INTERPRETATION AND APPLICATION OF SECTION 15(2)(C) OF THE MATRIMONIAL CAUSES ACT IN ADETULE V ADETULE: DID THE SUPREME COURT ERR?

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Abstract

A petitioner in a petition for dissolution of marriage can prove that the marriage has broken down irretrievably by showing under Section 15(2)(c) of the Matrimonial Causes Act that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. The interpretation and application of section 15(2)(c) was one of the issues considered by the Supreme Court in Adetule v Adetule. It is contended in this Review that the decision of the Supreme Court in that appeal upholding the decision of the Court of Appeal and trial High Court was wrong because it failed to appropriately evaluate the totality of the matrimonial history of the parties, their ages, education, health status and allowance for the ordinary wear and tear of marriage. It is also contended that the proper test for determining reasonableness under Section 15(2) (c) is objective and not objective/subjective test as applied by the Court of Appeal and upheld by the Supreme Court in that appeal.

Keywords: Marriage, Dissolution of Marriage, Matrimonial Causes, Intolerable behaviour, Petition, Reasonableness.

1. Introduction

The case of *Adetule v Adetule*[1] was decided by the Supreme Court on 10th December, 2021. It was a unanimous decision dismissing the appeal. There were two issues for determination before the supreme court namely: (1) whether from the pleadings and evidence, the

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[1] Reported in (2022) 10 NWLR (Pt 1838) 201.

respondent is the sole owner of the property at No. 3A Jerry Lane, Port Harcourt, Rivers State, and (2) whether from the pleadings and evidence, the ground of intolerable behaviour relied upon by the respondent for the dissolution of the marriage between the respondent and the appellant was cogent, adequate, sufficient or substantial enough and proved. This paper is not about the first issue, but is concerned with the second issue relating to the interpretation and application of section 15(2)(c) of the Matrimony causes Act[2] (MCA). It is contended that the supreme court in that appeal not only erred in the interpretation and application of the respondent's intolerable behaviour under section 15 (2) (c) of the MCA but also failed to hold the scale of justice evenly between the parties.

2. Synopsis of the Law on Respondent's Intolerable Behaviour under Section 15(2)(C) of the Matrimonial Causes Act

Dissolution of marriage is one of the matrimonial causes under the Matrimonial Causes Act.[3] Dissolution of marriage is a judicial process which brings a marriage to an end and the parties would cease to be husband and wife. Under the Matrimonial Causes Act, there is only one ground under which a marriage may be dissolved. That ground is that "the marriage has broken down irretrievably".[4] However, it is not enough for a petitioner to just allege that the marriage has broken down irretrievably. He has to plead and prove the fact(s) to support the irretrievable break down of the marriage. Thus section 15(2) of the Act provides that:

> The court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if, but only if, the petitioner satisfies the court of one or more of the following facts…

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[2] Cap M7 LFN 2004.

[3] Others include Judicial Separation, Nullity of Marriage, Jactitation of Marriage and Restitution of Conjugal Rights.

[4] Section 15(1). For judicial authority that there is only one ground for dissolution of marriage in Nigeria, see *Harriman v Harriman* (1989) 5 NWLR (Pt 119) 6; *Ojeladi v Ojeladi* (1979) 4-6 CCHCJ 52; *Egbueje v Egbueje* (1972) 2 ECSLR 747.

Those facts are enumerated in section 15 (2)(a)-(h). We are concerned with the fact mentioned in section 15(2)(c). Under Section 15(2)(c), a court hearing a petition for a decree of dissolution of a marriage shall hold the marriage to have broken down irretrievably if the petitioner satisfies the court

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

This is a general provision without any definition. Scholars simply refer to it as 'respondent's behaviour' or 'respondent's intolerable behaviour.[5] However, section 16(1) of the Act gives an idea of the nature and scope of what qualifies as intolerable behaviour. The section outlined seven conducts or behaviours which may be relied upon as proof that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. They are,

(a) Since the celebration of the marriage, the respondent has committed rape, sodomy or bestiality.
(b) Since the marriage, the respondent has, for a period of at least two years, been a habitual drunkard or habitually intoxicated by reason of using excessively any sedative narcotic or stimulating drug or preparation.
(c) Since the marriage, the respondent has within a period not exceeding five years suffered frequent convictions for crime and has been sentenced in the aggregate to not less than three years imprisonment.
(d) Since the marriage, the respondent has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life or for a period of five years or more, and still in prison at the date of the petition.

