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**IN THE SUPREME COURT OF TONGA  
APPELLATE JURISDICTION  
NUKU'ALOFA REGISTRY**

**AM 9 of 2020**

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**BETWEEN:            SAMUELA TAUFU'I**  
**-                            Appellant**

**AND :                    MOHE KI FALETONU TAUFU'I**  
**-                            Respondent**

**BEFORE HON. JUSTICE NIU**

**Counsel                : Mr. S. Tu'utafaiva for appellant.  
                                     Mrs. F. Fa'anunu for respondent.**

**Hearing                : 19 June 2020  
                                     : 24 June 2020 (in chambers with 2 children)**

**Ruling                    : 25 June 2020**

**RULING**

[1] This is an appeal by the appellant father against an order by Magistrate Kaufusi by which he granted the daily care and control of both children of the marriage to the respondent mother, upon the ground that:

- (a) the Magistrate Court had no jurisdiction to make such an order;

- (b) there had already been a custody order made by Magistrate Tuita in respect of the said children in favour of the appellant father, and there was no good reason to vary or revoke that order;
- (c) the order was not in the best interests of the said children; and
- (d) the older child be left with the appellant father until the Supreme Court decided the matter.

[2] An agreed statement of facts stated as follows:

1. The appellant and the respondent married on 20 October 2011. They have 2 sons:
  - (i) Tevita 'A e Valu Justin Taufu'i – 6 years old.
  - (ii) Viliami Uiniseni Taufu'i – 4 years old.
2. The appellant is from Ha'atu'a, 'Eua, and he is a senior constable of the Tonga Police.
3. The respondent is from Hala'ovave, Kolomotu'a, Tongatapu, and she is employed by Tonga Communications Corporation (TCC).
4. In or about 2015 the appellant was transferred to the Eua Police Station, and in about 2016 the respondent was transferred from Nuku'alofa to work at the TCC Office in 'Eua.
5. The parties had been living together with their two sons in 'Eua since 2016 until November 2019.
6. On or about 28 November 2019 the respondent with the consent of the appellant, came to Tongatapu with their 2 sons and their car.

7. Whilst in Tongatapu the parties and their sons made telephone contacts almost every day. On 3 December 2019 the appellant told the respondent if she wanted to stay longer in Tongatapu it would be alright with him. But he would like to come and take their sons back to 'Eua. However, the respondent told the appellant not to come to Tongatapu because the children would not be given to him.
8. On or about 5 December 2019 the appellant came to Tongatapu and he went to the respondent at her parent's home at Hala'ovave where she stays with their children. The appellant was not welcome at the respondent's home and was required to leave the home.
9. On the same day (5 December 2019) the appellant applied for an emergency protection order. That application is pages 1 and 2 of the documents. Notice of the said application was given to the respondent on the same day, and for the application to be heard on 6 December 2019 at 8.30 am (page 3 is the notice).
10. The respondent filed her reply to the application by the appellant on 5 December 2019 (pages 4-6).
11. On 6 December 2019 the appellant's application was heard and it was ordered (page 7):

"1 The children ... and the complainant are to travel to 'Eua and to be returned by the complainant to the respondent to Tongatapu on 20 December 2019 for Christmas and the new year's eve.

2 When the complainant comes to Tongatapu he has to go with the respondent to the Women and Children Crisis Centre at Tungi Colonade for their counselling programme.

3 The motor vehicle C21202 shall be returned to the complainant today”.

12. The counselling programme was attended by the parties where they agreed for the children to live with the appellant but they are to be free to go to the respondent. (refer page 8, second paragraph).
13. In or about January 2020 the respondent applied for review of the Court Order dated 6 December 2019. On or about 13 March 2020 the said Court Order was varied for the children to be brought to spend time with the respondent on one weekend of every month, and also on school breaks/holidays. (refer paragraph 3.1 of page 12)
14. On 16 April 2020 the respondent applied for a variation of the Court Order dated 13 March 2020 (pages 10-14), and the appellant replied on 17 April 2020. (page 15)
15. On 6 May 2020 the respondent filed an affidavit replying to the appellant’s reply (page 16-20), and on 11 May 2020 the appellant filed his affidavit of further replies. (pages 21-23)
16. The respondent’s application was heard on 11 May 2020, the Court’s ruling was delivered on 25 May 2020 (pages 24-27), and the notice of appeal against that ruling was filed on the same day with a request to stay execution of judgement.
17. At a chamber hearing on 27 May 2020, notice of which was not received by the appellant’s counsel, but the appellant was present, it was ordered for the two children to be given to the respondent. She then took the second child but the first child stayed with the appellant.
18. On 28 May 2020 the appellant filed an application for stay execution of ruling (pages 28-31).

