

28/03/19

IN THE SUPREME COURT OF TONGA  
APPEAL JURISDICTION  
NEIAFU REGISTRY

AM 7 of 2019

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**BETWEEN:** TONGA KUPU

**Appellant**

**AND:** LOTOLANGI KUPU

**Respondent**

**Counsel:** Mrs L Kuli for the Appellant  
Mr S Ika for the Respondent

**Date of Hearing:** 22 March 2019  
**Date of Ruling:** 26 March 2019

**RULING**

- [1] This is an appeal from a decision of the Principal Magistrate at Neiafu of 20 February 2019 in which he ordered that the appellant was to pay the respondent spousal maintenance of \$20 per week and child maintenance for five of their seven surviving children of \$20 per week; making a total of \$120 per week.
- [2] It is argued that the Principal Magistrate failed to give proper consideration to the evidence as to the parties' respective means and that it is unreasonable to require him to pay an amount of \$120 per week. The appellant requests that the amount of maintenance be reduced to a total of \$70 per week.
- [3] The arguments advanced at the hearing went beyond the grounds set out in the notice of appeal. No objection was made to that.

recd 27/03/19  
[Signature]

- [4] Three grounds appear in the notice of appeal and they are as follows:
- (a) That the Principal Magistrate failed to consider that the appellant's only source of income is from farming and that he has no fixed weekly income from the sale of his crops;
  - (b) That the Principal Magistrate failed to consider that the appellant had provided food (crops) for the respondent since September 2018; and
  - (c) That the parties had been living at the respondent's parent's house at Makave before the appellant was chased from the house in September 2018.

[5] There has been no challenge to the Principal Magistrate's jurisdiction to make maintenance orders under s. 2 of the Maintenance of Deserted Wives Act. I have not been required to consider that issue.

**A brief history of the marriage**

- [6] The parties were married in 1996 and had eight children of which seven children survive and five children are the subject of this proceeding. I understand the two eldest children are independent.
- [7] After their marriage the parties lived in their own home at Lapaha, Tongatapu and the appellant supported the family through farming. He had a commercial operation growing squash and pumpkins.
- [8] In 2013, marital difficulties arose and the respondent and the children moved to live with the respondent's mother at Makave. There were attempts at reconciliation. In September 2017 the appellant considered that the relationship had been restored and he had his tractor and truck shipped to Vava'u to re-join his family. He leased land to farm and has been growing crops.
- [9] The parties lived together until September 2018. It appears the family had three sources of income. First, the appellant grew crops. Secondly, the respondent ran a small grocery shop. Thirdly, the respondent also had a stall selling furniture, clothes and other items. The respondent still operates the shop. It is not clear if she still runs the stall.

- [10] The parties' marital problems continued and in September 2018 the respondent chased the appellant from the house and restraining orders were obtained against him. He has been living on his leased land ever since.
- [11] The appellant did not ignore his family obligations upon separation. He provided food for his family until December 2018. He paid for three children to go to New Zealand for a vacation in December. After this proceeding was issued he again provided some food. He pays the school fees of one child. However, the support has not been regular since December 2018.
- [12] The last time the appellant sold crops was in February 2019. He has watermelons to harvest in May 2019. There is a dispute as to whether he has other crops but there is no way for me to resolve that on the scant evidence that is before me. The appellant's intention, now that the relationship with the respondent has irreconcilably broken down, is to move back to Lapaha but this will be expensive for him and he will not have more crops to sell until December 2019.
- [13] At the hearing before the Principal Magistrate both parties were represented by counsel. They both gave evidence and were cross-examined and counsel made legal submissions.

#### **The first ground of appeal**

- [14] Mrs Kuli argues that the Principal Magistrate failed to consider that the appellant's only source of income is from farming and that his income is not fixed because it is dependent on the harvesting and sale of crops at various times of the year.
- [15] I do not accept this submission. It is clear from the transcript, with which no issue has been taken, that the Principal Magistrate did give his consideration to this matter. It was the reason he reduced the amounts that the appellant was ordered to pay the respondent from \$50 per week for her and \$40 per week for each child, down to \$20 each for all.
- [16] The transcript shows that the appellant's then counsel submitted to the Principal Magistrate that he reduce the respondent's claim 'by half' because the appellant 'receives income only when his plantation is harvested'. The Principal Magistrate then ruled:

I have taken into consideration the source of income received by the defendant and because of that I agree with the defence counsel and so the claim will decrease...

### **The second ground of appeal**

[17] It is said that the Principal Magistrate failed to take account of the fact that the appellant provided crops to his family after separation. Once again, this is not correct. The transcript records that the Principal Magistrate said in his ruling

That [the appellant] has been providing for the wife and the children up until December 2018.

### **The third ground of appeal**

[18] The third ground of appeal is that until separation the parties lived at the respondent's parents' house at Makave until the appellant was chased out. Related to this, Mrs Kuli submits that the appellant intends to move to Lapaha and he will incur large costs in doing so. She argues that this should be taken into account in assessing his maintenance obligations. It is premature to raise this matter now. The appellant has not yet returned to Lapaha and there is no evidence from which I could rule that the possibility of that occurring should affect his maintenance obligations.

