

**IN THE MAGISTRATE'S COURT OF  
THE REPUBLIC OF VANUATU  
HELD AT PORT VILA**

Civil case NO. 136 of 1996

(Matrimonial Jurisdiction)

**BETWEEN : ELSIE RIHAI**

Petitioner

**AND : JOHN RIHAI**

Respondent

**AND : LINDA TEVI**

Co-Respondent.

**Coram : Magistrate BRUCE KALOTITI KALOTRIP**

**Mrs Merrin Mason of counsel for the Petitioner**

**Mr Silas Hakwa of counsel for the Respondent**

**IN THE MATTER OF A PETITION OF Mrs ELSIE RIHAI FOR A DECREE OF  
DISSOLUTION OF MARRIAGE AND INCLUDED IN THAT SAID PETITION  
A CLAIM FOR THE CUSTODY AND ACCESS CHILD MAINTENANCE ;  
SPOUSAL MAINTENANCE AND PROPERTY SETTLEMENT AND  
DAMAGES AGAINST THE CO-RESPONDENT.**

(MATRIMONIAL CAUSES ACT CAP 192)

**Reason for Judgment**

The application for Mrs Elsie Rihai (the Petitioner) on 22nd May 1996 follows as set out summarily and paraphrased as follows :

1. The Petitioner and the Respondent were lawfully married on the 15th July 1990 at Pango Village - South Efate.
2. During the said marriage the legitimate children were born namely :
  - (i) Exlee Rihai born 20 March 1983
  - (ii) Tania Rihai born 9 September 1986
  - (iii) Olive Rihai born 9 November 1989
  - (iv) John (Jnr) Rihai born 18 August 1990
3. An appeal application to the Supreme Court of Vanuatu is made against the Magistrate's Court decision of July 1995
4. The Respondent has committed adultery with the Co-Respondent since the marriage celebration.
5. A claim for damages against the Co-Respondent for committing adultery with the Respondent.
6. At all material times the Petitioner and the Respondent are residing in Vanuatu.

The Petitioner therefore prays for a court order :

- (a) That the marriage between the Petitioner and the Respondent be dissolved.
- (b) That the Petitioner having some custody of both - Olive and John (Jnr) Rihai
- (c) That the Respondent pays 20.000 Vt monthly for custody towards Olive and John (Jnr) and another 20.000 Vt for the Petitioner by a way of family maintenance.
- (d) The Co-Respondent pays 100.000 Vt for damages towards the Petitioner.

During the first hearing date on 19th June 1996 it was generally accepted from both parties.

- i] That the both the Petitioner and the Respondent are married.
- ii] That they have four children from the said marriage.
- iii] That except for Exlee Rihai who attended school on Pentecost Island, the other three children have always resided with their father since their mother (Petitioner) left the matrimonial home.

Since there is more than one application this court has to test itself whether the question of Jurisdiction should not be taken into account in view of the nature of the application itself. The application thereof by the Magistrate's Court (Civil Jurisdiction) Act CAP 130 does not preclude me in dealing with the matter after careful consideration in particular the custody of children ; the property settlement and the damages claimed from the Co-Respondent are still within the financial limit of the court whilst in the normal circumstances if the divorce petition is opposed the court must discontinue in determining

such application pursuant to Section 1 of the same Act by referring it to the Supreme Court which has unlimited power under its Jurisdiction.

In light of the circumstances, the Magistrate's Court is deemed to deal with the various applications within its Jurisdiction and except for the divorce petition other applications are literally contested and while on the basis of the given evidence the following points are :

#### **A| Divorce**

The Petitioner for dissolution of marriage is unopposed. It has its basis on adultery between the Respondent and the Co-respondent. The evidence is again shown from both parties that the Petitioner and the Respondent have been living separate lives since October 1994 when the Petitioner left their matrimonial home.

