

THE TECHNICALITY OF PROOF OF ADULTERY IN DIVORCE PROCEEDINGS*

Abstract

Adultery is the voluntary act of sexual intercourse committed by a spouse with a person of the opposite sex, not being the husband or wife, during the subsistence of the marriage.¹ The objective of this paper is to examine the technicality of proof of adultery in divorce proceedings. The paper states that for a person to be said to have committed adultery, there must exist the element of free will which is fundamental to the commission of adultery. Therefore, where a spouse is involved in extra-marital sexual intercourse without his or her consent, the marital offence of adultery will not exist. The researcher adopted the doctrinal research method. The paper concludes that, adultery and intolerability can be used to prove that, a marriage has broken down irretrievably. Therefore, the court can hold that there is irretrievable breakdown of marriage, where the petitioner is able to prove to the satisfaction of the court that, since the marriage the respondent has committed adultery and that he or she find it intolerable to live with the respondent.

Keywords: Marriage, Irretrievable, Commission, Adultery, Intolerability,

1. Introduction

Generally, divorce is viewed as a catastrophic process that emphasizes the guilt or failure of the parties and leading to post-divorce situations of guilt and shame.² There were many consequences associated with divorce as it affected so many things that were connected to matrimonial relationship. Thus, it was observed by the English Court of Appeal in the case of *Watchel v. Watchel*,³ that: 'If a person was the guilty party in a divorce suit, it went hard with him or her. It affected so many things. The custody of the children depended on it. So, did the award of maintenance. To say nothing of the standing in society! So serious were the consequences of divorce that suits were contested at great length and at much cost'. The commission of adultery has led to divorced which has caused failure of many marriages in the world. This has led to a lot of hardship on the parties and the children of the marriages dissolved. However, the sole ground on which a petition for divorce may be presented to the court shall be that the marriage has broken down irretrievably⁴ and the petitioner must satisfy the court of one or more of the eight facts provided under section 15(2) of the Act.⁵ Under section 15 (2) (b) of the Matrimonial Causes Act,⁶ there is an irretrievable breakdown of marriage where, since the celebration of the marriage, the respondent has committed adultery and the petitioner finds it intolerable to live with the Respondent.

Adultery was defined by the Court of Appeal, in the case of *Erhahon v. Erhahon*,⁷ as consensual sexual intercourse between a married person and a person of the opposite sex other than the spouse. Therefore, for a claim of adultery to be made, the party accused of adultery must have consented to the adulterous act. As a result, where a woman is raped by a man, other than, her husband, she cannot be said to have committed adultery because, rape can only occur when the party claiming to have been raped, did not consent to have sexual intercourse with the other party. For a party to a marriage to commit the offence of adultery, there must exist the element of free will which is fundamental to the commission of adultery. Moreover, where a spouse gets involved in extra-marital sexual intercourse without his or her consent, the marital offence of adultery will not exist. Furthermore, where it is confirmed that a wife is raped by a third party, such forceful extra marital sexual intercourse will not constitute adultery.⁸ Adultery involves voluntary or consensual sexual intercourse between a married person and a person, whether married or unmarried, of the opposite sex not being the other spouse. That is, it is a voluntary sexual intercourse between two persons of whom one or both are married although not to each other. Sexual intercourse requires at least partial penetration of the vaginal by the penis. Adultery is only a symptom of marital breakdown. But it is not in itself regarded as demonstrating breakdown, unless the petitioner in addition can satisfy the court that the act of adultery is so offensive and deeply wounding to him or her that any further married life with the respondent is unthinkable. This is because, in addition to proving adultery, the petitioner must also prove that he or she finds it intolerable to live with the respondent. In the case of *Cleary v. Cleary and Hutton*,⁹ the Court of

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¹ E.I. Nwogugu, *Family Law in Nigeria* (1985), (Ibadan, Heinemann Press). p. 135.

² J. M. Eekelaar 'The Place of Divorce in Family Law's New Role' (1975) *Modern Law Review*, (38) (3) 241, 248.

³ (1973) Fam. 72,89.

