**OYINLOLA OLUFUNKE OBAYEMI**

**V.**

**SAMUEL ADEBAYO OBAYEMI**

SUPREME COURT OF NIGERIA

19TH MAY, 1967.

SUIT NO. SC 346/1966.

**LEX (1967) - SC 346/1966.**

OTHER CITATIONS

3PLR/1967/52 (SC)

**BEFORE THEIR LORDSHIPS:**

LIONEL BRETT, Ag. C.J.N.

GEORGE BAPTIST A. COKER, J.S.C.

IAN LEWIS, J.S.C.

**ORIGINATING STATE**

AKURE HIGH COURT (BECKLEY, J.)

**REPRESENTATION**

J. O. B. OMOTOSHO - for Appellant Wife

J. A. ADEYEFA - for the Respondent Husband

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

FAMILY LAW - MATRIMONIAL PROCEEDINGS: - Divorce on ground of cruelty - Test to be applied – “whether this wife has been cruel to this husband and this is only to be decided after all the facts had been taken into account” – Whether Gollins v. Gollins did overrule many previous decisions but did not lay down that the whole of the law of cruelty in divorce is now to be found in that one case

FAMILY LAW - MATRIMONIAL PROCEEDINGS: - Divorce – Application for Decree Nisi –Where successful – Whether open either party can subsequently ask the court to grant a judicial separation rather than a divorce because one of the factors to be considered was the interests of the children – Party to whom such request was open to – Relevant considerations in exercising court’s discretion thereto

FAMILY LAW - MATRIMONIAL PROCEEDINGS:- Divorce on ground of cruelty – Need to prove same with relevant facts according to the circumstances of the case – Defence of condonation of acts complained against – Need to plead same – Effect of failure thereto – Whether Cruelty cases, more than any other class of case, depend particularly on a careful estimate of the witnesses

FAMILY LAW - MATRIMONIAL PROCEEDINGS: - Custody of children – Interest of children as paramount consideration – Duty of trial court thereto – Propriety of making interim custody orders at the grant of Decree Nisi – Relevant considerations

ALTERNATIVE DISPUTE RESOLUTION: - Matrimonial proceedings - Private individual’s attempts at reconciliation – Evidence arising therefrom – Whether privileged or inadmissible or privileged but admissibility at the instance of party thereto – Whether discussions and correspondence in negotiations if ‘without prejudice,’ are privileged, unless the parties waive the privilege

CHILDREN AND WOMEN LAW:- Women and Divorce – Children and custody proceedings – Woman respondent and petition for divorce on ground of cruelty brought by husband – How treated – Custody proceedings and interest of children as the paramount consideration – Duty of judge to make permanent custody order when granting Decree Nisi – Relevant considerations

HEALTHCARE AND LAW: - Divorce proceedings on ground of cruelty – Meaning of legal cruelty and health implications – “Legal cruelty may be defined as conduct of such a character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger”- Legal implications

**PRACTICE AND PROCEDURE ISSUES**

APPEAL: - Whether party can raise fresh issue on appeal

COURT - COURT REGISTRAR:- Matrimonial proceedings – Certification that Decree Nisi has become final and absolute and that the marriage was thereby dissolved – When deemed made per incuriam - Duty of Registrar to search and be satisfied that there is no appeal pending against the decree nisi before filing the return to make the decree absolute – Effect of certification made on Registrar’s volition and without any request from the parties and while an appeal against the Decree Nisi was pending

EVIDENCE**: -** Admissibility - Discussions and correspondence in negotiations arising from private individual’s attempt – Whether privileged and inadmissible – Relevant considerations

**MAIN JUDGEMENT**

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

This is an appeal against the decision of Beckley, J. in the Akure High Court on the 14th of December, 1964, granting the petitioner a decree nisi of divorce on the grounds of cruelty in respect of his marriage with the appellant on the 26th of December, 1957.

It appears from the record that on the 15th of March, 1964, of his own volition and without any request from the parties the Divisional Registrar of the Akure High Court certified that the decree nisi was on the 15th of March, 1966, made final and absolute and that the marriage was thereby dissolved. The Akure High Court in our view, acted per incuriam in making the decree absolute on the 15th of March, 1966, because in fact, on the 26th of January, 1966, the appellant had filed notice and grounds of appeal against the decree nisi and under rule 40(1) of the Matrimonial Causes Rules, 1957 the Registrar is required to search and be satisfied that there is no appeal pending against the decree nisi before filing the return to make the decree absolute; this he clearly failed to do here. Since the appellant had only appealed to us against the decree nisi we pointed out that as a decree absolute had been made, having regard to the decision in Woolfenden v. Woolfenden [1948] P. 27, there should have been a motion to show cause why the decree absolute should not be treated as a nullity but we further indicated that if counsel so requested and counsel for each of the parties did, we would, on the undertaking of Mr. Omotosho for the appellant to file an appropriate motion and pay any necessary fees, treat it as if the motion to set aside was before us and we accordingly set aside the decree absolute on that undertaking and the appeal on the decree nisi proceeded.

