

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

**AM 19 of 2020**

*Solicitor General  
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24/08/20*

**BETWEEN: LISIA PAONGO**  
- **Appellant**

**AND : HEIMOANA PASI a.k.a 'OVALATA PASI**  
- **Respondent**

**BEFORE HON. JUSTICE NIU**

**Counsel : Mr. V. Latu for the appellant.  
Ms. A. Kafoa for the respondent.**

**Hearing : 17 August 2020**

**Ruling : 21 August 2020**

**RULING**

**Appeal**

[1] The appellant has appealed that the Magistrate has erred in dismissing the criminal charge which she has brought against the respondent.

**The charge**

[2] The respondent was charged that on 1 May 2020 he unlawfully damaged floral trees of the appellant, namely, Pua Tonga, Siale

Tonga, Pipi, Siale Tahi and Lose situated on a town allotment of the appellant which had been given to her by the former estate holder, Noble Fohe, who has passed away, contrary to S.184 (1) (a) of the Criminal Offences Act, and she prayed for compensation under S.25 (2) of the same Act in respect of such act of the respondent in the sum of \$340 and for costs.

### **The decision**

- [3] The Magistrate decided that the issue was whether or not there was lawful justification for the respondent to have damaged or destroyed the trees. She found that the appellant had been informed by the present Noble Fohe's representative in September 2019 that the care and maintenance of the piece of land had been given to the respondent, and that the appellant had been informed to remove her trees for some 6 or 7 months but that she had failed to remove them. The Magistrate therefore believed that the respondent had the interest in the land and to anything situated on the land. She accordingly held that the appellant failed to prove the charge beyond doubt that the respondent had unlawfully damaged or destroyed the trees, and acquitted the respondent.

### **Ground of appeal**

- [4] The ground of appeal of the appellant is that the Magistrate failed to give proper consideration to the appellant's possession of the land on which she had planted and maintained the trees planted since 1989 (30 years). She says she has had lawful possession thereof since 1989, and the Magistrate was wrong to have relied upon vague and uncorroborated verbal evidence called on behalf of the respondent that the care and maintenance of the land has been given to the respondent.

### **Evidence**

- [5] The appellant gave evidence that Noble Fohe was pleased with her hard work in leading the women of the village to clean and decorate

the village of his estate, Puke, and in organising the women for the national hosting by Tonga of the Pan Pacific Conference of the Pacific women in 1989. In recognition of her work, Noble Fohe, gave her the piece of land in issue in this case.

- [6] She was not married then and she kept the land continually cut and cleaned and planted floral trees on it soon after she got it. Those trees were 2 Pua Tonga, Pipi, Fiki, Siale Tahī, and Lose Malei. She was married in 1999 and she went and lived with her husband in Vaini but she continued to keep this land cut and cleaned. Her husband died in 2014 and she returned and lived in Puke in 2015. She then had 4 used vehicle tyres placed on the frontage of the land (as was done on the frontage of other homes along the roads of the village) and filled them with soil in which she planted Lose Malei and Siale Tahī plants.
- [7] She did not have the land granted to her and registered by the Minister of Lands.
- [8] In about August or September 2019, the present Fohe's representative informed her that he had been instructed by Fohe to inform her that he had given the care and maintenance of the land to the respondent, who lives next door to the land. She was told that she could cut and remove her trees and plants herself. The land on which the respondent lives is also Fohe's land because it has not been granted or registered by the Minister either.
- [9] The present Fohe lives and works in Australia.
- [10] The appellant did not accept the instruction conveyed by the representative to her. She continued to cut and clean the land as she had been doing and she did not cut down or remove any of her trees or plants.
- [11] On 1 May 2020, she went and asked the representative to ask Fohe if she could have her house built on the land because the Latter Day Saints Church had offered to build a house for her for free if the land

was registered in her. The representative later telephoned and told her that Fohe said that no construction was to be done on the land. A few days later, the representative went and told her that Fohe told him to have the land measured together with the land of the respondent and if there would be two town allotments of 30 perches each, then she and the respondent would have one each, and that if there was not enough land for the two allotments, the whole of the land, that is including the land she had, be given to the respondent and that another piece of land elsewhere would be given to her when Fohe would be able to come back from Australia.