⁴ *Harriman v. Harriman* (1989) 5NWLR (Pt. 119) 6; *Anagbado v. Anagbado* (1992), 1 NWLR (Pt. 216) 207.

⁵ Matrimonial Causes Act, Laws of the Federation of Nigeria, 2004, Cap. M7.

⁶ *Ibid.*

⁷ (1997) 6. NWLR (Pt.510) 667 at 687.

⁸ *Clarkson v. Clarkson* (1930) 143 LT, 775, per Lord Merrivale.

⁹ [1974] 1 W.L.R. 73.

Appeal held that, the adultery fact can be established provided the petitioner genuinely finds it intolerable to live with the respondent even if the adultery has not played any significant part in the breakdown of the marriage. Thus, a petitioner who seeks for divorce on ground of respondent adultery, must state that he or she finds it intolerable to live with the respondent. In the case of *Goodrich v. Goodrich*,¹⁰ it was stated by Lloyd-Jones that what matter is what are the present feelings of the individual petitioner?

However, it should be noted that, a mere allegation of adultery committed by either party to a statutory marriage will not be a sufficient proof of the fact that the marriage has broken down irretrievably to enable the court to grant a divorce in respect of a petition for divorce. This is because by implication of section 15(2)(b),¹¹ the allegation of adultery alone can no longer entitle a petitioner to be granted a decree of dissolution of the marriage for which he or she seeks a divorce. Hence, a petition for the dissolution of marriage on the ground of adultery will only succeed, if the petitioner testifies also that he or she finds it intolerable to live with the respondent as earlier stated. The above fact has been said, to sound like mere technicality, but that it is important. Thus, it was stated by the judge in the case of *Labode v. Labode*,¹² that this may sound like mere technicality but the Decree prescribes this technicality and it is important. Therefore, this paper examines the technicality of proof of adultery in divorce proceedings.

2. Proof of Adultery in Divorce Proceedings

Generally, it is not easy to prove adultery in matrimonial proceedings. Thus, on the standard of proof of adultery in divorce proceedings, the party that alleges adultery must establish that, there was some penetration of the woman's virginal by the man's penis during the act of sexual intercourse. However, the act of sexual intercourse need not have been complete. Thus, in the case of *Komolafe v. Komolafe*,¹³ the fact that the respondent saw a lady clad in a wrapper, early in the morning at the petitioner's house was held to amount to adultery. In this case, the petitioner sought for an order for the dissolution of the marriage on the ground that, the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition and the respondent alleged in her cross-petition that, the petitioner has committed adultery and asked for N500,000.00 damages for the resultant suffering, and emotional upheaval caused to her. The allegation was denied by the respondent. However, the only fact that the respondent seeks to rely in proof of this allegation of adultery, is the fact that, she arrived at the petitioner's new house early one morning and saw a lady in the house clad in only a wrapper. According to the court, this does not amount to adultery, and at best shows that the petitioner is familiar with the woman who is alleged to have committed an adulterous act with the petitioner. The court further stated that, the facts of the case do not amount to proof of adultery as these facts do not amount to the existence of a sexual relationship between the petitioner and the woman alleged. That if the petitioner had caught both of them in bed in the act of sexual intercourse, then she might have succeeded in proving that the relationship between the petitioner and the alleged woman, is an adulterous one and that even if the respondent's own version of the events of their first meeting is to be believed, the respondent has proved only that, a friendship and no more exists between the petitioner and the woman alleged. In the case of *Erhahon v. Erhahon*,¹⁴ it was established that, in divorce proceedings, for a case of adultery to succeed, there must be some penetration of the woman by the man although, the act of sexual intercourse need not have been complete. Thus, it was found by the court that, the fact that the 1st and 2nd respondents were caught and photograph sitting down and lying in the bed, it was not sufficient to prove that they had sexual intercourse. However, adultery will be sustained if it is proved to the reasonable satisfaction of the court.¹⁵ Thus, in the case of *Ejimbe v. Ejimbe*,¹⁶ the respondent's allegation of adultery against the petitioner was dismissed by the court, when the respondent failed to prove the allegation of adultery to the reasonable satisfaction of the court. However, some judges have maintained that a higher standard of proof is required to establish adultery. Thus, it was declared by the court in the case of *Ochei v. Ochei*¹⁷ that 'in matrimonial proceedings adultery must be proved with the same degree of strictness as is required for the proof of a criminal offence in a criminal case'¹⁸. Moreover, in the case of *Ojo v. Ojo*,¹⁹ it was declared by the court that, it is trite law that a high degree of proof is required when adultery is the issue in a divorce petition. In the case of *Ogunleye v. Ogunleye*,²⁰ adultery was inferred by the court, as a result of the fact that the respondent was living with the co-

¹⁰ (1971) 2 all E.R. 1340.

