

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

AM 20 of 2020

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**BETWEEN: 1. SIOSIFA TUPOU
 2. IKUNA TUPOU**

- Appellants

AND : SALONI TUPOU

- Respondent

BEFORE HON. JUSTICE NIU

**Counsel : Ms. 'A. Kafoa for the appellants.
 Mrs. F. Fa'anunu for respondent.**

Guardian ad litem : Ms. 'E. 'Akau'ola.

Hearing : 27 August 2020.

Guardian report : filed 29 September 2020.

**Submissions : by Ms. Kafoa filed 2 October 2020.
 : by Ms. Fa'anunu filed 6 October 2020.**

Ruling : 15 October 2020

RULING

Background

[1] The appellant, Siosifa Tupou (Sifa), and the respondent, Saloni Tupou, (Saloni) are both from Fua'amotu. In 2008, with Saloni at age 18, they were married and they lived with Saloni's family.

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- [2] They have 5 children: 3 boys aged 11, 8 and 7, and 2 girls aged 5 and 3.
- [3] By 2018, they have built and have lived in their own house, bought a motor vehicle and were operating a small retail shop. This has been possible because Sifa has been travelling on fruit picking seasonal work overseas repeatedly over the years, and they have frugally spent his wages to acquire these properties.
- [4] In 2019, whilst Sifa was away again for fruit picking, and while Saloni remained and operated their shop and cared for the children, Saloni began to have an affair with another man who was a driver delivering goods to the shop in consequence of which she conceived and gave birth to a child. She now spends most of her time, and in fact living with the man in Nuku'alofa. The man has his own wife and children and it appears he is now separated from his wife and is living with Saloni and their child. It would appear that that has been the situation since May this year.
- [5] Now Sifa is unable to return to Tonga from Australia where he has been fruit picking because of the border lock down caused by the world wide pandemic COVID 19. But he is still able to work and is remitting about A\$1,000 per month for the maintenance of the children and other expenses in Tonga. He sends it to his mother. The mother, Mele Tupou, is 68 years old.
- [6] Sifa had returned to Tonga in April 2019 and had heard rumours that Saloni had been with the man, and asked her about it but she lied that she had not been. It is not known when Sifa went again to Australia this last time but he says that Saloni admitted to him in June this year, that the child she had given birth to in January this year, was the man's child. That was near end of June 2020.
- [7] Sifa then instructed his brother, Ikuna, and Ikuna filed Sifa's application in the Magistrate's Court for an order that custody of the

children be granted to him, as well as possession of their vehicle. Magistrate Kaufusi granted the orders sought.

- [8] Saloni immediately applied to have those orders changed so that she would have custody and Magistrate Ma'u granted her those orders on 24 July 2020.
- [9] On the same day, Sifa filed his appeal to this Court against those orders.
- [10] Sometimes prior to the hearing of this appeal on 27 August 2020, the three boys, that is, the 3 oldest children, ran off and lived with Mele Tupou, Sifa's mother, and Sifa's brother, Ikuna. Only the two girls remained with Saloni's sister, Ongo'alupe, and her brother, Semisi, and their parents, Semisi Senior and Lesieli, with whom all 5 children had been staying.
- [11] During the hearing, both counsel agreed that it was a good idea that a guardian ad litem be appointed to verify the circumstances of the parties and report what he/she may find. I considered the matter overnight and I agreed and I appointed the Attorney General or an appropriate officer of her office whom she may designate as guardian ad litem in this matter.
- [12] That officer is Ms. 'Elisiva 'Akau'ola and after she made her inquiries and visits, she filed her report on 25 September 2020. Based upon her findings, she recommended that it was in the best interests of the children, that the children remain where they presently are – the 3 boys with Mele Tupou and the 2 girls with Ongo'alupe 'Oliveti, Saloni's sister, and brother and their parents.
- [13] Ms. Kafoa, for Sifa, filed her client's agreement to and support of that recommendation on 2 October 2020.

[14] Mrs. Fa'anunu, for Saloni, filed her client's disagreement with the recommendation. She maintains that the 5 children be altogether with her, as ordered by Magistrate Ma'u.

Consideration

[15] The law on the matter is fairly clear. The paramount consideration is what is in the best interests of the children, and unless there are strong reasons to the contrary, the best interests of young children are that they remain with the natural mother and that they are not separated from each other: ***Samita v Samita*** [1991] Tonga LR 4.

