

IN THE SUPREME COURT
OF THE TERRITORY OF
PAPUA AND NEW GUINEA

No. H.P. 15 of 1958

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THE QUEEN

ex parte AKO-AKO of Maipa

against

SAMA KAVITA of Nemberaka

and

BOSIAM KANAUI of Manus

REASONS FOR JUDGMENT

Delivered by The Chief Justice on 9th September, 1958

If I thought that SAMA and BOSIAM had the same legal right as the father, AKO, I would give them custody of the child, because they have without doubt devoted themselves to the child's welfare since early infancy, and have a genuine affection for the child which amounts to a very strong emotional bond. I expect that it will cause considerable distress to the respondents to be parted from the child, who appears to be equally attached to them. SAMA and BOSIAM must realize that I must obey the law as well as they, and any order I make must be according to law.

I understand the legal position to be that the natural father has a more immediate legal right to custody of his child than a stranger. This may be expressed in various ways, but the basis of the rule is that according to the fundamental structure of our society the family unit is based on blood relationships. The law of property inheritance is based on this as well as the laws relating to domestic relationships. The law imposes obligations upon natural parents which cannot apply to foster parents who are only united with the children by an emotional bond. It is therefore incontrovertible that according to the standards of our society a child has greater security and protection and greater social advantages when in the care of his natural parents. The law recognizes this as "natural" in origin and not merely "legal", meaning that it was

established in our society before our present legal system.

SAMA and BOSIAM are prepared to see that the child if brought up by them will share in their own native clan property, but I am satisfied that there are no native customs which would afford the child any real security. If all went well and everyone agreed, then there would be no difficulty but in the event of famine or family disputes, the child would undoubtedly be in a position inferior to that of a natural child. There appears to be no way in which rights could be conferred, since questions of land disposition and tenure whilst following a pattern, are undoubtedly subject to decisions by family groups and their influential members. and the child cannot resort to any tribunal to enforce specific rights, because no such rights could be conferred by the parents.

On my view of the legal position I must consider whether AKO has abandoned the child in the sense indicated in the Infants Ordinance or has otherwise shown himself to be unfit to have the custody of the child. He is willing and anxious to have this responsibility.

I have carefully considered the evidence and found nothing that disentitles AKO to an order. His conduct may be criticised, but mainly on the ground that he has been somewhat selfish in his dealings with SAMA and BOSIAM, but this was intended I am sure to benefit the child. His employment at Kairuku left him in a position in which he could not give the children proper attention. He recognized this, but left it to others to look after the children. If he proposed to continue in this way I would be prepared to hold that he was not carrying out his proper responsibilities and that the children's welfare would indicate that SAMA and BOSIAM should be entrusted with the child.

However AKO is now prepared to go to his village and place the children's welfare uppermost. I am not prepared to

place complete reliance upon him, because I think that he has shown considerable irresponsibility except when brought back to his senses by the sound legal advice he has apparently received. Without going into details his marriage proposals at different stages of the hearing show an appalling lack of self-discipline as well as serious social disadvantages which AKO must overcome if he is to bring up his children properly.

I want AKO to understand clearly that if I committed custody of the child to SAMA and BOSIAM I would do so permanently since the child would then have the best chances in life if brought up consistently as a member of a native community without changing from one group to another. I am prepared to give AKO a chance to prove that he really means to carry out his promise, so long as he does his duty faithfully I will allow him to bring up the child, but if he fails he can expect the child to be taken away from him.

I propose to make the child a ward of the Court, such order to operate for a period of five (5) years unless by subsequent direction the time is extended.

As a ward of the Court the child will be allowed into the care of AKO's family provided they all give the following undertakings :-

- (a) To abide by all directions of the Court in relation to the care, education and upbringing of the child.
- (b) To see that the child lives on proper premises and that her usual place of residence is notified to the Registrar from time to time.
- (c) That the child shall be under the care and control of MALANI and BAFIFI until AKO is established in a proper house with a suitable wife capable of and willing to look after the child whereupon the responsibility for the care and control of the child shall be that of AKO in the first place, but MALANI and BAFIFI shall at all time satisfy themselves that

in every respect the child is receiving proper care and attention.

- (d) Should any breach of these conditions occur, or if any need arises to seek the directions of the Court each of them, the said AKO, MALANI and BAFIFI, shall forthwith send notice and full particulars to the Registrar.
- (e) That until permission to the contrary is given the child shall live at Maipa village and be sent to the nearest Administration school.

The child is to be handed over to BAFIFI and MALANI at the District Office on a date and at a time to be nominated by SAMA, not more than five (5) days distant. Upon handing over the child AKO is to see that SAMA is paid the £25 = held by the District Office on his behalf. I cannot say on the evidence what sum ought to be paid to SAMA to reimburse him for expenses. If the parties cannot agree I express the view that a further £15 should be paid bringing the total to £40.

I reserve general liberty to apply for any further or other order or direction.

Chief Justice