### **Other matters**

#### *The restraining orders*

[19] I asked Mrs Kuli about the statement that appears twice in the notice of appeal that the appellant was chased from the home for no reason. She said that the appellant has not been able to see or have access to his children because the respondent obtained restraining orders against him. I must assume that there was good reason for the issue of the restraining orders and in those circumstances I cannot see how the appellant can set them up to avoid his maintenance obligations.

#### *Spousal maintenance*

[20] Mrs Kuli referred me to *Sefesi v Fukofuka* [2010] Tonga LR 171. In that case the Court of Appeal held that the parties' means to pay must be considered as a matter

of law before maintenance orders are made. Relevantly, the Court said at [13] and [14]:

In our opinion, there was insufficient material before the trial judge for any sensible assessment to be made about the amount of maintenance that should be paid by the respondent. Without exhaustively describing what evidence might be needed to undertake the task, it would, in many cases, require the judge to know the income of the person against whom the maintenance order was sought, details of what amounts that person might need to live including supporting a new partner (if any) and additional children (if any) and what other sources of income were available to that person (for example, income generated by the new partner). Equally important would be evidence about the financial needs of the person claiming maintenance and any children of the marriage. That again would require evidence of the income (if any) of that person together with evidence of living costs of that person and the costs of rearing and educating the children.

The need for evidence of this type was referred to by Ward CJ in *Vaotangi v Vaotangi* [2000] Tonga LR 434 at 436. It was again referred to by Ward CJ in *Abio v Tiliikini* [2005] Tonga LR 22 at 24. The maintenance order made by the trial judge should be set aside and the matter remitted to the Supreme Court for further hearing in which the parties can lead evidence to enable the Court to make a proper assessment of what is an appropriate amount of maintenance (if any) to be paid by the respondent.

[21] I am satisfied that the Principal Magistrate had sufficient information before him to determine what the appellant should pay towards the support of his children. The appellant accepted an obligation to pay child maintenance, evidence concerning his income was provided and, most importantly, his counsel submitted that it would be appropriate that he pay half of the amount that the respondent was claiming. The Principal Magistrate went further than that and reduced the amount claimed by the respondent for herself by 60% (from \$50 to \$20 per week) and for the children by 50% (from \$40 to \$20 per week).

[22] I am not satisfied from the transcript that the Principal Magistrate gave any consideration to the respondent's means. This was something that he had to consider before ordering the appellant to pay spousal maintenance. There does not appear to have been any consideration given to the ability of the respondent to support herself from the store and the stall nor to other sources of income she may have. I was provided with photographs of the store and whilst it is not a large operation I am told it is one of only two stores in Makave. Clearly the respondent makes sufficient from the business to consider it worthwhile to maintain it.

[23] Furthermore, the Principal Magistrate gave no reasons for ordering spousal maintenance to be paid. If a Judge or Magistrate fails to state, even if only generally and briefly, the grounds which have lead him to his conclusions then he has failed to perform his judicial function and the decision will likely be set aside on appeal.

[24] I therefore consider that the order that the appellant pay the respondent spousal maintenance must be set aside and should be referred back to the Magistrates' Court for rehearing.

*Hardship*

[25] Despite her thorough submissions, I was not persuaded by Mrs Kuli's arguments that compliance with the orders that he pay maintenance will cause the appellant hardship. He accepts that he must contribute to the support of his five children and the amount he is required to pay for them is modest at just \$5,200 a year (\$433.33 per month). The evidence was that when the appellant sells his crops he gets \$3,000 to \$8,000 per month.

[26] The appellant has sold crops in February and will have more crops to sell in May. He has the means to pay and the ability to budget for his maintenance obligations until he sells more crops in December. I note also that he has the support of overseas family. The respondent on the other hand shall carry by far the largest share of the burden in supporting the children.

*The orders cannot be open-ended*

[27] The obligation on the appellant to pay child maintenance should not be open-ended. It should continue only until a child turns 18 years of age and is at school. Once a child turns 18 years or finishes school they can be expected to at least contribute to their own support.

**Result**

[28] The appeal is allowed in part and I order as follows:

- (a) The decision of the Principal Magistrate that the appellant pay the respondent \$20 per week for the maintenance and support of each of the five youngest children of their marriage is upheld but shall remain in force

in respect of any child until that child either leaves school or reaches the age of 18 years.

- (b) The decision of the Principal Magistrate that the appellant pay the respondent spousal maintenance of \$20 per week is set aside. The respondent's claim for spousal maintenance is to be reheard in the Magistrate's Court on the first available date.

[29] Each party shall bear their own costs.



NUKU'ALOFA: 26 March 2019.

A handwritten signature in black ink, appearing to read "O.G. Paulsen".

O.G. Paulsen

LORD CHIEF JUSTICE