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[5] For example Herring, J. 3rd ed. *Family Law* (Essex, Pearson Education LTD, 2007) p. 103; Probert, R. *Cretney's Family Law* 6th ed. London, Sweet & Maxwell, 2006 p.65.

(e) Since the marriage, and within one year immediately preceding the date of petition, the respondent has been convicted of an attempt to murder or unlawfully kill the petitioner; or of having committed an offence involving the intentional infliction of grievous harm on the petitioner or the intent to inflict grievous harm on the petitioner.

(f) Throughout a period of two years immediately preceding the date of petition, the respondent has habitually and willfully failed to pay maintenance for the petitioner, ordered by a court in the federation or agreed to be paid under an agreement between the parties to the marriage providing for their separation; and

(g) The respondent is of unsound mind and unlikely to recover as at the date of the petition; or since the marriage and within a period of six years immediately preceding the date of the petition, the respondent has been confined for a period or for periods aggregating not less than five years in an institution where persons may be confined for unsoundness of mind in accordance with law or in more than none such institution.

It should be noted that the conducts/behaviours outlined above are not exhaustive. This is because the opening sentence of section 16(1) states that its application is 'without prejudice to the generality of section 15(2)(c) of the Act'.[6] Thus in *Gbolade v Gbolade*,[7] inordinate demands for sex was held to constitute intolerable behaviour. Similarly the practice of juju or charms by the respondent has also been held to constitute intolerable behaviour.[8] In an English case, intolerable behaviour was based on constant criticism and rudeness of the husband.[9] The test of intolerable behaviour is always objective in the sense that it is not sufficient for the petitioner to allege that he/she

[6] Nwogugu, E.I. *Family Law in Nigeria* Revised ed. (Ibadan, Heinemann Educational Books, 1989) p. 176.

[7] (1970) Suit No. WD/37/70, High Court of Lagos State, Lagos Judicial Division.

[8] See *Sotomi v Sotomi* (1976) 2 FNR 104 decided by High Court of Lagos State.

[9] That was in the case of *Livingstone-Stallard v Livingstone-Stallard* (1974) 2 ALLER 766 where the court also considered the parties methods of washing their underwear.

cannot live with the respondent because of his behaviour. The petitioner must show that the behaviour is such that a reasonable man cannot endure.[10] Although the test is objective, it is not a test of universal objectivity but on the society of the person concerned.[11] In *Nanna v Nanna,*[12] it well held that in considering what is reasonable, the court must consider in totality the matrimonial history of the parties. Allowance should also be made for the ordinary wear and tear of marriage and it is not every incident that happens in the matrimonial home that may lead to the conclusion that the petitioner cannot reasonably be expected to live with the respondent.

In fact, the conduct of the respondent that a petitioner will not be reasonably expected to put up with must be grave and weighty in nature as to make further cohabitation virtually impossible.[13] The question is how far did the Supreme Court go in interpreting and applying the law on respondent's intolerable behaviour as summarized above? Before we consider the question, let us capture the facts of *Adetule v Adetule*.

3. Facts of *Adetule v Adetule*

The parties Segun Tayo Adetule (husband) and Yemisi Tayo Adetule (wife) got married in Lagos in 1990 and lived as a couple in Port Harcourt Rivers State until 2004 when the husband (respondent at the supreme court) relocated to Lagos after resigning from his employment with an Oil Service Company. The resignation from his employment was in fact in 1998. His private business in Lagos didn't do well and he later re-located to Ado Ekiti where he established a school. The respondent as petitioner at the trial High Court alleged that his wife refused to join him when he moved to Lagos and still refused to join him when he relocated to Ado Ekiti. He alleged a number of

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[10] See *Ibrahim v Ibrahim* (2007) 1 NWLR (pt 1015) 383.
[11] Sagay, I. *Nigerian Family Law: Principles, Cases, Statutes and Commentaries.* Lagos, Malthouse Press, pp. 250-252.
[12] (2006) 3 NWLR (Pt 966) 1 CA
[13] See *Katz v Katz* (1972) 3 ALLER 219; *Ibrahim v Ibrahim*)supra) 5 *Anakwenze v Anakwenze* (1972) 2 ECSLR 708.

behaviours against her including nagging, being arrogant, strong-headed, uncontrollable and disrespectful. He also alleged that his wife had an insatiable lust for money and material things. On her part, the respondent at the lower court denied these allegations. According to her, when the petitioner resigned his employment in 1998, she took care of him and the children from the proceeds of her business until 2004 when the petitioner moved to Lagos. When the petitioner moved to Lagos, he asked her to remain in Part Harcourt to take care of her business and their house and she complied with the instruction. They exchanged visits a number of times. She further stated that when he moved to Ado Ekiti, she also moved to Ado Ekiti but he advised her not to close her business in Port Harcourt but should be going there to supervise it. That it was when she was staying with him at Ado Ekiti that the petition was served on her.

