

10 **Lamatau v Mau & Sole**

Supreme Court, Neiafu

Webster J

Divorce No.29/1991

18,19,23 April, 1991

*Divorce - damages for adultery - compensation not punishment*

20 *Damages - adultery - principles for assessment*

The Petitioner was granted a divorce on the grounds of her husband's adultery with the co-respondent. Damages of \$1000 were claimed from the co-respondent.

Held, allowing an award of \$300:

- 1 Damages are awarded as compensation (for loss of husband and injury to feeling honour and family life) and not as punishment;
- 30 2 Damages are not normally awarded unless co-respondent's conduct brought about the separation
3. Co-respondent here played a major part in the separation and therefore \$300.00 was an appropriate award having regard also to the maintenance to be paid by respondent to petitioner.

Cases considered: 'Afa v Tali & Sifa [1990] Tonga L.R. 185

Counsel for petitioner:

Mr Vaipulu

40 Counsel for respondent and co-respondent:

Mr Tu'ipulotu

### Judgment

In this Petition the Petitioner Kolopa Lamatau sought a divorce on the grounds of the adultery of her husband, the Respondent Sete Mau, with the Co-Respondent Seini Sole. This was admitted by the Respondent and the Co-Respondent and decree nisi of divorce was granted on 18th April.

In the course of the hearing it was also agreed between the parties that Sete should pay maintenance to Kolopa of \$600 per year payable in monthly instalments of \$50. I therefore award this sum to Kolopa for maintenance under section 15B of the Divorce Act, to be paid by monthly instalments of \$50 on the 1st day of each month, starting on 1st May, 1991. Under section 15B(3) the order will cease if Kolopa remarries.

Kolopa also claimed damages of \$1000 from Seini for the adultery. The law on claims for damages for adultery is set out in a judgment of this Court in 'Afa v Tali and Sifa [1990] Tonga LR 185 and I shall not repeat it. The basis of the claim has to be that the Petitioner has lost her husband: the damages will be awarded as compensation and not as punishment and are based on the actual value of the husband in terms of money and companionship; and on compensation for the injury to the Petitioner's feelings, honour and family life. The amount of any award is in the discretion of the Court and damages are not now normally awarded unless there is evidence that the Co-Respondent's conduct brought about the separation.

In brief Kolopa will be entitled to damages for all that she has lost if the Court is satisfied that Seini has taken away her husband from her. After hearing all the evidence I am satisfied that this is indeed the case and that the Co-Respondent Seini's conduct did bring about the separation of Sete and Kolopa, at least in part.

Because Sete in as adult man and had a free choice in the matter he is also to blame, but even looking at the evidence of him and Seini I believe that Seini had a major part in it, contrary to the normal relationship between men and women in Tonga.

It is very significant that Seini, who is also married without children, separated from her husband only in January 1990. I accept that by September 1990, when all this started, she would be feeling lonely and looking around for a boyfriend, as she herself admitted. It is therefore highly probable that she was the initiator of the adultery.

I also accept that Seini and Sete's trip to Toula with the tape recorder was the start of the affair. Seini actually went and told Kolopa and Litea that it was she who asked Sete to go with her, and she confirmed in cross-examination that it was her, even though she later denied this. While Sete said it was him, he also told the Court she told him to come with her to Toula. There were large parts of Sete's evidence which were clearly unreliable and even Seini admitted that his evidence was not in order: overall they each gave two versions of what happened, indicating they were trying to hide something in their evidence.

Then a week or so later when Kolopa chased Sete away from their home and he went to live at Leni Tui's, Seini came to him with food and blankets and did his washing. Leni gave evidence of this and Seini and Sete admitted it. I accept that Sete by that time was encouraging her, but I believe she took much of the initiative in doing that and so was substantially responsible for the break-up of Kolopa and Sete's marriage.

Kolopa and Sete has been married for 10 years and although they had no children there was no evidence of any serious disharmony before this time. They have 2 foster children who remain with Kolopa but she is not asking any maintenance for them.

Having started the break-up, Seini then kept up her pressure by accepting to be serious friends if Sete would divorce Kolopa. Seini continued by following Sete to Tongatapu and then to Toulā on their return to Vava'u, so making any chance of reconciliation between Kolopa and Sete impossible. As I am doubtful about Sete's evidence I do not accept what he said that he and Kolopa agreed to separate permanently when he went to Tongatapu.

It was accepted in evidence that Sete earned maybe \$100 or \$200 a week from fishing and Sete admitted that Kolopa now has no source of income.

100 In making the award of damages to Kolopa against Seini it is right to take into account the maintenance which I have already awarded her, and also Seini's evidence of her income from weaving of \$60 per month, even if this may be too low an estimate.

I shall therefore award damages of \$300 to Kolopa against Seini. This is less than the \$1000 claimed because the break-up was not entirely Seini's fault and because of the maintenance already awarded, and I believe in all the circumstances it is a fair award to Kolopa for what she has lost. I am fortified in this view when I find that it is the same as actually offered by the Co-Respondent in another case before me.