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The Legal Implication of No-Fault Divorce in the Common Law Jurisdictions of Cameroon

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(Received: 15 December 2025; Accepted: 20 December 2025; Published: 5 January 2026)

Abstract

This paper examines the legal implication of no fault divorce in the common law jurisdictions of Cameroon. The Divorce, Dissolution and Separation Act 2020 which permits married parties to make an application for divorce without apportioning blame is a violation of the right of fair hearing enshrined in the Constitution of Cameroon as well as an aberration of section 358 of the Cameroon Penal Code that prohibits desertion. The methodology used in this study is qualitative and the method adopted is the doctrinal method. The study finds that courts in the common law jurisdictions of Cameroon now apply the Divorce, Dissolution and Separation Act 2020 that does not require fault in granting divorce. The application of the law in the courts of Cameroon is problematic because the Cameroon Penal Code makes marriage a union that is not easily breakable. It is therefore recommended that the Civil Status Registration Ordinance in Cameroon be revised to incorporate new provisions that provide fault as the basis of divorce to ensure compatibility with the Penal Code, which recognises the sanctity of the institution of marriage.

Keywords: divorce; no-fault; common law; jurisdiction; marriage

1. Introduction

Marriage is meant to be a union for life. Lord Penzance James Wilde in the case of *Hyde v. Hyde Woodmansee*[1] said, "I conceive that marriage, as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others." Nevertheless, marriage is not always a bed of roses. Couples are bound to have problems. Some of the problems are mere distraction in the marriage and can be contained, others are so serious that they destroy the bond between husband and wife, and in this case reconciliation becomes impossible. Divorce therefore becomes the only solution.

Before Western civilization was influenced by Christianity, divorce was easily accessible and some-

[1](1866) L.R. IP D 130

times did not require government involvement [2]. This was the case in Ancient Rome where divorce was not considered a matter worthy of government intervention. Roman law allowed couples to divorce by simply declaring that their marriage had ended; no specific grounds were necessary.

Marriage was considered a contract that cannot be broken until the 18th century [3]. Divorce was actionable in many Western cultures either for a specific ground, such as homosexuality (in Germanic culture), or by mutual consent. In Germany, people accepted unilateral divorce, that is, divorce instigated by only one partner. In England, marriage was regarded as a simple contract that could be dissolved by one or both partners at any time. There was a long tradition of divorce in pre-Christian England [4].

In the 19th century, property laws gave women greater control over their marriages and as states defined the grounds for divorce, divorce laws grew as well [5]. In England, Section 1(1) of the Matrimonial Causes Act 1973 provides: "…. a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably." It follows from this provision that divorce is a legal option available to husband and wife. The Civil Status Registration Ordinance of Cameroon 1981, section 77 also states that a marriage can come to an end by the death of either party or legally pronounced divorce.

Towards the end of the 20th century, many legal reforms took place in Europe at the national level that permitted divorce under mutual consent and "no-fault" grounds or even unilaterally [6]. The question raised was whether these reforms geared in making divorce easier were at least partially responsible for the widespread increase in divorce rates.

The Philippines is the only country in the world, aside from the Vatican City, where divorce is not legal [7]. Although annulment and declaration of nullity of marriage are available to terminate some marriages in the country, they have many shortcomings, one of which is their high economic cost. In the Philippines, divorce carries a lot of social stigma in addition to legal and financial restrictions. This is especially true for women who are expected to maintain their marriages [8]. Notwithstanding the impediments affecting the majority of Filipinos from terminating unsatisfactory marriages, evidence still points to a growing number of Filipinos who have had their marriage dissolved or sought to have their marriage dissolved [9].

2. FROM FAULT TO NO FAULT DIVORCE

2.1 Fault Divorce

Divorce based on fault is a regime provided in the Matrimonial Causes Act 1973 (MCA). The MCA 1973 is applicable in the common law jurisdictions of Cameroon by virtue of section 15 of the Southern Cameroon High Court Law 1955 (SCHCL). It provides:

[2]S., Cain, Marital Breakdown and Divorce: An Historical Perspective, Unpublished Masters Thesis, University of Michigan-Flint, 1996, available at https:// deepblue.lib. umich. edu /bitstream/ handle/2027. 42/117994 /Cain.pdf? sequence=1isAllowed=y, visited,22/09/2023,p.5.

