IN THE SUPREME COURT OF TONGA
CIVIL APPEAL JURISDICTION
NUKU'ALOFA REGISTRY

NO.C.App.1332/98

BETWEEN : SALESI TU'AKALAU - **Appellant;**

AND : 'OFA TU'AKALAU - **Respondent.**

BEFORE THE HON. CHIEF JUSTICE WARD

Hearing: 25 February 1999
Judgment: 25 February 1999

Counsel: Fifita for the appellant
Veikoso for the respondent

JUDGMENT

On 25 February 1999 I allowed this appeal and ordered that the case should be sent back to the magistrates' court for fresh trial by a different magistrate. I said I would give my reasons in writing and I now do so.

The case in the magistrates' court was brought by the respondent wife against her husband and was in the following terms:

"The claim of the plaintiff is for $100.00 for maintenance for the past because you abandoned her without any maintenance but she is your lawful wife and your legitimate son 'Akileo Tu'akalau age 9 from 7 May 1998 and it is like this:

1. Claim maintenance for future to be $30.00 per week to the plaintiff
2. Claim $20.00 per week for maintenance for future of 'Akileo Tu'akalau
3. Request for a decision to the husband to give his wife and their three children a home for them to live in
4. Pay lawyer's fee $200.00 and court fee $21.00
5. This was done in Tongatapu on 7 May 1998 up to this day. ask to make a correction."

The case was heard on 2 September 1999 and both parties were represented. The summons was read to the defendant and his counsel replied; "We do not dispute the claim because we did not pay any maintenance."

The record of the proceedings continues:

"Court; Right, you do accept the claim.
Defence counsel; Your worship, I plead with you that there are grounds for this case to be heard and I ask to call witnesses.
Court; Counsel, it is a pity that you do not understand the court's procedure. It is clear to me that what you are insisting on for your case to proceed are matters which ought to be given in mitigation.
Defence counsel; Sir, I ask that we proceed with this case.
Court; Fine. It is unfortunate you do not understand the court's procedure. However, I'll accept your request in case the defendant has some truth.
Plaintiff's counsel; Sir, let the defence counsel proceed because we will not say anything further because they have already admitted the claim.
Court; Fine, continue."

The defence then called the defendant and the 20 year old son of the parties.

The defendant claimed he did provide maintenance for their four children but had made no note of the amount. He said the reason he abandoned his wife was because "She beats our children a lot and even myself. It reached a point where she damaged our dwelling house and I have escaped with our children for fear for our lives." He confirmed the separation occurred on 7 May 1998. The son confirmed "it was our mother who chased us away".

In his closing address, counsel for the defendant relied on the evidence that maintenance had been provided and that the complainant had chased out the family. He suggested the claim was excessive, he could not repair the house and he had filed for divorce.

Counsel for the complainant declined to say anything as "the defendant does not dispute anything in the claim" – a surprising suggestion after the evidence the court had just heard.

It is worthwhile at this point to pause and consider the position in which the magistrate found himself. At the outset, the defence had admitted a failure to pay any maintenance but it was soon clear this was not a complete answer and there were matters the defence wanted to put before the court. Whether or not it was correct to reprimand counsel for not understanding the court procedure, it would have been prudent for the magistrate at that stage to ascertain just what were the matters the defence hoped to prove. How, without knowing that, could the magistrate decide they were matters of "mitigation"? Counsel for the plaintiff did not know either but he took the safe course of going along with the magistrate and assuming a complete admission. Later, his decision to continue to maintain that stance is more questionable.

By the end of the evidence, the magistrate should have had no doubt that, far from a blanket admission, the defendant and his witness had raised a number of points of fundamental

importance. There was a claim that payment of maintenance had been paid for the children at least. There was a clear claim of constructive desertion by the wife which, if accepted, could deprive the complainant of any maintenance at all. There was a clear suggestion that the house had been damaged by the wife and that her plea to be provided with a home for her and the children was unsupportable because the children had left with the defendant.