19. On 29 May 2020 the application for stay was declined (pages 32 & 33) on papers without a hearing.”

### **Hearing**

#### **Appellants submissions**

[3] Mr. Tu’utafaiva produced and spoke to submissions in writing in support of the appeal.

#### **Jurisdiction**

[4] He submitted that the Magistrate’s Court could only have jurisdiction to make a custody order if the matter came under the Family Protection Act where S.18 (a) provides that the Magistrate may in making a protection order include a custody order “granting temporary or final custody of any dependant child to the complainant, or to another appropriate person if the Court is satisfied that it is in the best interests of the child and for the safety and welfare of the child in question.”

[5] He agreed that Magistrate Tuita correctly granted custody to the appellant to take the 2 children with him to ‘Eua, and that the respondent had the right to apply to vary that order, but that S.20 (2) required that there must be “good cause” shown for the variation.

#### **No good cause shown**

[6] He submitted that there was no good cause shown because there was no evidence or allegation of any domestic violence committed by the appellant to warrant the variation requested by the respondent. Furthermore, he submitted it was wrong (or improper) for Magistrate Kaufusi to have stated that Magistrate Tuita had not stated his reasons for his decision. He submitted that Magistrate Kaufusi ought to have appreciated that Magistrate Tuita had properly heard both parties before he made his decision, and that his decision was based on what he had heard and found.

### **Need for guardian ad litem**

- [7] He further stated that matters such as this were better heard in the Supreme Court where the Court may feel that a guardian ad litem was needed to act independently of the two parties in order that the best interests of the children are safeguarded.

### **Family Protection Act**

- [8] Mr. Tu'utafaiva submitted that the case authorities which Magistrate Kaufusi referred to which supported his decision were overtaken by and are no longer applicable since the Family Protection Act came into force in 2013 and where issues of domestic violence are involved.

### **Wishes of the two children**

- [9] Finally he submitted that before I would decide this matter, it was necessary that I speak to both children and ascertain their wishes as to who they would want to live with.
- [10] Mrs. Fa'anunu was not in agreement with Mr. Tu'utafaiva that I should hear the children as to who they wished to live with. She said that when Magistrate Tuita made his order he had not listened to either child as to his wish. She even submitted that Magistrate Tuita had no jurisdiction to make his order because there was no domestic violence, but I pointed out to her that the appellant had complained to him that he had been refused access to see the children, and that could be accepted as "mental abuse" for the purpose of the Act, and she agreed.
- [11] She also pointed out that the respondent had made her application to vary the orders made for good cause, namely, the contents of paragraph 3.2 of the respondent's affidavit dated 15 April 2020, which was attached in support of her application to Magistrate Kaufusi, the relevant part of which is as follows:

"I then took the MV Maui to 'Eua and came with Viliami whilst Tevita (older son aged 5) stayed because he wanted to stay with the defendant. When we arrived at the Nuku'alofa Wharf, I was surprised when Viliami told me that he would stay with me and not go back to 'Eua and I told him that he would stay with me ... As we live on during the lockdown, Viliami repeatedly mentioned that he just wanted to stay with me and that he did not want to return to 'Eua.

I then asked him why he did not want to go back to his father, and he said that he was often beaten by Tevita (older son) and I told him that he should not have been cheeky to his older brother because that was why he was being hit by him and he said that daddy often told Tevita to hit him."

She submitted that that was why the respondent made her application, so that that domestic violence be stopped when the two children were together.

- [12] As to me hearing the wish of the children, Mrs. Fa'anunu said that the respondent was afraid that the appellant might have influenced the wish of the older child to want to continue to live with him. She says that the mother wants both children to be with her so that they are together and to be company and play mate to each other under her care.

### **The two children**

- [13] With the assistance of counsel, the father brought the older child from 'Eua and I was able to speak privately with each of the two children on Wednesday 23<sup>rd</sup> June 2020.
- [14] I have to say that I was most impressed with the answers which the older boy, Tevita, gave to my questions. He said that he was 6 years old, went to Government school at Ha'atu'a, and that only him and

Samu (the father) lived at home. He said he has breakfast in the morning of "Ti" and he's taken to school in the vehicle. He has a lunch box with samosa and "keke". His teacher is Mele Uini. After school, Samu picks him up and go home where he changes and Samu tidies up the house and cooks the food of yam and chicken. After they eat they go to sleep. They sleep in separate beds in the same room. He says he is "lata" (not lonesome) there at 'Eua.

[15] He says he speaks to Mohe (mother) on the phone and that he wants to see her. He said he came from 'Eua on Monday (this week) and went and saw Mohe on Tuesday. Says he knows Pongi and Nasini live with Mohe and Viliami. Says he wants to live with Viliami and wants Viliami to live with him.