One of the witnesses called by the [petitioner] and who gave evidence of the appellant confessing to her that in a quarrel she had thrown her wedding ring at the petitioner was Mrs. Oguntoye, a Chief Magistrate, whom it was claimed the parties had approached to try and effect a reconciliation. Mr. Omotosho submitted as one of his grounds of appeal that this occasion was privileged and there was an absolute bar, as a result, to evidence being given as to what took place. He cited in support of his argument Theodoropoulas v. Theodoropoulas [1963] 2 All E. R. 772 as showing that any private individual’s attempts at reconciliation were equally with that of a probation officer’s attempts privileged and that accordingly Mrs. Oguntoye’s evidence should not have been admitted. In the case cited, however, objection was taken by counsel for the wife to the admission of the evidence and it seems dear to us that the evidence of what took place at such a meeting to effect a reconciliation is not as such, as Mr. Omotosho submitted, inadmissible but it is privileged so that only if a party claims privilege does it then become inadmissible. If a party chooses not to claim privilege but to waive it then the evidence does become admissible as was shown by McTaggart v. McTaggart [1949] P.94 where Cohen, L J. at page 96 said:-

‘The privilege, if any, was the privilege of the parties and they, having given evidence on what was said at the interview, could not assert the privilege. The result is none the less, unfortunate as the success of attempts at reconciliation might be prejudiced, if it became known that the probation officer could be called subsequently to give evidence, and I desire to make it clear that, as at present advised, I think that, if objection had been taken by the wife to the husband giving evidence as to this issue the objection would have been valid. Such a conclusion seems to me to be within the principle that discussions and correspondence in negotiations if ‘without prejudice,’ are privileged, unless the parties waive the privilege.”

We accordingly see no substance in this ground of appeal and the evidence of Mrs. Oguntoye for what it was worth was properly admitted as no objection to her giving evidence was made by the appellant.

Another ground of appeal was:-

‘The learned trial Judge erred in law in holding that ‘The enumeration of the law in Gollins v. Gollins had meant that most of the decided cases reported before this decision are not to be relied upon or as alternative in that they depended on wrong views as to the argument of Intention.”

Mr. Omotosho objected to this passage because he submitted Gollins v. Gollins [1963] 3 W.L.R. 176 did not overrule most of the previous cases. We would note that the passage complained of seems in fact to have been taken by the learned trial judge, with the alteration of but one word, from Rayden on Divorce 9th Edition 129. Be that as it may, it is not disputed that the House of Lords in Gollins v. Gollins made it clear that the proof of an intention to injure or proof that the conduct was aimed at the other spouse was not an essential requirement of cruelty but that without an Intent to Injure if the inexcusable conduct of one spouse knowing the damage he was doing reduced the other to ill-health then that conduct amounted to cruelty, whilst Williams v. Williams [1963] 3 W.L.R. 215 to which Mr. Omotosho also referred established that the test of whether one spouse treated another with cruelty was wholly objective. Mr. Omotosho relied on Le Brocq v. Le Brocq [1964] 1 W.L.R. 1085 to establish, as was said there by Harman, L J. at page 1089 that:-

“Cruel is not used in any esoteric or ’divorce Court’ sense of that word, but that the conduct complained of must be something which an ordinary man - or a jury: I suppose this court sits as a jury - would describe as ‘cruel’ if the story were fully told. There need not be blows. (There is no question here now of blows). There need not be any physical force used (there can be words far harder than blows with a saucepan) but there must be something as to which a jury would be able to say, when they heard it related: ‘Well, that was cruel of him,’ before a husband can be branded with the serious charge of being cruel to his wife.”

The test therefore to be applied objectively is whether this wife has been cruel to this husband and this is only to be decided after all the facts had been taken into account. We agree with Mr. Omotosho that the cases that he cited help in showing how legal cruelty should be determined but we do not see that the learned trial Judge misdirected himself in the passage complained of as Gollins v. Gollins certainly did overrule many previous decisions but it was not suggested that the whole of the law of cruelty in divorce is now to be found in that one case.

