

**IN THE SUPREME COURT**  
**OF THE REPUBLIC OF VANUATU**

**Matrimonial Case No.01 of 2000**

**(Civil Jurisdiction)**

#122

**BETWEEN: LEITARE GARAE**  
Petitioner

**AND: KILLES GARAE**  
Respondent

*Mr. Edward Nalial for the Petitioner*  
*Mr. Kiel Loughman for the Respondent*

**JUDGMENT**

This was a petition by the Petitioner, petitioning for the court to grant her divorce on the ground of persistent cruelty.

**Law**

Section 5 of the Matrimonial Causes Act states:-

*"... a petition for divorce may be presented to the Court either by the husband or wife:-*

*a) on the grounds:-*

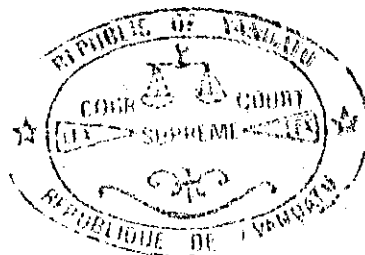
*(i) ...*

*(ii) ...*

*(iii) has since the celebration of the marriage treated the petitioner with persistent cruelty."*

**Evidence**

The Petitioner's evidence was that after the marriage the Respondent treated her with persistent cruelty. The marriage was celebrated on 24 May 1985. No relevant evidence to justify the act of cruelty from 1985 to 1998 apart from general evidence on cruelty within those period which I do not except as reliable evidence to assist the court on cruelty pursuant to section 5 of the said Act and to justify whether the cruelty was persistent. The only evidence for reliance by this court is of cruelty as of 1998 upward. The Petitioners affidavit of 6<sup>th</sup> May 2000 refers to incidents of cruelty in 1998 by the Respondent.

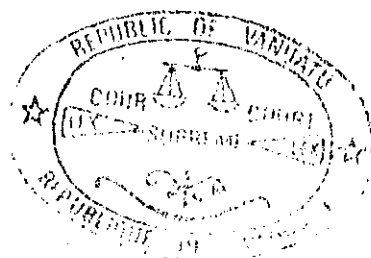


The run down on the petitioner's evidence of date and nature of cruelty are as follows:-

16.02.98 - the Respondent assaulted her with a timber on her leg and was broken, she was admitted to the hospital and her leg was plastered. The Respondent admitted this, 18.02.98 - after coming out from the hospital, he assaulted her again and was unconscious. The Respondent admitted this, 22.02.98 - he trimmed her hairs off with scissors. The Respondent admitted this, 14-3-98 - this time he trimmed all her hair off. The Respondent admitted this, 25.04.98 - he wanted to assault her with knife and she went out of the house. This question was not put to defendant, 02.05.98 - he assaulted her on her face and her face was bleeding. Respondent denied that this did not occur, 09.05.98 - he kicked her at her place of work at Eric Wong. The Respondent denied that, 16.05.98 - he assaulted her at Center Point. Respondent denied that, 12.06.98 - he assaulted her with needle. Respondent denied that, 13.06.98 - he intended to stab her with knife and she ran away. Respondent denied that, 18.06.98 - he assaulted her, and when he got a piece of wood she ran away. Respondent denied that, 10.06.98 - he kicked her again on her leg where it was previously broken. She went to the hospital but was told that it was alright. This assault was not put to the Respondent, 22.09.98 - he tore her clothes in front of their children while they were drinking tea. The Respondent denied that, 02.10.98 - he assaulted her finger with knife handle. Respondent denied that, 13.10.98 - he assaulted her again and she fell down and was unconscious and recovered 2 hours later. Respondent had no explanation to that, 16.10.98 - he assaulted her again and she could not walk for the full day. The Respondent denied that. 25-10-98- he assaulted her on her private part, he denied that.

