according to the learned trial judge, the judicial discretion could not, as we have said, have in fact arisen.

The petitioner has sought to have the judgment of the High Court affirmed on the grounds that the learned trial judge wrongly found the cruelty alleged not to have been proved on the evidence before him and that if this court accepts that then the learned trial judge rightly exercised his discretion thereafter in the petitioner’s favour. Now the petitioner’s allegations of cruelty were set out in 5 paragraphs of the petition as follows:-

“9. That the respondent is a woman of ungovernable temper and has habitually used violent and obscene language to the petitioner.

10. That in the last three years immediately preceding the date of his petition, the respondent has persistently nagged the petitioner both night and day sometimes in the presence of the houseboys.

11. That from the middle of September to mid October 1964 the respondent well knowing that the petitioner lay seriously ill callously completely neglected the petitioner.

12. That throughout the aforesaid period of petitioner’s illness the respondent persistently banged the doors and windows at night and or early hours of the morning thereby depriving the petitioner of his much needed rest and sleep.

13. That by reason of the respondent’s conduct as aforesaid the petitioner suffered in his health, in that in September 1964 he petitioner suffered a severe nervous breakdown.”

So far as paragraphs 11 and 12 are concerned the learned trial judge specifically found that they were not established but believed the respondent’s account of what happened and that the petitioner had deliberately embellished the story and against that part of the decision it has not seriously been contended before us that he was wrong on the evidence before him save that it was submitted that he did not fully take account of the evidence of the fourth plaintiff’s witness. So far as paragraphs 9 and 10 of the petition however, which the learned trial judge in effect treated together and which dealt with the alleged habitual violence and obscence language temper and nagging of the respondent, are concerned the petitioner submits that the learned trial judge adopted the wrong approach and evaluated the evidence wrongly when he said:-

“I have carefully reviewed the evidence of the witnesses and I am satisfied that if even the story of the petitioner is true that the respondent indulged in the nagging habits before marriage and yet plunged himself into the marriage, he cannot now be heard to complain of it. He is caught by the doctrine of volenti non fit injuria and all the authorities including Statham and Statham (1929) 45 Times Law Reports, page 127 agree on the point that the doctrine of volenti non fit injuria applies to divorce proceedings. While I find as a fact that the petitioner was ill for the last three years immediately proceeding the date of petition filed as evidenced by the testimony of the first and second petitioner’s witnesses whom I believe yet I am unable to hold that his illness was exclusively or partially caused by the nagging habits alleged against the respondent. The evidence led by the petitioner does not prove that his allegations in respect of respondent’s behaviour conclusively or partially was the cause of his illness.”

Statham v. Statham (1929) 45 T.L.R. 127 and Thompson v. Thompson [1961] All N.L.R. 496, which was also cited to the learned trial judge by the wife’s counsel, both deal with the issue of volenti non fit injuria, but in each case they deal with the acts of a respondent, committed after the marriage, to which the petitioner consented and no authority was cited to us and we see no justification for extending the doctrine of volenti non fit injuria to cover conduct prior to the marriage, as was done here by the learned trial judge when stating that the petitioner could not now be heard to complain of the respondent’s nagging habits after the marriage because he was well aware of them before he married her. This in our view is a misapplication of the doctrine of volenti non fit injure and we think that this may well have affected the learned trial judge’s whole approach to the petition for cruelty based on the nagging of the wife. We are not clear from the passage in the judgment which we have cited whether the learned trial judge was finding that the nagging was proved but that the petitioner was estopped from complaining by the doctrine of volenti non fit injuria, and whether he was also saying that he found the nagging proved but not the proof that this effected the petitioner’s health, or whether he was saying that the nagging was not proved but in any case the doctrine of volenti non fit injuria and the failure to prove that the cruelty caused the petitioner’s health to suffer meant that the matrimonial offence of cruelty was not made out.

We have already dealt with the erroneous application of the doctrine of volenti non fit injuria and so far as the health of the petitioner was concerned the learned trial judge accepted the medical evidence which the petitioner called and believed the two doctors who testified for him that the petitioners illness in 1964 might have been caused “by domestic worries or by “anxiety’ or psychological imbalance” respectively, but nonetheless he considered that the likely reason for the petitioner’s illness was that the petitioner was then committing adultery and that this brought on his illness. There was no specific evidence that the petitioner’s adultery did bring on his illness, but this was the learned trial judge’s own deduction.

We prefer, however, to express no opinion with regard to it as in our view the learned trial judge’s misapplication of the doctrine of volenti non fit injuria, coupled with the fact that we do not consider he properly considered the full effect of the evidence of the fourth plaintiff’s witness whom he did not disbelieve and whose evidence he erroneously said did not help the petitioner’s case, so coloured his mind that we cannot be certain that thereafter he properly evaluated the evidence of cruelty. That being so the only fair course for us to adopt is to allow the appeal and to send the petition back for re-hearing before another judge of the Lagos High Court who can on seeing the witnesses and hearing the evidence property deal with all the allegations of cruelty and in so doing the medical evidence can be fully examined by him, rather than for us to do so at this stage when it is not in our view essential for this appeal and when our view, if expressed, might colour the finding at the re-hearing.

We therefore order that this appeal be allowed and the judgment with the order of the decree nisi, other than the order as to costs in the Lagos High Court be set aside and that the petition be heard de novo before another judge of the High Court of Lagos State. The appellant wife is entitled to her costs of this appeal which we assess at 39 guineas.

Appeal allowed:

Judgment of High Court set aside:

Petition to be heard de novo before another judge of the High Court.

CASES REFERRED TO:-

Blunt v. Blunt [1943] 2 All E.R.76 and [1943] A.C. 517

Obayemi v. Obayemi (1967) N.M.LR. 212

Apted v. Apted and Bliss [1930] 246

Statham v. Statham (1929) 45 T.L.R. 127

Thompson v. Thompson [1961] All N.L.R. 496