
BETWEEN : KIMELA PIUKANA - Appellant;

AND : TIVISE AKERIPA - Respondent.

Date of Hearing: 23 February 1999
Date of Judgment: 3 March 1999.

Counsel appearing: Mr Tu'ivai for Appellant, Mr Fakahua for Respondent

JUDGMENT OF FINNIGAN J

This is an appeal against a Magistrate's decision, which awarded damages to the respondent in a claim for defamation. The award was \$200, with costs.

The plaintiff claimed she had been defamed by words of the defendant, that "the plaintiff had been caught with Sailo in the bedroom of the soccer team", which she said meant that she had committed sin with Sailosi Tovi. She claimed this was untrue and ruined her reputation as a married woman.

The hearing in the court below was brief. Counsels' questions to the witnesses and their submissions to the learned magistrate were short and to the point. There were three witnesses for the plaintiff, two for the defendant. The plaintiff gave evidence that she had not slept with Sailosi at the boarding house of the soccer team. Likutau Tauhelangi gave evidence that the defendant had told him the plaintiff and Sailosi were caught at the house of the soccer team, and he asked her but she said it was untrue. Cross-examined, he said that the reason he questioned her was that he and she lived together as unmarried partners. Simone Ilavalu said the defendant told him that the plaintiff's pregnancy was not understood, and people did not know who was the father of her child. Cross-examined, he said that the defendant had not told him that the plaintiff and Sailosi had slept together in the boarding house of the soccer team.

The defendant said it had been reported to him as chairperson that the plaintiff and Sailosi had been caught by members of the soccer team sleeping in the boarding house of the soccer team, and he told them not to sleep in the boarding house because it will cause unhappiness, and neither to be drunk nor to steal. Cross-examined about whether he had told Likutau that Tivise and Sailosi had slept at the boarding house of the soccer team, he

replied that it was just hearsay because it was reported to him. Sailosi Tovo then gave evidence. He said he was in the Ha'atafu soccer team in 1997 and 1998, and the truth is that he never once went with Tivise to the soccer team boarding house and slept or had sexual intercourse with her there. He said they talked once outside, and nothing happened there.

THE SUBMISSIONS

Counsels' submissions on the appeal were helpful, but without intending disrespect I shall not refer to them in detail. I need only refer to Mr Tu'ivai's submission that the (apparently contradictory) decision of the learned magistrate in a related case brought by the plaintiff and heard the same day, should be taken into account in this appeal. I accept the submission of Mr Fakahua that the decision in the other case rested on the evidence in that case and cannot have any effect in the present case.

THE DECISION

For the defendant, Mr Tu'ivai submitted to the learned magistrate that the defendant had shown it was true that the plaintiff had sexual intercourse at the soccer club boarding house. Mr Fakahua for the plaintiff submitted that it was the defamation that had been proved, and that the defamatory gossip had made the plaintiff an object of general ridicule.

The findings of the learned magistrate were as brief as the evidence had been. He found that the plaintiff's evidence and the evidence of Sailosi established she had not slept with Sailosi at the soccer team boarding house; that the defendant's evidence proved he had said that she had; that Likutau's evidence proved that the incorrect statement had been heard by somebody; that Simione Ilavalu's evidence showed that the defendant was anxious to tell bad things about the plaintiff. He found that the defendant's evidence strongly supported the plaintiff's, and he found that the defendant had defamed the plaintiff.

Neither the plaintiff nor Sailosi was asked if they had sexual intercourse anywhere else, it appears that it was the claim of having intercourse at the soccer club boarding house that was defamatory. On the evidence, I cannot see how the defendant's submission could be accepted. There was no evidence from any witness that the plaintiff and Sailosi had sexual intercourse at the boarding house. Neither can I see how the plaintiff's submission can be accepted. There was no evidence from any witness that the defendant's statement to Likutau had made the plaintiff an object of general ridicule. To the contrary, Likutau had asked her if it was true and she had said it was not, and there the matter rested. If the plaintiff was a married woman as alleged in the claim, there was no evidence of that. To the contrary, the evidence was that she lived unmarried with Likutau. There is no evidence to suggest that, if she were married, Likutau thought the less of her as a married woman because of the story told by the defendant. There was no evidence that anybody other than Likutau heard what the defendant said to Likutau.

The decision under appeal cannot stand on the evidence, and in my view this appeal must succeed. The learned magistrate's decision is accordingly set aside and replaced by judgment in favour of the defendant, with costs in favour of the defendant. I fix costs at the amount ordered by the magistrate, \$100, which was the lawyer's fee on the claim.

On the appeal, costs are allowed to the defendant, to be agreed, otherwise taxed.

NUKU'ALOFA,

3rd March 1999