**Order** : Absolute decree be granted upon three (3) months period of the Decree Nisi.

#### **B| Custody and access**

There was a long dispute between both parties one blaming the other for being unfaithful. While such quarrel has developed out of proportion the Petitioner who kept on pointing out fingers on the Respondent for being responsible of their unstable matrimonial home was having affairs with her cousin Janet from South Santo. At that time Janet was about 11 years old until she became pregnant at the age of 15. She was regarded as their own daughter however it was reported that the initial complaint to the Police has been withdrawn by the Petitioner hoping to see some improvement with the Respondents attitude. Although she said knowing the gravity with respect of the charge itself she took the liberty to withdraw the complaint upon the customary settlement of their differences through reconciliation. Similar

Scenario occurred has again repeated when the Respondent committed adultery with a certain Nancy from Tanna. Between October 1994 and July 1995 the Petitioner has not settled into a fixed home for she moved from one house to another. And a day after she left the matrimonial home she returned with a Police escort to remove her personal belongings and effects and took the three children with her namely : Olive Rihai, Tania Rihai, and John (Jnr) Rihai first to John Selwyn 's residence and then to family Binihi at Anaburu Area. They stayed there for about a week before moving to Edward Bani's home for about a month there. While at all these times the three children visited their matrimonial home almost everyday and on one occasion the Respondent had persuaded the Petitioner to return home but she refused from doing so. The Respondent sought legal advice from the Public Solicitor's bureau, but it was thought for their best interests that in order to truly reconcile it would be for the best interests of both parties to live separately for the time being. It was then that the Petitioner took the three children stayed at Tagabe but still such a recourse of action has not been of any assistance. On the contrary the situation has become burdensome for both parties illustrated from the fact that the Respondent was unable to have access to their children which makes it difficult for an eventual reconciliation. On the other hand the three children could not receive what they were entitled to even with limited financial resources the Petitioner may have received from the monthly salary and also from the fact that the children were not directly left under a proper care of Elsie's parents at home. Mrs Luciana Titek in her evidence admitted after seeing the difficulty the Petitioner may have encountered had persuaded the Respondent personally to take the children back with him to the matrimonial home. Dr Bador who treated John (Jnr) when he was taken ill from infection on his head also gave evidence to the effect that the child's head is infested with lice when taken to his clinic. At that time little John was under the Respondent's care who could have at least spotted the sores had he been a better father by playing his paternalistic role at home to which he replied that he had the little boys hair cut. Elsie says that the three children wore torn cloths each time they go to school at times with sores on their

bodies clearly shows that Linda Tevi is not fit to play a motherly role and it was the Respondent's family who reported all these happenings to her. Again to her frustration she said had tried but unsuccessfully convinced the Respondent to have the children returned to be under her care. The Petitioner explained the simple reasons to let the children back to her was undoubted by an excuse deduced from the Respondent who is not prepared to pay any maintenance to the Petitioner towards the children made it difficult for her to keep them with her, also had in fact denied her right of access to them. On examination, the respondent replied that the children have been living with him most of the times since separation, he had a secured and well paid job, a comfortable house and a new girl friend to look after them. Although he contented that the Petitioner was also during their separation seeing a certain man from Ambae while staying with Janet Simeon on Mele Road for three months while she was being employed by Prouds. She again had developed another relationship with a certain man Ambae named Rudolph Tari. The Petitioner claims that such relationships were considered to be of temporary in nature. She says to now have a new boyfriend Rudolph Tari from Ambae to which Rudolph replied in evidence that their affairs have now sedsed. Elsie in her evidence says she is presently employed by Vanuatu International Relation Centre (V.I.R.C ) with a monthly salary of 30.000 Vt and was also given a room in her work place. On or about June 1995 the Respondent had given another chance to the Petitioner to return home but she refused knowing that otherwise the Respondent would be taking another women. The court is of the view that both parties are partly to be blamed for the present case they both shared the mistakes the lack of respect on each other. In order to briefly decide on the custody of children which must have its permanent consideration the Supreme Court decision on Fishier -V- Fishier Civil case No. 144/90 drew attention to the extend that the children welfare need careful consideration. In this case the position of both parties is quiet understandable in view of their respective affidavit. It is almost 20 months now and the children are still living with their father in their matrimonial home while attending school regularly. At this early age the