[16] Mrs. Fa'anunu says that that authority supports Saloni's contention that the appeal be dismissed and that Magistrate Ma'u's orders be maintained. She says that the claim of the 3 boys that they were hit by Saloni's brother, Semisi, is true but that they were hit in order to discipline them, as they should be disciplined for their own good. An affidavit by Semisi was attached to Mrs. Fa'anunu's submissions where he stated the reasons he had had to discipline them and how he did them. He said that he only used the palm of his hand on their backsides and once with a stick. The reason for one was the lighting of the stove and frying of sausages without permission because of the risk of fire or of burning themselves. Another was for touching the grandfather's wallet without permission for the second time and the last, on which the stick was used, was leaving home and going with friends without permission after school and not returning until night time.

[17] I agree with Mrs. Fa'anunu and with Semisi that disciplining is most important for the well-being of a child. However, there are other ways of disciplining a child without hitting him or her, and it is not an excuse that the person inflicting the discipline does not know that. That is because hitting a child instead may have a negative effect rather than the desired result. It may cause the child to be rebellious or may cause the child to run away, as indeed has happened to these

3 boys. They all ran away to their grandmother, Mele Tupou, and they refuse to come back to their mother, or rather their uncle, Semisi, who had hit them.

[18] I do not think that it is in their best interests that they be ordered, and forced, to return and live with their uncle, Semisi, where they would live in fear that they might be hit for any wrong thing that they might do. They should be happy to return and live with him before I order that they return but they are not. I also believe that Semisi does not know how to discipline a child other than by hitting him.

[19] But what I am most concerned about is that the mother of the children, Saloni, is not there at home at all to live with them. She lives instead with the man whom she now loves and the child she has had to him. The guardian ad litem has confirmed that. Saloni does not see her children for weeks. If I make an order that the 3 boys are to be returned to her, they will not be living with her. They will be living with her sister and her husband and the uncle, Semisi, instead. What then is the purpose of ordering the return of the 3 boys to be with the mother when the mother is not going to live with them, that is, with all the 5 children? The purpose of the law to which I have referred is to keep all the children together with the mother so that they continue to be nurtured with the love, care, warmth and comfort of the mother. That is no longer the case because Saloni no longer has that love and care for her 5 children.

[20] It is clear, and it is confirmed by the Guardian ad litem, that the 3 boys are happy and are well cared for where they are presently living, as are the 2 girls.

[21] I therefore consider that these are strong reasons why the 3 boys should not be with their mother and as to why they should be separated from their 2 sisters. I agree with the guardian's recommendation that the 3 boys remain with the respondent's mother, Mele Tupou.

[22] However, I consider that I should make orders that would ensure that the best interests of all the children are maintained, in the special circumstances of this case.

[23] Accordingly, I make the following orders:

- (a) the appeal is allowed and the orders of the Magistrate's Court are set aside.
- (b) The custody of the three boys, Siokatame Tupou, Kalaneti Tupou and 'Ikani Tupou, is granted to the father, Siosifa Tupou.
- (c) The custody of the two girls, Sepiuta Tupou and Ahorani Tupou, is granted to the mother Saloni Tupou.
- (d) Access to the children shall be as follows:
 - (i) All the children shall be with the mother, and I order that the mother shall be with them, from 8 am until 12 noon of every Saturday.
 - (ii) All the children shall be with Mele Tupou from 12 noon until 4 pm of every Saturday.
 - (iii) The father shall ensure that he speaks with and can see all the children and the children can see and hear him by telephone or video link on every access.
 - (iv) Each parent shall inquire and ascertain from each child as to the state of their studies at school, their homework, their food, their clothes, and uniform, and as to any need they have and shall provide all things in respect of their reasonable needs.
- (e) Maintenance and school expenses of the children shall be provided by the parent in whose custody those children are.

- (f) Each parent shall ensure that each child is properly cared for and shall be responsible for the good health, honesty, discipline and religious teaching of the children in his/her custody.
- (g) Each parent shall ensure that no child is hit by any one, not even by the older child, and shall ensure that they are not punished by being hit, scolded, deprived of food, drink, or of any necessity. He/she shall explain and teach properly to the child what it is he/she has done wrong and why he/she should not do it again or why he/she should do what she/he did not do.
- (h) Each parent shall be honest and shall teach honesty to the children, and shall not lie to any child or to anyone else. He/she shall not promise anything to any child which he/she cannot perform and shall carry out all promises he/she makes.
- (i) He/she shall ensure whoever he/she has instructed to look after the child or children shall comply with these orders. If such person breaches these orders, that parent shall be liable for such breach.
- (j) There be no order as to costs of this appeal or of the applications in the Magistrates Court.