[3]ibid

[4]ibid

[5]M., Owens, "Divorce and Family Life in Nineteenth-Century Vanderburgh", Grand Valley Journal of History, 2019, Vol. 7, Iss. 1, Art. 4, p.8.

[6]L., González and K., Viitanen, The Effect of Divorce Laws on Divorce Rates in Europe Discussion Paper Series, Institute for the Study of Labor March 2006, p.1.

[7]B., Abalos, "Divorce and Separation in the Philippines: Trends and Correlates", Demographic Research, A Peer Review, Open-access Journal of Population Sciences, 2017, Vol.36, pp. 1548-1516:1515.

[8]ibid

[9]ibid

> The jurisdiction of the high court in probate, divorce and Matrimonial Causes and proceedings may, subject to the provisions of this Law and in particular subject to section 27 and to the rules of court, be exercised by the court in conformity with the Law and practice for the time being in force in England

Given that the MCA is applicable in divorce in England, it therefore applies in the High Courts in English speaking Cameroon from the wordings of section 15 of the SCHCL 1955. Section 1(1) of the Matrimonial Causes Act 1973 provides: "Subject to section 3 below, a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably." For the court to grant divorce, the petitioner has to prove that the marriage has broken down irretrievably. This is the fault based regime of divorce.

There are five evidence of irretrievable breakdown of marriage listed in section 1(2) of the MCA 1973. First, Section 1(2)(a) of the MCA 1973 provides that the court shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of the fact that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent. There are two elements to be established here, first, the respondent's adultery and the fact that the petitioner finds it intolerable to live with the respondent. These elements are difficult to prove. Adultery for example could be difficult to prove if one is relying on the evidence of eyewitnesses.

Second, section (2) (b) of the Matrimonial Causes Act 1973 is another evidence for irretrievable breakdown of marriage which is to the effect that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. Just like section 1(2)(a), two elements have to be proven which are the respondent's behaviour and the fact that the petitioner cannot reasonably be expected to live with him or her. This proof of divorce is also difficult to establish. In *Mangus P.M Mokeba v. Gloadys* E. Martins,[10] the judge said: "... the marriage cannot be dissolved unless I am satisfied that one or the other of the parties has behaved in such a way that he or she cannot reasonably be expected to live with the other. That is a question of fact ...".

In *Richards v. Richards*,[11] the decree was not granted because the behaviour and the illness were less severe. In that case, the petitioner-wife's only substantial complaint was that the husband, who was ill and as a result had become moody and taciturn, suffered from insomnia and as a result disturbed her at night. She alleged that on one occasion he had lost his temper and struck her on the head four or five times.

Again, pursuant to section 1(2)(c) of the Matrimonial Causes Act 1973, the petitioner can also establish irretrievable breakdown of the marriage by proving that the respondent 'has deserted the petitioner for a continuous period of at least two years preceding the presentation of the petition.' Another fact which can prove irretrievable breakdown of marriage is that the parties have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to a decree being granted.[12] After establishing the period of living apart, the respondent must positively consent to the grant of a decree.

Another fact upon which the petitioner may rely to prove irretrievable breakdown of the marriage is enshrined in section 1(2)(e) of the Matrimonial Causes Act 1973 and is to the effect that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition.

The fault based divorce enshrined in section 1(2) lost its popularity after the Supreme Court's recent

[10]Suit No HCSW/9/74 (Unreported).
[11](1972) 3 All ER 695.
[12]Section 1 (2) (d) of the Matrimonial Causes Act 1973

decision in *Owens v Owens.*[13] The case saw an uncharacteristic reluctance by judges to apply the law. Although it was accepted in this case that the marriage between Mr and Mrs Owen had indeed broken down irretrievably, Mrs Owen's petition for divorce was rejected on the basis that her allegations of unreasonable behaviour were "flimsy at best".[14] Lady Justice Hallett concurred that the court could not "overturn a decision of a trial judge who has applied the law correctly… simply on the basis we dislike the consequences",[15] but made it clear that she had reached this decision. There was therefore a campaign as a result of this case for a no fault bases of divorce to replace the five elements of irretrievable breakdown of marriage.