At the conclusion of evidence and final addresses, the trial court upheld the petition and dissolved the marriage on the fact that the respondent has behaved in such a manner that the petitioner cannot reasonably be expected to live with the respondent. The respondent as appellant appealed to the Court of Appeal without success. Her appeal to the Supreme Court was also dismissed based on the concurrent findings of the trial High Court and the Court of Appeal.

4. Criticism of the Decision

The criticism of the decision in *Adetule v Adetule* is based on two grounds namely: (1) The ground of intolerable behaviour relied upon by the respondent and upheld by the Supreme Court was not cogent, substantial enough and proved and (2) mis-interpretation of section 15 (2)(c) of the MCA.

(1) The ground of intolerable behaviour relied upon by the respondent and upheld by the Supreme Court was not cogent, substantial enough and proved.

As stated in the synopsis of the law on respondent's intolerable behaviour, the court in determining whether the petitioner's stand is reasonable must consider in totality the matrimonial history of the parties including their ages, education, health status, cultural beliefs

etc. The circumstances of the couple as they relate to their rights and obligations in the marriage must be considered from the standpoint of a reasonable man.

This principle was properly considered and applied by the Court of Appeal in *Anagbado v Anagbodo*[14] In that case, the petition alleged that the respondent was cruel to the appellant and used to pester him about the disability or deformity of the appellant in the presence of the children. The respondent led evidence to show that all the appellant's allegations against her were not true. She testified that she loved the petitioner and that from 1974 when they got married till 1986 when the petitioner presented the petition for divorce, she had six children for the appellant. She testified that she still loved the appellant and did not want divorce. The court of appeal upheld the judgment of the lower court that dismissed the petition. In dismissing the appeal, the Court of Appeal relied heavily on the history of the couple. According to Adio JCA (as he then was):

> No doubt, the picture of the respondent which the appellant painted was that of a troublesome and callous woman who enjoyed being cruel to the appellant. The learned trial judge was perfectly right in pointing out that certain aspects of the case did not bear out what the appellant wanted the court to believe about the respondent. The parties got married in 1974 and the petition was filed in 1986. Within that period of about twelve years, the appellant and the respondent had six children… The respondent was in effect, having babies for the appellant every other year… If the situation was so bad in the matrimonial home that the appellant could not reasonably be expected to live with the respondent, the appellant could not have been putting the respondent in family way every other year for a period of twelve years.

[14] Reported in 2 SMC, 118, decision of the Court of Appeal (Jos Division) on 10/7/91. SMC means Selected Matrimonial Cases

Unfortunately, the lower court in Adetule's case never considered this principle and both the court of Appeal and the Supreme Court felled into the same error. In Adetule, the marriage was blessed with three children and the husband was able to build a house in Port Harcourt in the course of the marriage. When he resigned from his job in Port Harcourt in 1998 without planning for life without employment, it was his wife (appellant) that took care of the family including the man and their children for six years. It was only in 2004 that the man moved to Lagos and established a private business which was not successful. Expectedly his wife and children remained in Port Harcourt because the family has a house there and the wife also has a business there. That time they were exchanging visits.

From the evidence, trouble started when the husband relocated to Ado Ekiti and started running a private school. His wife was reluctant to join him in Ado-Ekiti because the income from the school was small as a result of the few numbers of students in the school. His wife wanted to stay in Port Harcourt to look after their house and continue with her business while visiting her husband occasionally. This was not acceptable to the husband. The wife then agreed and moved to Ado-Ekiti and it was while she was living with him at Ado-Ekiti that the petition was served her.

It is submitted that based on the history of the marriage, the conduct of the appellant in the appeal cannot be said to be weighty and grave as to warrant the conclusion that the respondent cannot reasonably be expected to live with the appellant. What happened between the parties could have been regarded as the normal wear and tear of a marriage which should not result in dissolution of the marriage.

