

DIC-MDT
IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY

NO. C.APP.19/2000

BETWEEN : MANATU-KI-MULI VAOTANGI : Appellant

AND : 'AILINE VAOTANGI : Respondent

BEFORE THE HON. CHIEF JUSTICE WARD

COUNSEL : *Mr S. Tu'utafaiva for Appellant*
Mr T. Fakahua for Respondent

Date of Hearing : 18 December 2000

Date of Judgment : 18 December 2000

J U D G M E N T

The respondent brought a claim in the magistrates' court for maintenance. The claim was "for \$100.00 for past maintenance and \$70.00 for future maintenance due to the fact that you left your wife and 3 children without any maintenance".

The magistrate heard the case on 14 September 2000. He asked if the appellant defended the claim and was told he did not wish to do so. It continues:

Ct : *Do you have a lawyer?*

Deft : *Yes Sir, but I wish to represent myself as I do not dispute this claim for maintenance. Sir, I wish to say a few words. The reason why I left home was because my wife chased me from home saying that it is not my home but hers and that's why I left home.*

Ct : *That's all right we are not hearing a case about you leaving home. The reasons why we are here today is about maintenance of your wife and three children; it does not mean that you leave home and you don't have to provide for your wife and three children.*

Deft : *Sir, I do not dispute this claim for maintenance.*

Ct : *All right, I will order for the maintenance of your wife and your children. Firstly, order for past maintenance of \$100.00 to be paid. Lawyer's fee \$100.00. Court fees of \$8.00. Future maintenance \$50.00 per week starting from 18/09/00. All these to be paid in 2 weeks if not a warrant of distress to be issued."*

appeals against those orders on three grounds. The first two on a challenge of the accuracy of the court record. Mr Tu'utafaiva

MINISTRY OF JUSTICE

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Action. 19/12

tells the Court that he was instructed to represent the appellant that day but was delayed because he had been detained in the Supreme Court. He only reached the magistrates' court at about 11.0 by which time the case had been concluded. He explains that his instructions in this case were to dispute the propriety of the maintenance order as well as the amount to be paid.

He challenges the statement in the record that the appellant was asked if he had a lawyer and that he did not dispute the right to maintenance. He tells the court that his client denies that is correct Mr Fakahua, for the respondent, was at the lower court and supports the general accuracy of the record.

As long ago as 1994, I pointed out in the case of *Taufa v Ma'u* (1994) Tonga LR 97 that where, on appeal, a challenge is to be made to the accuracy of the record, the appellant should supply affidavit evidence of the suggested inaccuracy. Without it, the appellate court is unable to consider anything beyond the record itself. It is not sufficient for counsel to speak of it from the bar table.

In the present case, counsel could not agree about the accuracy of the record and so the court needed evidence upon which to resolve the dispute. Even where counsel agree both that there is an inaccuracy and its exact nature, there will still need to be an affidavit to demonstrate the error and the correct version.

The first two grounds stem from the suggested error. There was no evidence before the Court and so they fail.

The third ground is that the magistrate's decision to allow the respondent's claim was based on no evidence placed before the court. It would appear from the record that the magistrate might have considered that the appellant's statement that he did not dispute the claim for maintenance extended to an acceptance of the amount. That would have been a reasonable assumption but I consider that it could equally have been a statement simply that he did not dispute liability.

In all cases where the magistrate is determining the amount of maintenance that should be paid, he should hear evidence of means. He clearly did not in this case and the case must be returned for such evidence to be produced. To that limited extent, the appeal is allowed.

The magistrate's order of the amount of maintenance is quashed and the case is remitted to a different magistrate to hear evidence and determine the sum de novo.



L. H. H. H.

NUKU'ALOFA: 18th December, 2000

CHIEF JUSTICE