The fault divorce is not expeditious in nature. Too much time is spent to adduce evidence and counter-evidence, or to prove any of the 'five facts'. Several adjournments characterised the fault based divorce given the existence of the contentious divorce proceedings. Ekundayo[16] echoes the same view. He notes that no fault divorce "saves the time of litigation in terms of affidavit and evidences thus save time of courts. There is reduction in the number of court appearances".

2.2 No Fault Divorce

No fault divorce came as a result of the outcry of lawyers and judges about the fault-based system. They argued in favour of divorce noting that it is a reflection of marital failure and it emanates from incompatibility and irreconcilable differences within couples.[17] One reason for adopting no fault divorce was to reduce the number of divorces by desertion, sometimes termed "poor man's divorce."[18] Lawmakers expected that the no fault law would make divorce simpler and perhaps less expensive.[19]

The foolproof evidence of irretrievable breakdown of marriage enshrined in the Matrimonial Causes Act 1973 has been replaced with no fault bases of divorce in the Divorce, Dissolution and Separation Act 2020. Replacing section 1 of the MCA 1973, the 2020 Act provides:

> (1)Subject to section 3, either or both parties to a marriage may apply to the court for an order (a "divorce order") which dissolves the marriage on the ground that the marriage has broken down irretrievably.(2) An application under subsection (1) must be accompanied by a statement by the applicant or applicants that the marriage has broken down irretrievably.(3) The court dealing with an application under subsection (1) must—(a)take the statement to be conclusive evidence that the marriage has broken down irretrievably, and (b) make a divorce order. (3)The court dealing with an application under subsection (1) must—(a) take the statement to be conclusive evidence that the marriage has broken down irretrievably, and (b) make a divorce order. (4) A divorce order—(a) is, in the first instance, a conditional order, and(b)may not be made final before the end of the period of 6 weeks from the making of the conditional order.

The above provision has amended the Matrimonial Causes Act 1973 in the following ways: changed the language from petition for divorce to application for divorce; removing the grounds to prove irretrievable breakdown of marriage replacing this with a simple requirement to provide a statement of irretrievable breakdown of the marriage. It introduces a new minimum overall timeframe

[13] *Owens v. Owens* [2018] UKSC 41, [2018] 2 FLR 1067.

[14] Hannah Greene, 'The riddle of *Owens v Owens*' [2017] Fam Law 476, 477.

[15] *Owens v. Owens* [2017] EWCA Civ 182, [2017] 4 WLR 74, 99.

[16] O., Ekundayo, "Ending Divorce without Bitterness: Making a Case for Only No-Fault Divorce under the Nigerian Matrimonial Law", *International Journal of Humanities and Social Science*, 2021, Vol. 11.No. 6, p.90.

[17] N., Swisher, "Marriage and Some Troubling Issues With No-Fault Divorce", *Regent University Law Review*, Vol.17, 2005, pp.244-259:245.

[18] H., Alan *et al.*, "No Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary", *Nebraska Law Review*, 1978, Vol.58(1), pp.1-99:15.

[19] ibid

of six months (26 weeks) made up of a 'minimum period' of 20 weeks in divorce and dissolution proceedings between the start of proceedings (when the court issues the application) and when the applicant(s) may apply for a conditional order and the current minimum timeframe of 6 weeks between the conditional order and when the order can be made final.[20]

The Divorce, Dissolution and Separation Act 2020 has been applied in the courts in English speaking Cameroon. In *Moukoube Philomina Manga v. Raphael Enyi Ubom*,[21] the High Court of Meme in considering 'an application for divorce' noted:

> For a court of law to pronounce a decree of divorce; the Applicant is no longer bound to establish any of the grounds provided for under sections 1(2) a,b,c,d and e of the Matrimonial Causes Act 1973. The conditions that the applicant must fulfill are that: his application must be accompanied by a statement that the marriage has broken down irretrievably and he must confirm to the court that he wishes the application to continue (see section 1(20) and (3) of the English Divorce Dissolution and Separation Act 2020. Once these conditions are fulfilled the court must consider the statement made by the applicant as conclusive evidence that the marriage has broken down irretrievably and make a divorce order.