Having resumed normal cohabitation with her husband in Ado-Ekiti, the trial court would have allowed time for possible reconciliation. A good divorce law should seek to save marriages if possible. Thus, if a

couple seeks a divorce, the legal procedure should do all it can to persuade them to be reconciled and turn back from divorce.[15]

5. Misinterpretation of Section 15(2)(c) of the MCA

As noted earlier, the test, in determining whether the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent, is objective. The standard to be used by the court is that of a reasonable man. So it must be shown that a reasonable man in the position of the petitioner will also find the behaviour of the respondent intolerable.

The Supreme Court recognized this law when it held that 'the determination of an intolerable behaviour that can warrant the dissolution of marriage between a husband and wife is to be based from the position of a reasonable person on the facts and circumstances of the couple as they relate to their rights and obligations in the marriage.[16]

Unfortunately however, the Supreme Court failed to apply this test of objectivity consistently in the appeal when it accepted the position of the Court of Appeal that the tests to be used were both objective and subjective tests. The Court of Appeal had held that

> '… First the court must put on the mantle of the reasonable man and judge the behaviour of the respondent accordingly. Secondly (and this appears to be slightly contradictory, although in fact it is not), the court must not consider the respondent's behaviour and petitioner's reaction to it from the point of view of what a spouse cannot reasonably be expected to accept from the other spouse but what the particular spouse (the petitioner) cannot be expected to tolerate from his partner, the respondent'

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[15] This principle has now been codified in England. See the Family Law Act 1996 section 1 (1) (b). See also McCarthy, P., Walker, J. and Hooper, D (2000) 'Saving Marriage – A Role for Divorce Law?'*Family Law*, vol. 30 page 412.

[16] Per *Garba* JSC on page 233

This position of the Court of Appeal which the Supreme Court endorsed is completely contradictory. The objective test and subjective test cannot be applied concurrently in the same suit. In this appeal, the Supreme Court should have considered whether the behaviour of the appellant (respondent at the lower court) was of such a nature that the petitioner cannot tolerate from the stand-point of a reasonable man. If they had done that, no doubt they would have come to the conclusion that the facts of intolerable behaviour presented by the petitioner were not cogent, adequate, sufficient and substantial enough.
In the application of the confusing objective/subjective tests, the Court of Appeal stated as follows:

> … Whereas a flirtatious husband in England may reasonably be expected to live with a flirtatious wife, this is not so in Nigeria where male promiscuity is tolerated while female promiscuity is prohibited by the norms of society...

It is submitted that the Supreme Court should not have agreed with this submission. The first part of the submission is correct not only in England but also in Nigeria. A petitioner who alleges intolerable behaviour of the respondent based on flirtatious behaviour is very unlikely to obtain a divorce if it is shown that he is also guilty of flirtatious behaviour. There will be no moral ground for such a petition.

It is the second part of the submission that is not only wrong in law but gender biased. An important aspect of the principle of Rule of Law' is equality before the law or equal subjection of all classes of the society to the ordinary laws of the land administered by the ordinary law courts.[17]

[17] For the principle of the Rule of Law, see Dicey, A.V *The Law of the Constitution* cited in Mowoe, K.M *Constitutional Law in Nigeria* (Lagos, Malthouse Press Limited, 2008) 16-17.

That is why in the construction of a statute or enactment, words importing the masculine are interpreted to include the feminine and vice versa.[18]

The implication of the submission of the Court of Appeal which the Supreme Court left undisturbed is that a dissolution of marriage may be granted to a male petitioner based on Section 15(2)(c) if he proves that his wife is promiscuous and he finds it intolerable but that cannot be granted to a wife who petitioned on the same ground and proved that her husband is promiscuous and she finds it intolerable. With humility, this interpretation is dangerous and should not be followed.

6. Conclusion

The sole ground for dissolution of marriage under the MCA is that the marriage has broken down irretrievably. Where the fact in proof of the irretrievable breakdown is based on Section 15(2)(c) of the MCA the test for determining whether the behaviour is tolerable or not must be objective. It must be shown that a reasonable man of the society of the petitioner would also find the behaviour intolerable. Concurrent test of objectivity and subjectivity is wrong and the law ought to be applied evenly to parties whether husband or wife.

[18] Section 41(a) of the Interpretation Act Cap. I 23 LFN 2004.