In addition, Anneth, and Roselyn gave evidence. Anneth inform the court of two occasions, one time she saw her crying and her clothes were torn and the other time where the Respondent himself came and knocked at her door and he told her to go and see the petitioner. She went there and saw her lying on the children's bed with swollen around her body, and the Petitioner informed her that the Respondent assaulted her with a piece of a wood. Whereas Mrs. Piagk explain as to why the Petitioner came to the women council office to seek assistance over the continue assault by the Respondent on her. Even she was kept in the women safe house for her safety over the assaults.

The matter also ended up with the custom chiefs for some formal settlement. They had a custom meeting to settle the matter and the Respondent promised the chief not to assault her again and custom payment of mat was made. However, when they returned home, the assault did not stop.



## **Restraining order**

A restraining order was issued by the court on the 4<sup>th</sup> December 1998. Order No. 1 (3) states amongst other orders that:-

*"The respondent Killes Garae is restrained from:*

*B) Assaulting, threatening or harassing the applicant or causing other person to assault, threat or harass the applicant."*

This will confirm the attitude of the Respondent towards the Petitioner, otherwise if there were no such assaults by the Respondent towards the Petitioner, the restraining order would not have been made preventing him not to assault the petitioner.

## **Statement to police**

The Petitioner made several statements to the police over the assault by the Respondent on her but he was never charged.

## **Submission on facts**

The court agreed to the Respondent's counsel that there were no actual series of event of assault before 1998, and as stated above, that the Petitioner's evidence was too general in explaining assaults for the period before 1998. Likewise, the Petitioner's counsel submissions did not address cruelty before 1998.

## **Credibility**

The Petitioner and the Respondent's evidence were evidence to explain the series of assault. The other two witnesses only gave evidence to some of the accounts of assault they have witnessed while Piagk evidence gave explanation of what she did when the Petitioner seek their assistant at the Women Council Office over the assaults on her by the Respondent.

In general observation and assessment as to credible evidence, I am more satisfied to believe the evidence of the Petitioner in the series of assault administered to her by the Respondent. Even though, the Respondent admitted some of the assault, I could not believe him on those other assault he denied not to have happened and accept the Petitioner's evidence as evidence of truth and also the evidence of the other two witnesses on the events of assault, also the evidence of Piagk.



## Application of the Law

I accept that the events of assault started when the Respondent was admitted to the hospital in 1998. While in hospital he learnt that the Petitioner was having an affair with another person, Sam. This was not denied by the Petitioner as she admitted that she is now staying with Sam and this is no longer an issue. This was the main reason why Killis continued to assault her. Therefore, does those events of assaults amount to cruelty?

The respondent's counsel submitted the case of *Ainsmith -v- Ainsmith* (1967) 10 FLR 396 at page 402 held:-

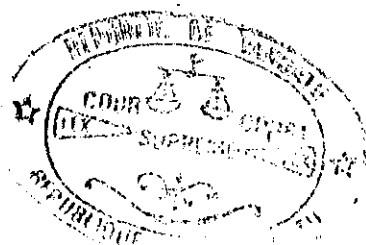
*"... it is now formally established that in matrimonial causes, before a spouse can be found guilty of cruelty, certain elements must be present:*

1. *The conduct must cause injuries or reasonable apprehension of injury to the health of the other party, irrespective of whether such result was intended;*
2. *The conduct which is alleged to constitute cruelty must be grave weighty;*
3. *The conduct, viewed, as a whole in the light of all the circumstances, must be capable of bearing the description of cruelty in the general acceptance use of that word."*

The elements of cruelty in the *Ainsmith -v- Ainsmith* case is in my view would bring much closer the real nature of cruelty under section 5 of the Matrimonial cases in divorce petitions on the ground of cruelty in Vanuatu, I accept the elements decided in the above case to give effect to the law of cruelty under section 5 of the said Act. Not only that, the issue of cruelty was also applied recently in the *Siehi* case which the court held that cruelty to be persistence is a matter of law for the court to decide.

