

IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU

Civil Case No: 41 of 2011

(Civil Jurisdiction)

**BETWEEN: ABRAHAM TALLY**

Claimant

**AND: SOPHIA TALLY**

Defendant

Mr Justice Oliver A. Saksak

Miss Jane Tari for the Claimant  
Miss Tatavola Matas for the Defendant

Date of Hearing: 21<sup>st</sup> May 2012  
Date of Judgment: 24<sup>th</sup> May 2012

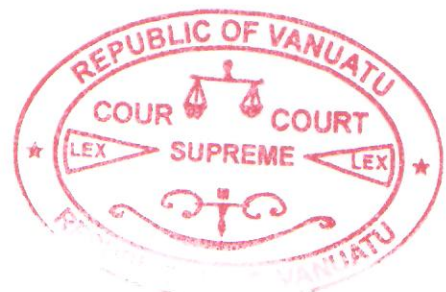
**JUDGMENT**

1. The Claimant filed a Supreme Court Claim on 19<sup>th</sup> April 2011 seeking basically two orders namely –
  - (a) That he be given Custody of two children by names of Medina Tally and Melina Tally with access granted to the defendant, and
  - (b) Costs.
  
2. The Claim is made under Part III of the Matrimonial Causes Act Cap 192.



3. The following are some relevant facts -

- (a) The Claimant and the defendant were lawfully married on 29<sup>th</sup> December 2006.
- (b) Two children were born to them namely Medina Tally aged 5 and Melina Tally aged 3.
- (c) They lived together as a family in Port Vila near the Korman Stadium.
- (d) The Claimant works with the National Council of chiefs and has been working since September 2000. He earns a salary of VT31.000 per fortnight.
- (e) The defendant had no employment but concentrated on looking after the children when the claimant was away at work.
- (f) The claimant paid for food, rents electricity and water for the family.
- (g) The defendant contributed financially to the family needs by incomes earned from her tailoring business and cakes sales. She contributed to paying Medina's school fees of VT9.000 in pre-school in 2011.
- (h) In 2007 the claimant had extra marital affairs with another woman.
- (i) The defendant was informed about this extra marital relationship her husband was having and she retaliated by engaging in extra marital affairs with another man. As a result, the defendant conceived and gave birth to another child.
- (j) Prior to the claimant and defendant having extra marital relationships the defendant complained that she had been abused by the claimant since 2005 in that –



- (i) every day the claimant demanded to have sex with her, even when she was tired and feeling unwell.
  - (ii) even when she was having her menstruation period he demanded and had sex with her.
  - (iii) even when she was pregnant with Medina and Melina, he demanded and had sex with her
  - (iv) even after birth only just returned from hospital and still bleeding the claimant demanded and had sex with her.
- (k) Due to the above difficulties and abuses the defendant decided to take the two children and returned to live with her parents in Luganville, Santo in 2011.
- (l) The two children now attend schools in Luganville and it is the defendant who pays for their school fees.
- (m) The defendant now looks after and cares for 6 children.
- (n) She maintains her tailoring business, cakes and ice-block sales and earns above VT55.000 per month.
- (o) She receives an additional income of VT20.000 pr month from two rented rooms at VT10.000 each.
- (p) The claimant now leases a plot of land at Etas, East Efate of VT20.000 per month on which he lives by himself.
- (q) In 2011 on Christmas Day the claimant sent VT10.000 to his children in Santo, with a small carton once or twice in 2011.
4. The Claimant relies on the evidence contained in his sworn statements dated 19<sup>th</sup> April 2011 (Exhibit (1)) and of 11<sup>th</sup> May 2012 (Exhibit (2)).





5. The defendant opposes the claims of the Claimant strenuously and relies on Response dated 29<sup>th</sup> June 2011 and Amended Response dated 16<sup>th</sup> March 2012 and her sworn statement in defence dated 29<sup>th</sup> June 2011.
  
6. In the Claimant's written submissions Counsel raises two issues namely :-
  - (a) Who should Have Custody Over Medina and Melina?
  - (b) What is the best interest of a child?
  
7. It is argued by Counsel for the Claimant that because he is the lawful father of the two children with a permanent job with fixed salaries and children's allowances, land and a house with garden and accessories and necessities of life, he is better equipped to provide better education, health care, home and relationship between them. Counsel further argues the defendant without gainful employment would be unable to meet the needs and demands of 6 children as they are growing up. It is further argued by Counsel that the defendants past actions and behavior infer she is a person of loose character and as such she would not fully pay attention to the childrens welfare and as a result the children might become victims of her character.
  
