

'Afa v Tali & Sika

Supreme Court
Webster J
Divorce case No. 57/1990

9, 18 October 1990

- 10 *Divorce - damages for adultery - principles for award and assessment*
Damages - adultery - principles for award and assessment

The petitioner obtained a degree of divorce on the grounds of his wife's adultery with the co-respondent and claimed \$1,000, the maximum allowable under the Divorce Act (Cap 29) as damages against the co-respondent.

HELD

Dismissing the petitioner's claim for damages :

- 20 1. Damages for adultery should be awarded only if the co-respondent has seduced or enticed the respondent away from the petitioner, which had not been proved on a balance of probabilities:
2. Damages for adultery should be compensation to a petitioner for the loss of his wife, and not to punish the co-respondent or make an example of him: and on this basis, if damages were awarded they would have been only \$250 in view of the facts that the wife had previously been unfaithful and was not a good mother to the children.

- 30 The petitioner in person
Counsel for the respondent and co-respondent : Mr S. Vaipulu

Judgment

In this Petition the Petitioner Paula 'Afa sought a divorce on the grounds of the adultery of the Respondent, his wife Pilisita Tali, with the Co-Respondent Tevita Kapukava Sika. This was admitted by the Respondent and not contested by the Co-Respondent, who was present in Court, and decree nisi was granted on 9th October.

- 40 Custody of the children by the Petitioner was continued in terms of a previous court order, with reasonable access to the Respondent.

The Petitioner also claimed damages of \$1,000, the maximum amount permitted by law, from the Co-Respondent for the adultery. He is entitled to do so under section 12(1) of the Divorce Act, the maximum amount was amended as recently as 1988, indicating that Parliament intended the entitlement to make such claims to continue.

The Petitioner in evidence made it clear that his claim was partly for the loss of the Respondent as a wife and companion, and partly for the loss of a mother to their twin daughters now aged 3.

50 Although permitted by law, such claims for damages are most uncommon and very infrequent in Tonga. I believe there is a general feeling that they are inappropriate because the adultery may be as much the fault of the erring Respondent as the Co-Respondent; and because the adultery is merely a symptom - and not the cause - of the existing breakdown in the marriage.

In law the basis behind the claim is that because of the Co-Respondent's adultery with the Respondent the Petitioner has suffered the loss of his wife. Damages will be based on -

60 (a) the actual value of the wife (in terms of money and companionship); and

(b) compensation for injury to feelings, honour and family life.

Damages are measured as compensation and not to punish or make an example of the Co-Respondent. See generally *Halsbury's Laws (2nd Ed) - Husband and Wife para 1102 and Mackenzie's Practice in Divorce (6th Ed) pages 221-223.*

But damages are not awarded automatically on proof of adultery and whether to make an award or not, and the amount of any award, is in the discretion of the court. Damages are not normally awarded now unless there is evidence that the Co-Respondent's conduct brought about the separation.

70 If an award of damages is made, factors in assessing the amount are the wife's value as a housekeeper and mother and her loyalty and affection for the husband; the husband's character and treatment of the wife and whether he drove her to seek the company of other men; the husband's being left with the children; and the Co-Respondent's knowledge that the Respondent was married and had children and whether he resisted the Respondent's advances.

Evidence was given only by the Petitioner and Respondent, and not by the Co-Respondent. As might be expected, there was considerable conflict in evidence between the two parties. Much of the evidence had no real relevance to the claim.

80 The Petitioner claimed that the Co-Respondent took the Respondent away. The Respondent denied this and said she had left of her own accord and gone to the Co-Respondent because the Petitioner had tried to carry on with her sister. The Petitioner in turn denied this.

However both agreed on 3 matters -

- (1) the Respondent had previously committed adultery with another man, indicating an inclination to be unfaithful, whatever the Co-Respondent may have done.
- (2) the Respondent went off to the Co-Respondent then was brought back by the Co-Respondent to the Petitioner for a few weeks, then left finally. This reduces if not eliminates the suggestion of enticement or seduction by the Co-Respondent.
- 90 (3) the marriage had broken down by the end of 1998. The Petitioner said this occurred when the Respondent first went to the Co-Respondent, but the Respondent said it was shortly before that when the Petitioner was involved with her sister.

It was clear from other evidence that the Co-Respondent, who was related to the Petitioner, must have known that the Respondent was married and had children.

100 In light of the evidence as a whole, and particularly the matters where there was agreement, I cannot find it proved on the balance of probabilities that the Co-Respondent seduced or enticed away the Respondent or that the Co-Respondent's conduct brought about the separation.

The parties were married in 1981 and it is likely that the problem was what is commonly known as the 7-year itch. In other words after about 7 years of marriage a couple may get tired of each other through no particular fault of either and may seek other partners. It was also clear that neither wanted to reconcile with the other now.

110 I also believe that the Respondent was very likely to have had sexual relations with another man by her own wish without being seduced. She admitted previous adultery with one other man and her loyalty and affection for her husband were obviously not high.

Therefore, I cannot award any damages to the Petitioner.

If I am wrong in this and I should have awarded damages, I would not consider that this was a case where the maximum amount of \$1000 should be awarded.

The Petitioner was often away from home working 5 days a week and may be drove the Respondent to seek the company of other men. He appeared to be obstinate in character and may not have been an easy husband.

120 Nor am I convinced that the Respondent was as ideal a wife as made out by the Petitioner. From what the Court heard previously in the dispute over the custody of the children, the Respondent could hardly be said to be a good mother to her young twin daughters: she was unreliable, left them on their own in Nuku'alofa, and did not use the access to them provided to her by the court.

The only real factor for damages was the value of the Respondent in the day to day care of the children and if I had awarded damages – and I emphasise I am not doing so – I would have awarded \$250.

For all these reasons I dismiss the Petitioner's claim for damages.