¹¹ Matrimonial Causes Act, Laws of the Federation 2004, Cap. M7.

¹² (1972) N.M.L.R 195

¹³ (2001) 2 LHCR, (part 17) p. 81 at 87.

¹⁴ (1997) 6NWLR (Pt. 510) 667 at 687

¹⁵ Section 82 of the Matrimonial Causes Act, 2004. Unreported

¹⁶ Suit No. WD/59/86 of 3/3/89, Lagos High Court.

¹⁷ (1973) E.C.S.L.R 623.

¹⁸ (1948) P. 179.

¹⁹ (1981) H.C.L.R 236 at p.254.

²⁰ (1979) F.N.L.R, 22.

respondent in the matrimonial home as husband and wife at the time when the case was being heard. Moreover, in the case of *Labode v. Labode*,²¹ the diary of the respondent that was found in her wardrobe contained references to the weekend spent at the house of the party cited. In her subsequent divorce, these facts were held to raise a rebuttable presumption of adultery between them. Furthermore, the court has also inferred adultery as a result of pregnancy or the birth of a child for a man married under the statute by a woman other than his statutory wife.²² On the other hand, adultery will also be inferred by the court, when a legally married woman is pregnant or gives birth to a child for a man, other than her husband²³. However, a petitioner who alleges that his wife has given birth for another man must substantiate the allegation. Thus, it was stated by the court in the case of *Ebinum v. Ebinum*,²⁴ that ‘it is not enough for the petitioner to allege that the respondent gave birth to... an unknown person without substantiating same...as such the ground fails’.

Moreover, adultery *simpliciter* does not establish irretrievable breakdown of a marriage celebrated under the Act. In addition, intolerability must be alleged by the petitioner and an allegation of intolerability raises a question of fact. As a result, the allegation itself will not necessarily suffice for a decree of divorce to be granted. The allegation must be proved. Moreover, the petitioner must explain why he or she finds it intolerable to live with the respondent. In the case of *Ayoola v. Ayoola and Anor*,²⁵ intolerability of the alleged adultery was proved, when the petitioner disclosed under cross-examination that ‘...after the adultery of the husband) she did not think that her husband was worth spending the whole of her life-time with, and peace eluded both herself and her husband. Moreover, in the case of *Ambe v. Ambe*,²⁶ intolerability of the alleged adultery was also proved, when the petitioner moved out of the matrimonial home, when she discovered that the respondent committed adultery and that she found it intolerable to live with the respondent.