(Translation)

- (a) 'Oku tali 'a e tangi pea 'oku tuku ki tafa'aki (pea 'ikai toe ngaue'aki) 'a e ngaahi tu'utu'uni 'a e Fakamaau'anga Polisi.
- (b) 'Oku foaki 'a e pule ki he fanau tangata 'e toko tolu, Siokatame Tupou, Kalaneti Tupou mo 'Ikani Tupou, ki he tamai, Siosifa Tupou.
- (c) 'Oku foaki 'a e pule ki he ongo fanau fefine, Sepiuta Tupou mo 'Ahorani Tupou, ki he fa'e, Saloni Tupou.

- (d) Kuo pau ke pehe ni `a e fetu`utaki `a e ongo matu`a ki he fanau `oku `ikai ke na pule ki ai:
- (i) Kuo pau ke fakataha kotoa `a e fanau ki he fa`e, pea `oku ou tu`utu`uni ki he fa`e ke fakataha mo kinautolu, mei he taimi 8 pongipongi `o ngata `i he taimi 12 ho`ata `o e `aho Tokonaki kotoa pe.
 - (ii) Kuo pau ke fakataha kotoa `a e fanau kia Mele Tupou mei he taimi 12 ho`ata `o ngata `i he taimi 4 efiafi `o e `aho Tokonaki kotoa pe.
 - (iii) Kuo pau ke fakapapau`i `e he tamai `oku ne lava `o lea pea ne lava `o sio ki he kotoa `o e fanau pea lea mo sio `a e fanau kiate ia `i he fetu`utaki telefoni pe vitio `i he fetu`utaki kotoa pe.
 - (iv) Kuo pau ke faka`eke pea fakapapau`i `e he tamai mo e fa`e `a e fanau taki taha ki he tu`unga `o `ene ako, homueka, me`akai `oku kai, vala, mo e teunga ako, mo ha me`a `oku ne fiema`u, pea ke ne fai `a e me`a kotoa ki he ngaahi fiema`u fakapotopoto kotoa.
- (e) Ko e tauhi mo e fua `o e fakamole `o e ako `o e fanau kuo pau ke fai ia `e he tamai pe fa`e fekau`aki pe mo e fanau `oku ne pule ki ai.
- (f) Kuo pau ki he tamai mo e fa`e ke na fakapapau`i `oku tokanga`i lelei `a e fanau taki taha, pea kuo pau ko hono fatongia `a e mo`ui lelei, faitotonu, talangofua mo e ako`i fakalotu `a e fanau `oku pule ki ai.
- (g) Kuo pau ke fakapapau`i `e he tamai mo e fa`e `oku `ikai ke taa`i `e ha taha ha fanau, tatau ai pe pe ko e taa`i `e he lahi `a e si`i, pea kuo pau ke na fakapapau`i `oku `ikai fai ha tautea `o ha fanau `aki `a hono taa`i, tafulu`i, fakafiekaia`i, fakafieinua`i pe `aki ha ta`e `oange `o ha fiema`u fakapotopoto. Kuo pau ke na fakamatala pea akonaki fakalelei ki he fanau `a e me`a hala kuo ne fai mo e `uhinga `oku totonu ke `oua te ne toe fai ia pe ke fai `a e me`a na`e `ikai ke ne fai.

- (h) Kuo pau ke faitotonu 'a e tamai mo e fa'e pea ke na ako'i 'a e faitotonu ki he fanau, pea kuo pau 'e 'ikai ke na loi ki ha taha 'o e fanau pe ki ha taha kehe. Kuo pau 'e 'ikai ke na palomesi ha me'a ki he fanau pe ki ha taha kehe 'a ia 'e 'ikai te na lava 'o fakahoko, pea kuo pau ke na fakahoko 'a e palomesi kotoa pe kuo na fai.
- (i) Kuo pau ki he ongomatu'a, ke na fakapapau'i ko e tokotaha 'oku na tuku ki ai ke tokanga'i 'a e fanau 'oku ne fai pau ki he ngaahi tu'utu'uni ni. Kapau 'e maumau'i 'e he tokotaha ko ia 'a e ngaahi tu'utu'uni ni, 'e mo'ua 'a e matu'a ko ia ki he maumau'i ko ia 'o e tu'utu'uni.
- (j) 'Oku 'ikai ke 'i ai ha tu'utu'uni ki he totongi 'o e fakamole 'i he tangi ni pe 'i he Fakamaau'anga Polisi.



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

Niu J

J U D G E

NUKU'ALOFA: 15 'Okatopa 2020