I am satisfied that the assault administered by the Respondent on the Petitioner are continued assault, the interval can not be of great importance. The intervals can be for shorter periods or longer period and that is for the court draw a line as a matter of law to bring in line with the requirement of section 5 of the Matrimonial Causes Act. I find that the event of assaults was persistence in it's nature in that those assault relate to a particular nature, and that was over the affair of the Petitioner and Sam and that was persistence cruelty pursuant to the provision of section 5 of the Act.

The evidence as I accept satisfies the element of cruelty and were persistent. The nature of the assault surely landed the petitioner in



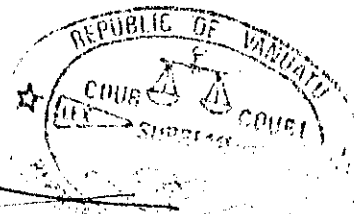
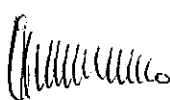
hospital with broken leg. Even her private part was assaulted, her clothes were torn in front of her children, she was beaten up with wood and parts of her body was swollen, bleeding face, assaulted and being unconscious all these amount to causing injuries to her body and even reasonable apprehension to her health. All these satisfy the element of cruelty. Not only that but the issuing of restraining order by the court for the respondent not to assault her was of great importance to cruelty by the respondent to the petitioner. Usual argument or just slapping on the face in marriage life could be referred to as usual ups and down in marriage life and cannot satisfy the elements of cruelty under section 5 of the Matrimonial Act. Having said these, the court is satisfied that those assaults administered by the Respondent far exceed what I term as usual ups and downs in marriage life, which in my view the court is not readily to interfere with in granting divorce. However, in this case I find that events of assault as from February to October 1998 caused great harm and injuries to the Petitioner and all amount acts of cruelty against her.

As the Petitioner is now staying with another man what good will be done to her if she was to go back to the respondent. In my view the situation will not change and may go worse as establish by the evidence before the court.

And therefore, divorce is the only cause to take. It is sad to order divorce, but when two ends can not meet then they must be separated for a good cause.

I therefore grant divorce on ground of cruelty and order absolute be issued three months there after.

**Dated at Port Vila, this 10<sup>th</sup> day of November 2000.**



**R. MARUM MBE**  
**JUDGE.**

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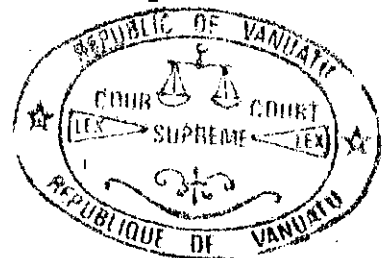
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**Hearing of Application for custody  
and maintenance.**

**UPON HEARING** Both counsel, and with their client consent I make the following orders:-

1. That the two children, Samantha Garae and Clinton Garae be in the custody of their mother Leitare Garae;
2. The father shall have access to the children;
3. Leitare Garae shall not prevent Kielles Garae to have access to the children unless the prevention is based on reasonable grounds;
4. Prevention without a reasonable ground in giving access to the children is a contempt of Order No. 3;
5. Kielles will be responsible also for the up keeping and Maintenance of the children while they are in Leitare's custody;
6. These orders shall continue until each child attains the age of 16 years or revoked by a court of competent jurisdiction;



7. Further and upon hearing both counsels, it is also ordered that:-

- a) Kielles Garae shall not threaten the said children or harm them in any way or does anything that may threaten or hinder their well being while under his responsibility;
- b) If Kielles breaches Order No. 7 (a) then Order 2, 3 and 4 be revoked;
- c) For order No. 7 (b) to be effective, Leitare Garae must make a formal complaint by application to the Court for hearing, and if the Court satisfy of the elements of Order No.7 (a), then Order 2, 3 and 4 be revoked.

**Dated at Port Vila, this 21<sup>st</sup> day of November 2000.**

**R. MARUM MBE**  
**JUDGE.**