3. Circumstances Held to be Adulterous and Intolerable by the Courts

Under the Matrimonial Causes Act,²⁷ matters are to be established to the reasonable satisfaction of the court. But the court has always insisted on concrete evidence when adultery is alleged. As a result, circumstantial evidence which is legally accepted as establishing adultery, is now receiving little judicial weight. In the case of *Alabi v. Alabi*,²⁸ the court set out circumstances from which adultery could be inferred by the court as follows: ‘Evidence of disposition (familiarity) and opportunity for sexual intercourse with a person other than a spouse – intimate and mutual relationship, general cohabitation, confession and admission of adultery, entry in the register of birth of a child, frequent visits to hotels and the contraction of venereal disease from a third party’. However, it was noted by the court that the above listed circumstances were not exhaustive. But, the courts had recognized and regarded some of these circumstances as evidence of adultery in some cases. Thus, in the case of *Fadare v. Fadare*,²⁹ the court combined cohabitation, birth of a child and admission to found adultery. Moreover, in the case of *Ambe v. Ambe*,³⁰ evidence of the finding of the co-respondent’s dress in the matrimonial home as well as late night visits to the home led the court to infer adultery. But the courts in some other cases have found the circumstances listed in the case of *Alabi v. Alabi*,³¹ as insufficient. Thus, in the case of *Attigbo v. Attigbo*,³² where evidence was given by the petitioner that he peeped through the window of the wife’s Government Residential Area home and caught her committing adultery with the co-respondent, the court reasoned that where adultery is a crime, such as the case under the Penal Code,³³ it has to be proved ‘beyond reasonable doubt’ as an essential requirement, before a court hearing a petition for a decree of dissolution of marriage can hold that the marriage has broken down irretrievably. Furthermore, in the case of *Erhahon v. Erhahon*,³⁴ the respondent was alleged to have committed adultery with six named persons. The evidence before the court included pictures which showed the respondent and the sixth co-respondent standing or sitting nude together and the co-respondent lying nonchalantly on the respondent’s folded arms. The evidential pictures were taken at about 1.20am in the matrimonial home of the parties. According to the respondent, the pictures were taken under duress and threat to her life. While accepting

²¹ (1972) N.M.L.R, 195

²² *Ayoola v. Ayoola Anor*. (1979) 2 F.N.L.R, 252.

²³ *Akparanta v. Akparanta* (1970-71) E.C.S. N.L.R, 104.

²⁴ Unreported Suit No. 10/71HD/85 of 22/4/86, High Court of Lagos.

²⁵ (1979) 2 F.N.L.R. 252 at p. 254.

²⁶ (1975) N.M.L.R. 28.

²⁷Laws of the Federation of Nigeria, 2004, Cap.M7, Section 82.

²⁸ (2007) 9 NWLR (Pt.1039)297.

²⁹ (1974) 4 UILR (Pt. iv) 504.

³⁰ (1975) 5 UILR (Pt. 11) 138.

³¹ *Supra*.

³² (1985) HCNLR 869.

³³ Cap. 89 Laws of Northern Nigeria. Ss 386and 387.

³⁴(1997) 6 NWLR (Pt.510) 667.

the evidence of the respondent, the trial court dismissed the allegations of adultery as not having been proved 'beyond reasonable doubt.'

The commission of the matrimonial offence of adultery has also been held to be a matter of inference to be drawn from the surrounding circumstances, such as undue familiarity coupled with opportunity, improper behavior and suspicious circumstances. Thus, in the case of *Segun v. Segun*,³⁵ the Respondent was adamant that the petitioner has moved out to live in a residence built for her by the man she was said to have committed adulterous acts with. The respondent further claimed to have met the man at the residence of the petitioner at 10:00pm and also at 5 am the following day. Based on the above facts, the proof of the matrimonial offence of adultery succeeded. In the case of *Oliyide v. Oliyide*,³⁶ the evidence before the court was that, the respondent who was in the habit of going out and keeping late nights was kept in the custody of the party cited. That it took a police search and the arrest of the party cited before the respondent was produced by the party cited. The court then held that, the evidence before the court did not establish adultery between the respondent and the party cited, since the evidence before the court did not show when or where the alleged adultery was committed. It was further stated by the court that, matrimonial misconduct carried a higher degree of proof than the balance of probabilities particularly for adultery which is a serious offence.³⁷ It was also reasoned by Okuribido J. that, even if any adultery had been committed, it had been condoned when the petitioner took back the respondent upon her return from the police station and because, there was no evidence of intolerability on the part of the petitioner. Therefore, for a petition for dissolution of a marriage on ground of adultery to succeed there must be evidence of intolerability on the part of the petitioner. The view that the intolerability must be in consequence of the adultery can be said to be correct. This is because, under section 15(2)(b) of the Matrimonial Causes Act,³⁸ a marriage will only be dissolved, if the petitioner is able to prove to the satisfaction of the court, that the marriage has broken down irretrievably because, a party to the marriage has committed adultery and the other party finds it intolerable to live with him or her. Therefore, the key word under section 15(2) (b) of the Act,³⁹ is, and the petitioner finds it intolerable to live with the respondent. This implies that, the intolerability is a resulting effect of adultery. In the case of *Ochie v. Ochie*,⁴⁰ it was stated by Oputa J. that, it is not enough to prove adultery under the Matrimonial Causes Act, 1970, that the party alleging it must go further to show that the adultery was intolerable.