Having heard those matters, counsel for the plaintiff would have been wise to ask the court for an opportunity to call evidence in reply on the basis that he had been taken by surprise because the initial comments of defence counsel led him to believe there was nothing he needed to prove.

It appears the magistrate had no doubts either and commenced to deliver his judgment. It was in the following terms:

"Defendant, the points that you have raised ought to have been made in your prayer for mitigation. The filing of the divorce petition is another matter. I do not believe that you are scared of your wife (plaintiff). You abandoned your wife without maintenance and I understand that your children spent times with you both. And that you chased your wife away from your home. As it is I rule that the claim succeeds as follows:
Past maintenance $100.00 + lawyer's fee $80.00 + Court Fee $21.00.
Future maintenance at $20.00 per week commencing today and in default a writ of distress may issue."

It is the duty of a magistrate to conduct proceedings in his court in a manner that is most likely to achieve a just result. Often the rules of procedure can limit the manner in which he can intervene to save a party from the consequences of the way the party conducts his case and this is especially so in civil proceedings where the parties are represented.

In the present case, he may well have been misled by defence counsel's opening words but it was very soon clear that counsel was not offering an unqualified admission of the claim against him. The choice of words was careless and the court is entitled to expect a professional lawyer to state his case unambiguously but, once it was clear that was not the case, the magistrate should have ensured he knew exactly what was the position before he went any further. Instead he chided the lawyer for not knowing the proper procedure and continued without himself seeing the problem confronting him.

Once the evidence had been called, it was very clear that this was not just a dispute over quantum (which I assume is what the magistrate meant when he spoke of mitigation) but a challenge to the claim itself. At that stage he should have adopted a procedure that would allow each side to present its case before he reached his decision.

At the stage when he gave his judgment, the only evidence was the apparently unchallenged account of the defendant and his adult son. In such circumstances, the magistrate has two alternative courses. He may accept the evidence as sufficient proof, on balance, of the facts [illegible] always be remembered that rejection of one contention does not, in itself, prove the opposite. If, for example, on a charge of speeding, the only evidence is a denial by the accused that he was exceeding the limit, the fact the magistrate

disbelieves it does not, in itself, allow the magistrate to find that he was in fact exceeding the limit. Unfortunately that is what the magistrate did in this case.

Having disbelieved the evidence of the defendant and his adult son that they had been chased or scared out of the home by the plaintiff, he concluded the defendant abandoned her and, later in the judgment, that he had chased her away. There was no evidence before him of either.

He then goes further and concludes with a finding of fact about which there was no evidence whatsoever from either side, namely that the children spent time with both parents.

I would add that, whenever a magistrate totally rejects the evidence of a witness when there is no evidence to the contrary, he should always state his reasons.

He then ordered that the defendant pay arrears of maintenance and weekly payments thereafter. He had heard absolutely no evidence of the plaintiff's need or the defendant's ability to pay. He ordered the arrears asked without any explanation of how he arrived at the figure. He gave only two thirds of the sum claimed for the wife and made no mention whatsoever of the claim for the son with no explanation of either. The request for a home for the wife and their three children was likewise apparently ignored. Similarly, the lawyer's fee is reduced from $200.00 to 80.00 without enquiry or reasons.

The magistrate has a wide discretion in such applications but, whenever there is such a power it must be exercised judicially. That means the manner in which it is exercised must be for good reason based on evidence and stated in the decision. It is an abuse of the magistrate's position to exercise his discretion capriciously or in a cavalier fashion by apparently simply plucking figures from the air. It has long been the rule that, where a judge has exercised his discretion on the basis of material before him, an appeal court will not interfere even if it disagrees with his conclusion (see, for example, Donald Campbell and Co v Pollak (1927) AC 732) but where, as here, there is no evidential basis for the decisions made, it will allow an appeal.

The only way to deal with so many and fundamental faults is to quash the decision and order that the case be remitted to the magistrates' court with an order that it be heard de novo by a different magistrate. Each party shall pay its own costs in the matter so far whatever the final outcome of the case.

SUPREME COURT TONGA

Gordon Ward

NUKU'ALOFA, 4th March, 1999. CHIEF JUSTICE