The Court accordingly declared that the marriage had broken down irretrievably and pronounced divorce.[22] In *Akwe Loreta v. Angwei Jackson Abel*,[23] the Applicant made an application for the Court to a.) dissolve their marriage, b.) grant a Decree Nisi in his favour and c.) adjudge the Respondent the party responsible for the irretrievable breakdown of the Marriage. The court granted the first and second prayer of the Applicant but rejected the third prayer noting that: "with the coming into force of the Divorce, Dissolution and Separation Act 2020, the grant of Divorce is no longer fault based".

The Court also applied the no fault divorce enshrined in the Divorce, Dissolution and Separation Act 2020 in the case of *Moukoube Philomina Manga (applicant) v. Raphael Enyi Ubom (respondent)*.[24] In this case, the applicant, Moukoube Philomina Manga seised the High Court in Meme division of the south west region, praying the court to grant a decree of divorce based on the fact that her marriage to the respondent had broken down irretrievably.

Justice Ngajong Collins Chung stated that for a court of Law to pronounce a decree of divorce, the Applicant is no longer bound to establish any of the grounds provided for under Articles 1(2) a, b, c, d and e. of the Matrimonial Causes Act 1973. The conditions that the applicant must fulfill are that: his application must be accompanied by a statement that the marriage has broken down irretrievably and he must confirm to the court that he wishes the application to continue.[25] Once these conditions are fulfilled the court must consider the statement made by the applicant as conclusive evidence that the marriage has broken down irretrievably and make a divorce order. Having being satisfied that the applicant has met the requirements provided for in the English Divorce; Dissolution and Separation Act 2020 for a conditional order of divorce, the Court held that the marriage had broken down irretrievably and made a Conditional Order of divorce.

3. LEGAL IMPLICATION

[20] Information Pack Divorce, Dissolution and Separation Act 2020 6th April 2022, available at https://resolution.org.uk/wp-content/uploads/2022/02/Information-Pack-Divorce-Dissolution-and-Separation-Act-2020.pdf, visited,29/09/2023.

[21] Suit N0.HCK/70mc/2022,Unreported.

[22] ibid

[23] Suit No.HCF/113/MC/2022.

[24] Suit No. HCK/70 ^{MC}/2022.

[25] See article 1(20 and (3) of the English Divorce Dissolution and Separation Act 2020.

3.1 Desertion

The no-fault-based divorce instituted in The Divorce, Dissolution and Separation Act 2020 is an aberration of section 358 of the Cameroon Penal Code. It stipulates that:

> Any spouse or parent who without just cause evades whether by desertion of the family home or otherwise however, the whole or part of his/her moral or material obligations towards his/her spouse or children shall be punished with imprisonment for three months to one year or with a fine from 5.000FCFA to 500.000FCFA or with both such imprisonment and fine. Where a spouse alone is deserted, no prosecution may commence without his/her complaint.

The above provision has two limbs, first, it makes desertion a crime in Cameroon and second, it prohibits evasion of marital and parental duties. These elements are now discussed in turn. The Cameroon Penal Code has not defined desertion. Decided cases have attempted a definition or better still description. Thus in *Frowd v. Frowd*,[26] it was said: "Desertion means the cessation of cohabitation brought about by the act or fault of either party." In *Jackson v. Jackson*[27] Sir Henry Duke said "If there is abandonment by one of the spouses of the other, that is desertion. If one of the spouses causes the other to live separate and apart that is desertion." Desertion could nevertheless be said to be the unjustifiable withdrawal from cohabitation without the consent of the other spouse and with the intention of remaining separated permanently.[28] Four major elements could therefore be identified of desertion, namely: the cessation of cohabitation,[29] the respondent's intention to desert the petitioner, the absence of consent by the petitioner[30] and the absence of any good cause for withdrawing from cohabitation or remaining apart on the part of the respondent.[31]

Intention is an important element in desertion. In *Bowron v. Bozoron*,[32] after reviewing a good number of cases on desertion, Pollock, M.R., noted that a purpose and intention must be attached to the separation before desertion is proved.