[16] I asked him if he would like to come and live with Viliami here in Tonga and he said that he wanted to live with Samu because of his school. I said to him, if you change your school so that you now attend a school here in Tonga, would you like to come and live here with Viliami? He said, I don't want to because Pongi hit us. I said did Pongi hit you before? He said yes. Why? Because we played and he stopped us and hit us. What with? With a timber. How big? A small one. Where did he hit you? On my palm. How many times? Only once. How often? Everyday. I do not like it. Does anyone else come to your house at 'Eua? No. Do you go to Church? Yes. What Church? Mormon. When? Sunday. Can you pray? Yes. Do you have clean clothes when you go Church? Yes.

I then said to him, if I was to make an order that Pongi does not hit either of you anymore, and if he does I would send him to jail, would you like to come and live with Mohe and Viliami? I have to say he not only said yes, he brightened up and I would say, looked happy. I then thanked him and he went out.

[17] Viliami then came in. Although he is only 4, I was impressed with his understanding, he even knows he is 4 and that he had gone to Kindy in 'Eua. He said that he lives with Mohe. He said he wants to be with Tevita, and with Samu and Mohe. He said he was not hit by anyone. I asked him where he would like to live and he said he wants to go and live with Samu in 'Eua and then come back. I asked him if he would like it if Tevita would come and live with him here in Tonga, and he said yes, he would like Viliami to come and live with him and Mohe. I then thanked him and he went out.

### **Consideration**

[18] Having heard, seen and observed the two children, I am confirmed in my view that the judges in the cases referred to by Magistrate Kaufusi, as well as other cases, were correct in the rulings which they made in those cases. Children of young age, and these two boys are of young age, should not be separated from each other and they should not be separated from their mothers (unless unfit). Refer *Samita v Samita* [1991] Tonga LR 4 where Martin CJ stated:

“There are two basic principles in determining matters of this nature, that unless there are strong reasons to the contrary,

- (i) young children should remain with their mother;  
and
- (ii) young children should not be separated from their brothers and sisters.” (P6).

[19] I must also point out that it is not correct that the Family Protection Act has overtaken the authorities of the cases referred to by Magistrate Kaufusi, or the case I have referred to. The Act contains no such provision, either expressly or impliedly. In my view it in fact confirms those principles. The Act aims at the protection of the weaker person, who is usually the wife, who is the mother, as well as

the children from abuse by the stronger person who is usually the husband. That is the situation in the present case. It falls squarely within the provisions of the Act and it falls to be decided in accordance with the principles established by the Courts for the protection of the welfare of the children.

[20] I feel very sorry for both boys – they both long for each other. That is natural with all children. They thrive in the company of their siblings. They all benefit from each other. They must not be separated under any circumstance, unless there is no other way. Both boys want each other. They told me so. And Tevita, the older boy, also wants to come and live with the mother, if he can go to school here. I could not help but feel for the lonesome life he lives on his own with his father at 'Eua. He needs the love and comfort, company and teaching of the mother as well, and more so at his young age. I also feel for Viliami who longs for the company and lead of his older brother, but he says he wants to come back to his mother.

[21] As to the grounds of appeal of the appellant which I have outlined above, I would say:

(a) **Jurisdiction**- The Magistrate Court does have jurisdiction in the present case because the appellant did complain of a domestic violence committed by the respondent against him in refusing him access to see the two boys. The appellant cannot now say that the Magistrate has no jurisdiction to vary the order made in respect of that complaint.

(b) **Good cause** - Mrs. Fa'anunu correctly pointed out that there was a complaint by the respondent that there was "child abuse" or of hitting of the young boy by the older boy. That would be good cause to vary the order or at least reconsider the order formerly made by the Magistrate's Court.

As it has turned out, Magistrate Kaufusi, following correctly the authorities on the issue, varied the orders made to what they presently are. He was correct to have pointed out the failure of Magistrate Tuita to state his reasons for his own orders. The reasons ought to have given, otherwise the order has no lawful basis.

[22] I have found Magistrate Kaufusi's ruling well founded and I have found no valid ground in the appeal of the appellant to interfere with the orders he has made. The orders he has made are in the best interests of the two children, and because his orders have not been implemented as yet, the two children have suffered in the meantime, as I have found after I have spoken with each of them.

### **Conclusion**

[23] Accordingly, I am satisfied that the Learned Magistrate Kaufusi has not erred as is alleged in the grounds of appeal of the appellant and that his orders be forthwith carried out. I order that the appeal is dismissed.

**NUKU'ALOFA: 25 June 2020**



A handwritten signature in black ink, appearing to read "Niu J", is written over the seal.

Niu J

**J U D G E**