children had their natural instinct to liken either parents and this is common grounds to either be with their mother or father regardless of their embroiled situation but as they are grown up getting use one's environment would learn to chose through perception which is best suited for them perhaps the process may not benefit them either on a long term process. This Court would again obliged to intervene to the best interests for the children welfare into a more nature and rational manner. Although they may need the maternal love in the present position it would not at all held restraining the life style they are accustomed and it would again be a pity to have them enjoyed only a part of their entitlements. Like any other children with all intends and purposes their mother's capabilities would not assist them in a long run to their satisfaction. Their interests need to be maintained and protected at all material times. Although the general principle drawn from Fisher -V- Fisher would be of some assistance the current situation would give some indication of what their future holds. Therefore the court sees fit pursuant to section 7 of the Act to make a permanent order in view of the present arrangement.

**Order :**

- (i) That the Respondent is granted custody of Tania Rihai ; Olive Rihai and Junior Rihai.
- (ii) That the Petitioner must have access to Tania Rihai ; Olive Rihai and Junior Rihai any time provided she gives 24 hours notice to the Respondent and to return them back as conveniently arranged.
- (iii) Both parents must adequately provide for their children basis material needs at all material times.

## **C] Child Maintenance**

The content of the Petitioner's Affidavit and that of the Respondent's are self explanatory with respect to means and property of the parties respectively. On examination the Petitioner admitted the three children have been living with her from one home to another since October 1994 but now returned to their matrimonial home and have always resided with their father and regarded their home as home base. Both parties also indicated that at that time the court's decision was made ie : 30th August 1995 the three children were living with their natural father who took care among other things their school fees and other basic necessities. Therefore no Order is made to this application must fail.

## **2. Spousal Maintenance and Property Settlement**

### **(a) Spousal Maintenance**

The petitioner's evidence shows that she was previously employed by Prouds Co. before moving to V. I. R. C on a full time employment. She had a room let to her as part of her entitlement benefit. She left their matrimonial home initially claiming that her husband chased her out should not at all be of an issue now had she not taken seriously by returning home when she was approached on several occasions. Had the matter been resolved immediately it would not become stale as from the present status-quo. Neither party took the initiative. The Public Solicitor had given advise that the process of reconciliation must take effect the soonest without specifically pointing fingers on either party to initiate it. Instead of resolving the problem for the best interests of the family and the children's sake it was rather a sorrowful situation in disillusion instead of regaining its normal course. The court decision on 30 August 1995 was made at that time the Petitioner was on full time employment. This court is satisfied that the Petitioner left their matrimonial home on her own accord. Thus No Order is made to this effect.



(b) Property Settlement

Again each party's affidavit on July 1996 show that there is no other income derived apart from their normal salary. The Respondent evidence proves contrary to the Petitioner's contention that John Rihai owns other properties ie : rent house which belong to the family. Elsie claims that the house is built upon the land given to her by the Melanesian progressive party (M.P.P) at Holen Area. The Respond on reply did not deny the Petitioner's money of 100.000 Vatu used to secure a personal loan from ANZ Bank purportedly develop a piece of land in Santo. The Petitioner gave evidence to the effect that the money was never used purposely. The respondent did not deny the use of the said sum. She had to pay some 37.000 Vatu and the 50.000 Vatu was used to offset the balance owing as the loan fell among the category of doubtful debts. She continued to say that when she left home on October 1996 some of her personal possessions such as T.V and Video and other household items were left behind all of which were severely denied by the Respondent cross-examination. Alternatively the Petitioner requested a global sum of 500.000 Vatu for both spousal and property settlement because of her intention to begin a new life without the Respondent. Such claim would have some adverse effect on the prevailing circumstances it all fell back as to whether the claim is adequately substantiated although there is no precise measure as to the 500.000 Vatu is optional. The whole course in this application followed so far proves otherwise. If ever few household items remain in the matrimonial home they would at least serve their purposes for the sake of the children this would inevitable play a role as or the common sharing of the children's welfare as it is quiet proper to maintain and protect their interests in a long run. Therefore the court in this present situation makes no relevant Order except for the 100.000 Vatu intended to be used purposely by the Respondent must be refunded back to the Petitioner forthwith.