As already pointed out desertion is one of the foolproof evidence of irretrievable breakdown of marriage. Going by section 1(2)(c) of the Matrimonial Causes Act 1973, the petitioner can establish irretrievable breakdown of the marriage by proving that the respondent 'has deserted the petitioner for a continuous period of at least two years preceding the presentation of the petition.' It follows from the above that a party relying on desertion may not be granted divorce, if it has not been proven. In *Nyancho v. Nyancho*,[33] the appellant was found not to be in desertion because there was evidence to prove that they started living apart only because he was transferred to Buea and had never formed the intention to desert.

Following section 358 of the Penal Code, it means that spouses are bound to be in marriage as long

[26] [1924],p.24.

[27] [1904]p.178.

[28] See *McCurry* v. *McCurry*, 126 Conn. 175, 178, 10 Atl. (2d) 365.

[29] Here, desertion involves the departure from a state of affairs and not necessarily from a place. In *Walker v. Walker*, (1952) 2 All ER 138, the wife refused to cook for her husband, slept in a separate bedroom, which she kept locked and also did not perform other household duties for the husband. She communicated with him by notes. Although he sometimes used the same kitchen as a matter of necessity, she was found to have deserted him.

[30] Where one spouse consents to the other leaving for whatever purpose, there can be no desertion. The fact however that one spouse is happy to see the other go is not the same thing as consent. As Buckley L.J. said in *Harriman v. Harriman* (1909) 123 at 148, "Desertion does not necessarily involve that the wife desires her husband to remain with her. She may be thankful that he has gone, but he may nevertheless have deserted her."

[31] A spouse will not be guilty of desertion if he or she has a good reason for leaving or remaining separated from the other. This will normally include behaviour within the meaning of section 1(2) (b) such that the petitioner cannot reasonably be expected to live with the respondent. In *Tona v. Tona*, Suit N° HCSW/102mc/84,Unreported) the respondent-wife had left the matrimonial home because of the violent conduct of the petitioner. The court held that she was not in desertion.

[32] [I925] p.193.

[33] (Appeal N° 29, Judgment N° 67/cc 73 Supreme Court Yaounde).

as the going is well. Unless justifiable reasons exist, no party has the liberty to walk away from the marriage. By implication, the Penal Code still upholds the fault based system of divorce that has been abolished in the Divorce, Dissolution Act 2020. This is conflict of laws which may pose a problem of interpretation in the future. What happens if a wife for example, institutes a criminal action for desertion against the former husband who has obtained a decree of divorce on a no fault bases and without her consent. Will the court dismiss the application as unfounded given that divorce has been granted or convict the husband? Either ways, there are implications. If the husband is convicted, it means the fault based regime triumphed over the Divorce and Dissolution Act 2020. On the other hand if the application is dismissed because of the decree of divorce, it implies that the no fault bases of divorce introduced in the Divorce and Dissolution Act 2020 is a legal means to evade a crime in Cameroon or better still a means of legitimizing a crime. Such a decision will be an error in law. It implies that receive English law takes precedence over legislation in Cameroon. This cannot be true if one considers section 11 of the Southern Cameroon High Court Law 1955. It states:

> Subject to the provisions of any written Law and in particular of this section and of sections 10, 15, and 22 of this Law, a). The common Law, b). The doctrines of equity, and c). The statutes of general application which were in force in England on the 1st day of January 1900, shall in so far as they relate to any matter with respect to which the legislature of the Southern Cameroons, is for the time being competent to make Laws, be in force within the jurisdiction of the court.

It can be inferred from this provision that the High court is not bound to apply statutes of general application in England pertaining to an issue that has been covered by a legislation in Cameroon. The Penal Code is not specifically a legislation on family law in Cameroon but it contains provisions on family matters. Desertion is one of such provisions. It will not be erroneous to maintain that the Divorce, Dissolution and Separation Act 2020 is incompatible with the Penal Code and as such, it cannot be the applicable law.