8. The pleadings and evidence of the defendant do show that the claimant is also a person of loose moral character. For instance the defendant alleged at paragraph 9 of her sworn statement about the claimant having extra - marital affairs but the claimant has not produced any evidence to challenge



or rebut that evidence. Secondly the allegation of constant sexual abuses complained of at paragraphs 5, 6, 7 and 8 of the defendant's sworn statement stand unchallenged and unrebutted by the claimant. These omissions indicate the claimant has not come to Court with clean hands as he claims to be in his written submissions.

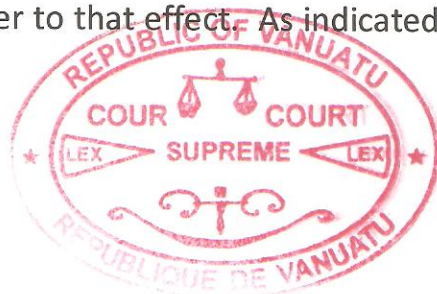
9. It is against that history of sexual abuses that this Court must ask whether it is safe for the two young children being girls who are growing up, to be left alone with a father with no mother?
10. Furthermore Etas is many kilometers away from the Vila North School and is therefore deemed unsafe for the children to travel alone if proper arrangements are not made or if made, there are failures along the way. Etas is also far away from the Police Station and Hospital. Further a home with accessories and amenities of life left for the enjoyment of children without any parental control creates an unhealthy environment for the children.
11. The defendant raised only one issue of whether or not the Claimant should have custody of Medina and Melina? Counsel submitted that in considering this issue the Court must consider as paramount the "best interest" of the child. Counsel refers the Court to Section 15 of the Matrimonial Cases Act Cap 192 (the Act). Counsel for the Claimant refers to Part III of the Act as the basis of this claim. However it is the view of this Court that this section is not applicable. The Claimant's claims do not claim for divorce or a nullity of marriage. Both parties are still legally married but



just living separately. All the claimant is seeking is an order granting custody of Medina and Melina to him instead of the defendant. But in the view of the Court he cannot validly claim for custody unless his action seeks for divorce or nullity of marriage. Therefore the claims of the Claimant for custody is not legally founded. At best the Claimant can only seek an order granting him access to the children.

12. Miss Matas made references to Articles 1 to 40 of the Convention on the Rights of the child and cited the Case of Molu v. Molu No. 2 [1998] VUSC 15, CC 30 of 1996 and Matrimonial Case No. 130 of 1996 (15 May 1998). In that case the Court held that the Convention is binding on the Republic of Vanuatu without any reservations and held that under Article 3 of the Convention, the Court must consider the best interest of children to be a paramount or primary consideration. In that case a 4 year old female child's custody was granted to her mother.

13. The Court endorses Molu v. Molu and rules that it is applicable to the present case. Considering the facts and applying the provisions of the Convention to those facts, the Court considers that the best interests of Medina and Melina are best protected by the defendant who is the mother of these two children. I have had the opportunity to read the other parts of Counsel's submissions and I totally agree and accept them. The Court further agrees with Counsel that under Article 27 (4) of the Convention the Court is empowered to order that the Claimant pays all child allowances in relation to Medina and Melina to the defendant for the use and benefit of the two children. There will be an order to that effect. As indicated earlier



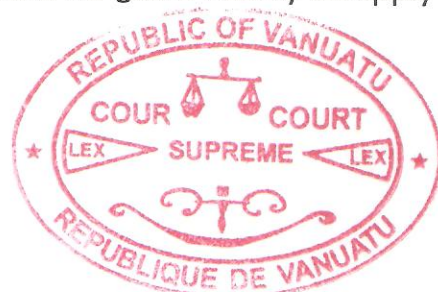


in the judgment, the Claimant is only entitled to access to the children and there will be an order to that effect.

14. The Claimant's claims for custody is therefore declined and is accordingly dismissed.

15. The Court issues the following Orders :-

- (a) The defendant has custody of Medina and Melina at all times until they each have attained 18 years of age when they will be entitled to make their own choices.
- (b) The claimant be given access to the two children during school holidays, public holidays or weekends but only on the basis of or subject to arrangements mutually agreed between the defendant and the claimant.
- (c) The claimant be required to release all child allowances paid in respect to Medina and Melina to the defendant for the children's support until they both reach the ages of 18 years or until his employment is terminated.
- (d) The defendant be required to open a special Bank Account to hold on trust for the two children into which all child allowances, present and future, shall be paid. The defendant be required also to maintain a good record of all withdrawals and how the allowances are expended. The claimant be entitled to have access to or be provided with copies of the record on a monthly basis. The claimant be given liberty to apply for a



review of these orders in the event of misuse of allowances by the defendant.

(e) The claimant pays the costs of the defendant on the standard basis as agreed or taxed.

**DATED at Luganville, this 24<sup>th</sup> day of May 2012**

**BY THE COURT**

  
**OLIVER A. SAKSAK**

**Judge.**