Mr. Omotosho submitted to us that it was open to either party to ask the court to grant a judicial separation rather than a divorce because one of the factors to be considered was the interests of the children. In support of his argument he cited Dove v. Dove [1963] P.321 and Davies v. Davies [1956] P.212 but in each of these cases it was a successful wife petitioner who having obtained a decree nisi sought to have this rescinded and a decree of judicial separation substituted. No authority was cited to us where an unsuccessful party has asked to have the decree nisi altered to one of judicial separation against the wishes of the successful petitioner and where judicial separation was not sought by that party or indeed by either of them. As a general principle there must be a prayer for judicial separation and if it is sought after hearing has commenced then there ought to be an amendment. It is only in exceptional cases that a judicial separation can be substituted for a decree nisi already granted and Karminski, J. in Davies v. Davies [1956] P.212 at page 215 makes it clear that it is only when a successful petitioner makes the application that the court in its discretion will grant it as he said”-

“Quite clearly, I think the court has a discretion in an application of this kind to grant or to refuse the application, though the discretion must, of course, be exercised judicially.”

Accordingly as no prayer for judicial separation was entered by either the appellant or the successful petitioner we do not consider that the appellant has any legal right to ask for it on appeal. Mr. Omotosho relying on Bull v. Bull [1965] 3 W.L.R. 1048 submitted there was still a discretion in the court to allow this but that case turned upon the failure of the wife to pray for the discretion of the court to be exercised in her favour in respect of her adultery and had nothing to do with a general Inherent discretion. We do however note that the learned trial Judge him-self fell into the error of thinking that there was a general discretion in the court to grant or refuse a divorce basing it on Blunt v. Blunt [1943] A.C. 517 and Wickins v. Wickins [1918] P.265 but in our view he misunderstood the applicability of these cases as they turned upon the discretion of the court to grant a decree, notwithstanding the misconduct, be it adultery as in Blunt v. Blunt or desertion In Wick-ins v. Wickins of the petitioner. Once a petitioner has made out his case on the grounds of adultery, desertion or cruelty then, unless he has committed misconduct, he is entitled to be granted the decree he asks for and as here it was never suggested that the petitioner had to seek the court’s discretion for his misconduct, no question of the court having discretion arose as the learned trial Judge thought when he said:-

“In petitions based on adultery, cruelty, etc. the grant or refusal of a decree is at the discretion of the court.”

Turning to the grounds of appeal against the findings of fact it is to be noted that the learned trial Judge made eight so called findings of fact though actually the last four were not findings of fact establishing legal cruelty at all, when he said:

“I find therefore that:-

1. On or about the 7th day of December, 1962, the respondent, while in a violent temper, damaged doors and glass windows of the matrimonial home, gave the petitioner a bite near his left eye and struck him with a pair of scissors near the right ear.

2. On or about February 1963, at Ado-Ekiti, the respondent, in a violent temper, went to meet the petitioner in the office, tore certain official letters, abused the petitioner to the hearing of the staff at the centre and threw the engagement and marriage rings at the petitioner.

3. Around May 1963, the respondent went to meet the petitioner at Ado-Ekiti when she humiliated him in the presence of visitors, poured some stout beer on one of the visitors and threw an empty bottle at one of the visitors and missed her.

4. On the 23rd October, 1964, the petitioner went to the lodgings of the respondent at Akure and the respondent tried to prevent him from seeing the children, tore his shirt and humiliated him before the visitors.

5. Almost throughout their married life from 1962 upwards the relationship between the petitioner and the respondent, as admitted by the respondent in most of her evidence quoted above, had been strained.

6. The respondent had shown utter disregard for the marriage relationship between herself and petitioner by her various acts over the years.

7. The respondent had shown lack of respect for the petitioner, his father and most members of his family.

8. That there has been no act on the part of the petitioner, which I can regard as act of forgiveness of the respondent’s misdeed.”

It is necessary, therefore, to confine the determination on whether cruelty had been established to the first four findings. Mr. Omotosho did, however, seek to argue under finding (8) that there had been condonation but as this was not pleaded and no amendment to make this plea had been sought in the High Court we followed the practice set out in Rayden on Divorce 9th Edition 234 which was adopted, as stated there, by the Court of Appeal in England in the unreported case of Gill v. Gill and refused to allow argument to be addressed to us on the point in this appeal.