4. Proof of Adultery and Unreasonable Behaviour

In cases involving adultery, an unreasonable behaviour has to be negative, grave, and weighty and must be such that a reasonable man cannot endure it. Therefore, such behaviour will prevent further cohabitation between the petitioner and the respondent. However, some behaviour have been held to be unreasonable by the courts. In fact, the court have taken into account, the behaviour of the parties, together with the characters and personalities of the parties. Thus, it was ruled by the Court of Appeal in the case of *Bibilari v. Bibilari*⁴¹ that 'the test on standard of behaviour expected of the respondent is objective. It is the court that will be satisfied that the petitioner cannot reasonably be expected to live with the respondent before a Decree of dissolution is granted'. In the case of *Attiogbe v. Attiogbe*,⁴² the words, reasonably be expected, suggest an objective test but in determining what is reasonable, the court must look at the parties and their peculiar idiosyncrasies. Moreover, in the case of *Ayangbayi v. Ayangbayi*,⁴³ in one occasion, the respondent poured a solution of mixed water and pepper into the eyes of the petitioner and in another occasion, the respondent intended to set the petitioner on fire ablaze and poured kerosene on the petitioner while he was asleep. The Respondent also threw stones at the petitioner. These behaviours were held to be unreasonable by the court. Moreover, in the case of *Akinbuwa v. Akinbuwa*,⁴⁴ the behaviour that were held to be unreasonable were, uncaring and selfish attitude, addition to charms and native medicine (making the respondent take oath of exclusive loyalty to him), refusal of sexual intercourse from 1985 to 1990 and physical assault occasioning injury to the eye. While in the case of *Attiogbe v. Attiogbe*,⁴⁵ the behaviour that were held to be unreasonable were smashing car windscreen, hitting of petitioner with broken glass, assault, and reckless behaviour to the children of the marriage. Furthermore, in the case of *Damulak v. Damulak*⁴⁶ the petitioner complained of two cases of assault. One assault occurred when she was four months pregnant. She also

³⁵ *Segun v. Segun* (2000)1 LHCR, p. 63.

³⁶ (1980) 7-9 CCHCJ 295.

³⁷ *Ibid* at p.297.

³⁸ Laws of the federation of Nigeria 2004, Cap. M7.

³⁹ *Ibid*.

⁴⁰ (1973) E.C. S.L.R 623

⁴¹ (2011) 13 NWLR (Pt. 1264) Pp. 227 – 228.

⁴² (1985) HCNLR 869, 873.

⁴³ (1979) 10-12 CCGCJ, I.

⁴⁴ (1998)7 NWLR (Pt. 559) 661.

⁴⁵ (1979) 10-12 CCHCJ, I.

⁴⁶ (2004) 8 NWLR (Pt) 874) 151.

complained of frequent vicious quarrels even over frivolities. The court reasoned that, the incidents could aggregate to become unreasonable and then held the accumulation of even minor acts of ill treatment causing or likely to cause the suffering spouse to breakdown under strain, to constitute unreasonable behaviour. Moreover, the case of *Ekrebe v. Ekrebe*⁴⁷ further explains the difficulty of proving adultery and unreasonable behaviour of the parties to a marriage. In this case, the evidence before the court was that, the petitioner committed adultery with the co-respondent whom he cohabited and allegedly contracted a customary law marriage, accompanied by the co-respondent's change of her name to that of the petitioner, which was published in a national newspaper. The respondent further gave evidence that, she found used condom in the petitioner's trousers. The Court of Appeal then held that, adultery could not be established, since the cohabitation and the change of name did not prove a valid marriage under customary law which had been consummated.⁴⁸ It must be noted however, that under section 166 of the Evidence Act 2011, there is a presumption of customary or Islamic law marriage where the parties are cohabiting as husband wife.⁴⁹ Thus confirming the fact that, if the case of *Ekrebe v. Ekrebe*⁵⁰ had been decided after 2011, the court may have reasoned differently. However, it is clear from the decisions reached in the cases discussed above, that the standard of behaviour envisaged of the respondent, which the petitioner will not reasonably be expected to live with, will be decided by the court. Thus, it was stated by the court in the case of *Akinbuwa v. Akinbuwa*,⁵¹ that 'an elementary principle of matrimonial law, is that a minor assault committed by one spouse upon another especially for corrective purposes are pardonable and would go to no issue in a divorce proceeding, provided it is not frequent or of such character as is likely to cause or produce reasonable apprehension of danger to life, limb or bodily or mental health to the victim'.