The Penal Code takes precedence over any received foreign law because of its national character. It is the researcher's view that the initiation of a divorce application by one spouse without the other spouse's consent and not based on fault could therefore be interpreted as an act of desertion if the divorce is granted.

3.2 Fair Hearing

The right to fair hearing is as old as human rights itself. It can be traced to the event that occurred in the Garden of Eden between Adam, Eve and God.[34] This incident is widely recognised as the origin of human rights. The right to fair hearing is enshrined in human rights conventions such as the International Covenant on Civil and Political Rights 1966. Article 14(1) states that: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."[35]

It can be deciphered from the above provision that the right to fair hearing is applicable to criminal charges against a person as well as any other suit in law which could be civil, commercial, labour, family or succession. In the Nigerian case of *Rear Admiral Francis Echive Agbiti v. the Nigeria Navy*,[36]

[34] Holy Bible, Genesis chapter 2 verse 15-17.

[35] Article 7 of the African Charter on Human and Peoples Rights also provides for the right to fair hearing. It states: Article 7 of the Charter relates directly to the Right to Fair Trial. It stipulates that: 1. Every individual shall have the right to have his cause heard. This comprises: (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) The right to be presumed innocent until proven guilty by a competent tribunal; (c) The right to defence, including the right to be defended by counsel of his choice; (d) The right to be tried within a reasonable time by an impartial court of tribunal.

[36] (2011) 4 NWLR (pt. 1236) 175.

Lord, Hon. Justice Adekeye, JSC asserts that "fair hearing requires the observation of the twin pillars of natural justice namely; (a) Audi alteram partem, that is, hear the other side (b) Nemo judex in causa sua, that is, no one should be a judge in his own cause".The right to fair hearing is enshrined in the Preamble of the Cameroon Constitution. It states that "the law shall ensure the right of every person to a fair hearing before the courts". The Constitution does not specifically limit the application of this right in criminal cases. It can therefore be interpreted to apply both in criminal and civil matters. Rozakis[37] made it clear that the right to a fair trial refers both to criminal and civil cases.

The no fault divorce introduced in the Divorce, Dissolution, and Separation Act 2020 is a clear violation of the right to fair hearing enshrined in the Constitution of Cameroon and international conventions ratified by Cameroon. This is so because in no-fault divorce proceedings, and judging from the cases that have been heard in the South West Region of Cameroon so far,[38] it can be stated that applications are generally undisputed and matters will not involve any consideration by the court of the reasons for the breakdown of the marriage. In fact, an application for divorce cannot be challenged even if the other party does not want a divorce. Even when an application is disputed, the grounds for opposition will be limited to legal technicalities such as the court's jurisdiction to entertain the matter or the existence (validity) of the marriage in the first place.

4. Conclusion and the Way Forward

It is understood that the Divorce, Dissolution and Separation Act 2020 which permits married parties to make an application for divorce without apportioning blame (no fault divorce) was meant to ensure that a person should not be bound by a union he/she does not longer wants. This conception can fit well in UK because of its culture and not in Africa and particularly Cameroon. In Cameroon, the institution of marriage is highly valued reason why the Cameroon Penal Code makes desertion without justifiable cause an offense. The regime for divorce that suits Cameroon is the fault based divorce given that it respects the principle of fair hearing enshrined in the Constitution of Cameroon and the sanctity of the institution of marriage. It is therefore recommended that the Civil Status Registration Ordinance 1981 should consider an amendment to include provisions on fault bases of divorce. This will help to maintain the integrity and sanctity of the institution of marriage. Also, such a legislative move would be in accordance with the Penal Code.

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[37] C., Rozakis, "The Right to a Fair Trial in Civil Cases", *Judicial Studies Institute Journal*, 2004, Vol.4(2), p.96.

[38] See for example, the cases of *Akwe Loreta v. Angwe Jackson Abe*i, Suit No. HCF/173/MC/2022 and *Moukoube Philomena Manga v. Raphael Enyi Ubom*, Suit No. HCK/70/MC/22.

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