So far as the first four findings are concerned counsel for the appellant has submitted that neither if they are looked at individually nor if they are looked at cumulatively could they amount to cruelty. We agree that individually none of them as such could amount to legal cruelty but that is not the test because the learned trial judge rightly looked at them cumulatively as it is necessary to look at the marriage as a whole. The test is as we have said, whether this woman has been cruel to this man and in determining that, as was decided in Williams v. Williams (1963] 3 W.L.R. 215, it is necessary to apply an objective test.

Complaint was made that the first finding could not be sustained because the petitioner said that when the appellant threw the scissors at him it cut him and the cut bled all night yet the doctor who examined him next day only referred in his evidence to finding an abrasion. Certainly if it was as bad as the petitioner endeavoured to make out one would expect the doctor to find a wound but nonetheless allowing for exaggeration the learned trial judge saw on the petitioner’s face the mark that the petitioner alleged was the result of the appellant’s bite and the learned trial judge found that the appellant did throw a pair of scissors at the petitioner though he was careful to make no finding as to the harm it did when it struck him. So far as the second finding is concerned complaint was made that, even accepting it, this could not have amounted to legal cruelty, but whilst we agree that looking at 1 in Isolation this is so a is a different matter when the marriage as a whole is looked at of which this was but one Incident. So far as the third finding was concerned complaint was made that this action of the appellant may have humiliated the petitioner in front of his guests but it could not be legal cruelty especially as the conduct of the petitioner provoked the appellant’s reaction. We certainly agree that the conduct of the petitioner here in refusing to introduce his guests to his wife when she arrived at his house was not the conduct to be expected of a husband and might naturally be expected to provoke the wrath of a wife but that could not in our view justify the manner or extent of the way the appellant’s wrath was in fact demonstrated. It could not justify pouring beer over a guest and throwing a bottle at her. Once again taken in isolation this could not In our view have amounted to legal cruelty but one must not so look at I but rather treat I as one of a series of Incidents. Finally complaint was made on the fourth finding in that though the respondent attacked the petitioner and tore his clothes he also tore hers, but it must be kept in mind that it was the appellant who started it and tried, on the finding of the learned trial judge, to prevent the petitioner from seeing his children and when so trying to stop him tore his clothes. It was only thereafter that the petitioner took his revenge and tore her clothes in what became really a fight between the parties.

We do not consider that it has been established that the learned trial Judge erred in making the findings of fact that he did on the evidence before him, but the more difficult question is whether, accepting these facts, it can be said that they amount to legal cruelty. On this aspect this is in our view a borderline case and nowhere more than in the law as to cruelty in divorce do individual views differ so much as to whether, when looking at facts objectively, it is considered that they do or do not amount to cruelty. It may be here that if some of us had been sitting at first instance we might have come to a different view to that which was taken by the learned trial judge, but bearing. in mind the particular importance of seeing the parties and their witnesses, as was indicated by Pearce J. (as he then was) in Lauder v. Lauder [1949] P. 277 at page 308 when he said:-

“In this case the trial Judge saw the witness and observed their demeanour.

Cruelty cases, more than any other class of case, depend particularly on a careful estimate of the witnesses. For in a cruelty case the question is whether this conduct by this man to this woman, or vice versa is cruelty. How far a spouse has to depart from the normal standards of kindness and self-control that are the basis of married life and how great an effect that departure has to have on the other spouse before it constitutes cruelty is always a question of degree, depending largely on the temperament, circumstances and health of each party. To attempt to decide that question in such a case as this without seeing the parties or their witnesses would be hazardous business and an appellate court does not lightly embark on it. Lord Thankerton in the case of Watt (or Thomas) v. Thomas [1947] A. C. 484, 487, 488 sums up the effect of the cases on this point, and says that the principles embodied therein may be stated in three propositions which my Lord had just read out. For reasons which I will give there seems to me here no question of misdirection of himself by the Judge, and my view on the points dealt with by these three propositions, using their exact language, is as follows:

1. I am not satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial Judge’s conclusion.

2. I do take the view that without having seen or heard the witnesses this court is not in a position to come to any satisfactory conclusion on the printed evidence.

3. I am not satisfied that the learned Judge has not taken proper advantage of his having seen and heard the witnesses. Indeed, after reading the whole transcript of the evidence more than once, and after hearing the detailed and able arguments on both sides, I am satisfied that the learned Judge took the fullest advantage of seeing and hearing the witnesses. His judgment confirms this.

We do not consider here it would be right for us in determining which side of the line this case falls to hold when we did not see the witnesses that what the learned trial Judge held to be legal cruelty could not be so. Certainly taken individually the incidents could not, in our view, have amounted to legal cruelty, but when taken cumulatively, as they must be, we should not feel as an appellate court justified in reversing the decision of the learned trial Judge that they did constitute legal cruelty.