However, in order to prove unreasonable behaviour, it is important for the petitioner to call independent witnesses to testify to the unreasonable behaviour of the respondent on the particulars of the allegations. Thus, in the case of *Ibrahim v. Ibrahim*,⁵² the petitioner complained that the respondent dented his career record in the Nigerian Army because, she stole his service pistol, which led to his early retirement. The petitioner also complained that the respondent brought into the matrimonial home, diabolical objects made up of vulture feathers and wrapped black objects. The petitioner testified alone and did not call any independent witness to testify and the court held that, the behaviour failed to meet the standard of behaviour envisaged to be unreasonable for which the petitioner cannot reasonably be expected to live with. Moreover, adultery has been inferred by the court where there is direct evidence corroborated by a witness. In the case of *Okala v. Okala*⁵³, the petitioner adduced evidence to prove the fact that, he was informed that his wife had invited the party cited to their matrimonial home while he was at work. He then arranged and came home with one of his colleagues. The respondent and the party cited were seen coming out of their matrimonial bedroom while the bed was in a rough condition. The colleague also gave evidence in the case and it was held by the court that, the respondent had committed adultery.

5. Conclusion

This paper has revealed that, adultery involves consensual sexual intercourse between a married person and a person who is not a party to the marriage during the subsistence of the marriage. Thus, it was defined by Adesanya in his article as the consensual sexual intercourse between two persons of opposite sexes at least one of who is married to a person other than the one with whom the intercourse is had, and since the celebration of the marriage⁵⁴. Moreover, adultery under the Matrimonial Causes Act⁵⁵ is no longer a matrimonial offence, but merely one of the many facts which a petitioner can prove to establish that a marriage has broken down irretrievably. The court has taken the view that, it is not necessary to prove the direct fact or the time and place of an act of adultery. Thus, the fact, may be inferred from the circumstances of the situation.⁵⁶ In the case of *Faleye v. Faleye* another,⁵⁷ adultery was inferred by the court, when the petitioner tendered before the court the certified true copy of the certificate of marriage celebrated between the respondent and the woman cited in the case. This paper has also shown that, adultery and intolerability can be used to prove that a marriage has broken down irretrievably.⁵⁸ Thus, when a petition for divorce on the ground of adultery is filed, the court would hold that, there is irretrievable

⁴⁷ (1999) 3 NWLR (Pt.596) 514.

⁴⁸ Ibid at p.526.

⁴⁹See, Michael Atta, 'Presumption of Customary Law and Islamic Marriages Based on Cohabitation: Need for Guidelines in Interpreting Section 166 of the Evidence Act 2011' (2015) *UNIZIK Law Journal* (11) 165-176.

⁵⁰ Supra.

⁵¹ (1998) 7 NWLR (Pt. 559) 661 at 667.

⁵² (2007)1 NWLR (Pt. 1015) 383.

⁵³ (1973) E.C.S.L.R., 67.

⁵⁴ Adesanya S.A., *Laws of Matrimonial Causes*, 1972, p.49 Adesanya S.A,

⁵⁵ *Laws of the federation of Nigeria*, 2004, Cap. M7.

⁵⁶ *Ambe v. Ambe* (1975) N.M.L.R., 28

⁵⁷ Unreported Suit No. ID (33/WD)84 of 2/5/86, Lagos High Court.

⁵⁸ Section 15(2)(b) of the Matrimonial Causes Act, 2004.

breakdown of marriage, if the petitioner is able to prove to the satisfaction of the court that he or she finds it intolerable to live with the respondent.