[12] On or about Saturday 9 May 2020, while the appellant was away at 'Utulau until Sunday 10 May 2020 (which was Father's Day in Tonga), the respondent destroyed all the plants and trees of the appellant on the land and all the vehicle tyres were dug out and thrown off from the frontage of the land.

[13] The respondent did not give evidence but the representative did, for the respondent. He said the appellant came and asked to have her house, which was being gifted to her by the LDS Church in their aid programmed, built on the land. He said he telephoned Fohe and that Fohe told him to do as he thought was best, and that he told Fohe that there was not enough land there for 2 allotments of 30 perches each.

[14] He said that he did not know that the previous Fohe had given the land to the appellant and that he did not know that she had planted the floral trees and plants on the land or that she had maintained and kept the land cut and cleaned. He said that the respondent has not yet registered the land.

### **The law**

[15] This case concerns the ownership of the trees and plants planted and maintained on the land. There is no legislation in Tonga that specifies the ownership of plants, crops and trees on land, except legislations

which provide that the owner thereof be compensated for loss, destruction or removal thereof. Tonga has therefore followed and applied English common law, and English common law provides that the owner thereof is the person who planted and maintained the same as his property, except for timber trees, which belong to the owner of the land, unless otherwise agreed with the owner of the land. That law was applied in *H. C. Lough Ltd v Hohepa Tauteka* [1954] N.Z. L.R. 333. It was also applied in *Tu'ipelehake v Lavulavu* (L.1261/99) by Ward CJ in respect of vanilla plants which the Tu'ipelehake had planted and in respect of coconut trees which were on his land (estate).

- [16] Plants, crops and trees, unless they are timber trees, belong to the person who had planted and maintained them as his own. They do not belong to the person who owns the land, and the Magistrate was wrong to have held that it formed part of the land and therefore went with the land when the land was taken off the appellant and given to the respondent.
- [17] These floral trees and plants were not timber trees and are therefore not the property of the owner of the land, namely, the Noble Fohe. They were the lawful property of the appellant who had planted and maintained them.
- [18] S.184 (1) (a) of the Criminal Offences Act under which the charge against the respondent is brought provides that every person who intentionally and unlawfully causes damage to any tree or cultivated plant growing in any private plantation or garden shall be liable to imprisonment for any period not exceeding 2 months if the amount of the damage does not exceed \$5,000. This land is a private garden of the appellant and the trees and plants are valued at \$340.
- [19] The appellant, the owner of these trees and plants, did not consent to the destruction of thereof, and the respondent gave no evidence that he had lawful justification to do so, except that he was given the care

and maintenance of the land by the owner of the land, Noble Fohe. That does not give him the ownership of the trees and plants of the appellant or any right to destroy them.

[20] Accordingly, he had no lawful justification for doing so. He therefore intentionally and unlawfully damaged the trees and plants of the appellant as charged.

### **Conclusion**

[21] I consider that in the interests of justice and to minimise the costs to the parties by further remission of this matter to the Magistrate's Court, I should make the appropriate orders in this appeal.

[22] Accordingly, I make the following orders:

- (a) The appeal is allowed.
- (b) The respondent is guilty of the charge and is convicted and is discharged.
- (c) The respondent shall pay compensation to the appellant for the loss which she has suffered in consequence of the offence of the respondent in the sum of \$340 within 1 month or imprisonment for 30 days in default.
- (d) The respondent shall pay the costs of the appellant in this Court and in the Magistrate's Court in the sum of \$2,500.00.



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

Niu J

**NUKU'ALOFA: 21 August 2020**

**J U D G E**