Finally in regard to the granting of the decree nisi Mr. Omotosho argued that as no medical evidence was called it has not been established that either the conduct of the appellant had caused danger to the health of the petitioner or that it gave rise to reasonable apprehension of danger to his health. We agree that actual danger to health was not shown, but the learned trial judge dealt with the alternative requirement of reasonable apprehension of danger to health and we bear in mind the approach that the Court of Appeal in England adopted in Fromhold v. Fromhold (1952) 1 T.L.R. 1522 where Singleton, LJ. said at page 1525:

‘The third complaint upon this appeal is that the Judge misdirected the jury on the Issue of cruelty, leaving them with the impression that there must be injury to health even in cases of physical injury. The generally accepted definition of cruelty is set out in Rayden On Divorce 5th ed., p. 80):

‘Legal cruelty may be defined as conduct of such a character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger.’

The wife’s complaints were that she had been kicked on at least two occasions, so that there were bruises on her legs or on her body; that she had been struck on the eye, so that she had a black eye; that she had been struck on a hand with a knife in a way which caused a wound or wounds on the hand, and If those com-plaints were found by a jury to be true, I should not have thought that anyone could doubt that they were within the definition of cruelty as known to the law.

The Judge in his summing-up mentioned the facts and said:

‘There is not any evidence that in any way, direct or indirect, any of these matters or all of them together in the slightest degree affected her state of health, and you may think that there is some difficulty in those circumstances in coming to the conclusion that these things fit the description of what is now called legal cruelty at all. It is entirely for you.’

I find that a little difficult to understand as a direction to a jury. If the Judge is satisfied, or if a jury are satisfied, that a man kicks his wife in the way this wife said she was kicked, and bruises her in the way that she said she was bruised (and an-other witness gave evidence as to bruises), I should have thought it was something which most people would regard as cruelty..

[His Lordship referred to the Judge’s further direction and continued:] Again it seems to me that the direction goes too far. It is open to a jury, if they find that kicks which led to bruises such as were spoken of by two witnesses were given to find that that was cruelty, and the case would not have been carried any further if the wife had been asked if it had affected her health and she had said that it did. I agree with the submission of Mr. Simon that those passages which I have read amount in the circumstances of this case, to misdirection.”

Once again in this aspect of the case it might be said that this was a borderline decision, but we cannot see that the learned trial Judge misdirected himself and we do not consider that it has been shown to our satisfaction that we should reverse his finding in this regard.

The last ground of appeal argued by Mr. Omotosho was:-

‘The granting-of the custody of all the children to the petitioner will work out to be an unbearable permanent emotional upset for the respondent.”

In fact no permanent order for custody has yet been made. The decree nisi was pronounced on the 14th December, 1965; each party asked for custody of all three of the children and the judge proceeded to hear evidence. In his decision, given on the 20th January, 1966, he expressed the view that in all the circumstances of the case the petitioner was entitled to succeed in his prayer, but went on to say that he could only make an Interim order at that stage. He however kept carefully in mind that the interests of the children was the paramount consideration and awarded the immediate custody of the two elder children to the petitioner and the custody of the youngest to the respondent until further order. This purported to be an interim order but this was clearly an error as the learned trial Judge ought to have then made a final order. As, however, this point was not raised by counsel we now ask counsel to consider what should be done and to address us further in regard to it.

Subject to hearing further argument as to the order on the custody of the children, the appeal is dismissed. As before we began to hear the appeal against the decree nisi we set aside the decree absolute as having been made per incuriam either party is now at liberty to apply at once in the High Court for the decree nisi to be made absolute.

Appeal dismissed.

CASES CITED:-

Woolfenden v. Woolfenden [1948] 27

Theodoropoulas v. Theodoropoulas [1963] 2 All E. R. 772

McTaggart v. McTaggart [1949] 94

Gollins v. Gollins [1963] 3 W.L.R. 176

Williams v. Williams [1963] 3 W.L.R. 215

Le Brocq v. Le Brocq [1964] 1 W.L.R. 1085

Dove v. Dove [1963] 321

Davies v. Davies [1956] 212

Bull v. Bull [1965] 3 W.L.R. 1048

Blunt v. Blunt [1943] A.C. 517

Wickins v. Wickins [1918] 265

Gill v. Gill

Lauder v. Lauder [1949] 277

Watt (or Thomas) v. Thomas [1947] A. C. 484

Fromhold v. Fromhold (1952) 1 T.L.R. 1522