

Each of the appellants gave evidence. Their account was the same in relation to the killing of the pig. They said they were told by 'Uluvalu to kill the pig and use it to feed the people working for him and that is what they did. The first appellant agreed when asked if he realised it was 'Ofa's pig but never said he knew of that fact before he had killed it and cut it up which he had done on the instructions of 'Uluvalu. The other two appellants told the lower court that they simply followed the instruction of 'Uluvalu and had no knowledge that the pig may not have been his to kill

The magistrate gave a short judgment in which he accepted that the pig had been put in 'Uluvalu's sty and that it was slaughtered, roasted and divided there. He then stated;

"The question being asked today is whether the pig belongs to 'Ofa 'Okusi or Paula Tatafu or 'Uluvalu. The reason it was slaughtered is because the noble told 'Alipate."

His conclusion was:

"This case is for slaughtering 'Ofa's pig, eating it and dividing it. With 'Alipate he has no doubt in telling of the knowledge of the pig. It belongs to 'Ofa. With respect to Katoa and Haloti, they were being told by 'Uluvalu but there is no witness. Therefore I will rule for the plaintiff."

He finally ruled that he would accept the claim only for \$600 and divided that sum equally between the three defendants.

It is clear the magistrate found that the pig did indeed belong to 'Ofa and there was no dispute the defendants had killed it. However that is not sufficient to establish liability. The evidence against the first defendant was that he was only told about the ownership of the pig after he had killed it. The killing had been on the instructions of the noble. The other two clearly had no knowledge of the ownership before they killed it and they also gave evidence that they were instructed to do so by 'Uluvalu. The magistrate appears to have rejected their account because there were no witnesses. That was an extraordinary statement because the two defendants, who are of course witnesses, had given evidence.

The magistrate has decided the case entirely on the basis that the pig was killed and did not belong to the defendants who killed it. He has not addressed his mind to the basis of liability. If there were claim against anyone, it would have been against the person who gave the instruction to these men to kill the pig. On the magistrate's finding of fact, he was the person who was liable and should have been sued. These appellants killed someone else's pig in the genuine belief it belonged to the person who had told them to do it. They were

the innocent agents of the true tortfeasor on the facts as found by the magistrate. The evidence fell far short of establishing any liability in tort against them.

The appeal is allowed and the order quashed.

I should also mention that, had the judgment stood, I would not have been able to accept the final order for damages. The claim was that the pig was worth \$800. There was no evidence of the value except the claim that it was a puaka toho by one witness and a denial of that by one of the defendants. The magistrate decided it was worth \$600. He should have heard evidence of the value and there was none. He has simply plucked a figure from the air. The decision to share the burden equally between the three defendants is also hard to understand in the light of his finding of a greater degree of knowledge and intention in the first defendant than the other two. There may have been a reason. The magistrate has a wide discretion in the distribution of damages but, as with every exercise of a judicial discretion, it must be exercised for good reason and those reasons must be stated.

The order in the court below is quashed. The plaintiff's claim fails. The magistrate had ordered each appellant to pay \$7.00 for the court fee and \$50.00 each for the lawyer's fee. I assume those add up to the total costs and so I order that the plaintiff should pay the same costs to each appellant. If any fees have already been paid, they must also be refunded in addition, as must the damages if already paid.

The plaintiff must also pay the costs of this appeal which I shall fix at \$100.



G. W. W. W.

NUKU'ALOFA: 11 October, 1999.

CHIEF JUSTICE