**Order : The sum of 100.000 vatu be refunded to the Petitioner forthwith.**

**e) Damages**

The Petitioner claims a sum of 100.000 Vatu against the Co-Respondent Linda Tevi for the loss of her husband, her separation from her children and her standard of living and also from the fact that she is still emotionally hurt for the broken up of their unit. The under lying principle from the Supreme Court Judgment in Waiwo -V- Appeal case No. 1 of 1996 his Lordship the Chief Justice had identified and analysed the types of damages to be considered. Should any claim of similar nature arise, his Lordship prompted indicates from his decision some guidance as to the approach to be adopted and manner in which awards for damages should be made in our Divorce courts. Although it is a liquidated sum of 100.000 Vatu a general damages of an unspecified amount, Exemplary damage would not fall under this category. The chief Justice states in order to justify the award of Exemplary damages it is not sufficient to show merely that the defendant has committed a wrongful act. The conduct of the defendant must be high handed, insolent, vindictive or malicious, showing contempt of the plaintiff's, or disregarding every principle which activates the conduct of common decency (ibis)

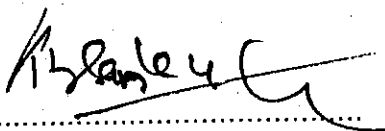
The Co-Respondent admitted in her evidence that before she came to Vila from Pentecost on July 1995 had no knowledge of the broken down of the marriage between the parties, she was only told by the Respondent's family that the Petitioner and the Respondent were no longer living together that they have had their separate lives. Contrary to such evidence, the contention by the Petitioner shows that the Co-Respondent was in Vila on February 1995 in Vila. Both John and Linda knew of each other before in Vila prior to her coming down on July 1995.

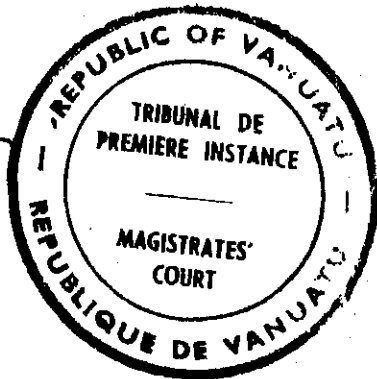
The evidence from Luciane Titek shows that between October 1994 and December 1994 the Respondent was the one approaching the Petitioner to return home which she refused. He was approached by the Petitioner's above witness to take the three children home since Elsie was having difficulty taking care of them. The Petitioner persistence refusal to return to their matrimonial home upon the Respondent's request when picking up the children has aggravated the situation. I shall again repeatedly saying that award of damages is not distinguishable from the whole context of the application of divorce. It has to be assessed in light of the prevailing circumstances considering the evidential facts to the current situation. Having said that the court finds that the matrimonial home had already broken up on December 1994 when each chose to live one's separate life. On January 1995 to July 1995 both the Petitioner and the Respondent private lives began to take shape from certain height of view meaning their private lives were much more exposed to Public Knowledge. Each drove by oneselfish desires yet claiming to be still considered as husband and wife. Even if the Co-Respondent had made acquaintance with the Respondent on February 1995 each of the parties, the Petitioner and the Respondent have lived adulterous life style by Co-habiting with their chosen partners. If the case has been genuine enough in favour of the Petitioner, I would recommend for special damage to be relevant in this type of circumstances for specific sum is being claimed for under compensatory damages. Therefore the court finds the Petitioner's claim not proved from the fact that the marriage has already been broken down on December 1994. In Waiwo -V- Waiwo there would have be more weight put in for such a claim for damages although the award would desire between zero sum and 100,000 Vatu in contest with this application which only create an artificial outlook only to one's detriment. Since this is a clear a matrimonial matter. Thus the Court makes the following Orders that :

- No Order for damages

- Both partie are held responsible as to costs for these proceedings.

Dated at Port Vila this 12<sup>th</sup> day of September 1996

  
BRUCE KALOTITI KALOTRIP  
Magistrate



Delivered at Port Vila this 10<sup>th</sup> day of  
November 1997.

