

**IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

**Civil Appeal
Case No. 22/2188 CoA/CIVA**

BETWEEN: John James Viraleo
Appellant

AND: Harry Lolo
First Respondent

AND: Hezekiah Lolo
Second Respondent

AND: Brenda Lolo
Third Respondent

AND: Hopkins Vuraina
Fourth Respondent

AND: Elis Vuraina
Fifth Respondent

AND: Mathieu Vuraina
Sixth Respondent

AND: Erima Vuraina
Seventh Respondent

AND: Olive Vuraina
Eighth Respondent

AND: Keitson Vuraina
Ninth Respondent

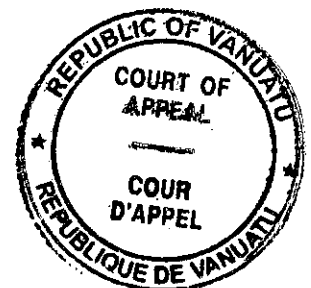
AND: Togoleo Vuraina
Tenth Respondent

Date of Hearing: 15 November 2022

Date of Judgment: 18 November 2022

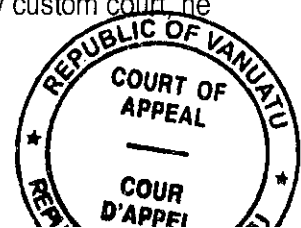
Before: Chief Justice V Lunabek
Justice R Young
Justice O Saksak
Justice D Aru
Justice R White
Justice S Harrop

Appearances: Self represented Appellant
E Macreveth for the Respondents



JUDGMENT OF THE COURT

1. In December 2015 Mr Leo alleged that the respondents in this appeal had breached a customary caution or taboo relating to a certain area of sea. The breach was denied by the respondents. Mr Leo then committed various acts against them and was subsequently charged and convicted of 44 charges of criminal offending. The convictions involved rioting, malicious damage, arson, threatening to kill, intentional assault and unlawful entry.
2. Mr Leo was subsequently sentenced to three years imprisonment. He challenged the convictions primarily on the basis that the court had no jurisdiction to consider the criminal charges against him. The Court of Appeal rejected that argument. (*Leo v Republic of Vanuatu* [2019] VUCA 50).
3. Subsequently the respondents in this appeal issued civil proceedings and sought summary judgment against Mr Leo for the damage they alleged he caused arising from his criminal acts. Mr Leo opposed the application saying that he was acting under customary law in accordance with article 95(3) of the Vanuatu Constitution.
4. The Judge granted summary judgment against Mr Leo as to liability and adjourned the damages assessment providing for the provision of sworn statements from both parties as to quantum. Mr Leo now appeals against this judgement.
5. The Judge in the Supreme Court rejected the article 95(3) argument by Mr Leo adopting the reasoning of the Court of Appeal in Mr Leo's criminal case (as 2). Given the evidence of Mr Leo's convictions relating to arson and intentional malicious damage and the evidence in support of the amended claim the Judge concluded that summary judgment should be granted as to liability. The Judge said that Mr Leo had not raised any matter of dispute on which he could conclude that summary judgment was not an appropriate format for consideration of the respondent's claims. The Judge noted that Mr Leo was basing his arguments solely on custom as he had in the previous criminal case.
6. Mr Leo's grounds of appeal effectively repeated the arguments that were rejected by the Court of Appeal in his criminal case.
7. As we understand his submissions Mr Leo says he should have been tried by way of custom law with custom charges and in a custom court. The Supreme Court had failed to apply the Constitution correctly and had failed to use custom law. This was an error. Mr Leo's submissions were that if he had been tried under custom law by custom court, he



would not have been convicted of the crime and he would not be liable for any damages arising from his criminal actions because he had acted in accordance with custom. And so he submitted that his criminal conviction should be set aside, that the Judgment in the Supreme Court holding him liable for damages in this case should also be set aside.

8. In his submissions before this court he now claimed that he has a "counterclaim" for VT 29,295,000,000.
9. He says that the Appeal Court should uphold a judgment of a customary court which had acquitted him of any wrongdoing.
10. We do not consider that we need to say much beyond what we said to Mr Leo in our judgment rejecting his appeal against his criminal convictions. In that appeal we considered what are essentially the same points raised as in this appeal.
11. In that appeal we said:

"10. We deal first with the appeal against conviction. Mr Molbaleh referred to Article 95(3) of the Constitution and submitted that's customary law part of the laws of Vanuatu. They are applicable and enforced by the chiefs. He submitted that the appellant as a custom chief was just applying customary laws by enforcing their breaches. He should not be convicted as he believed he has a right to do so under the customary laws. We reject that submission.

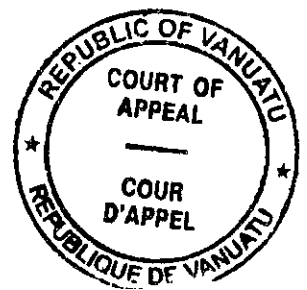
11. We note that Mr Molbaleh had failed to refer the Court to Article 47(1) of the constitution in relation to the applicability of custom by the Courts. Article 47(1) provides:

"The administration of justice is vested in the judiciary, who are subject only to the Constitution and the laws. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a Court shall determine the matter according to substantial justice and whenever possible in conformity with custom."

12. We agree with the prosecution submissions that "custom" and "customary" law are subservient to the Constitution and legislations enacted by Parliament. Customary law cannot be inconsistent with the Constitution and legislations enacted by Parliament. Customary law only applies if there is no rule of law applicable.

13. We endorse the statement made by the learned Judge in his Judgment in Public Prosecutor v Leo [2018] VUSC 75; Criminal case 2745 of 2016 (28 May 2018) where he said at paragraph 31:

"Customary considerations would only be a factor in the Supreme Courts' considerations if there were no rules of law applicable to what it was determining; and if it were possible to determine the matter on the basis of substantial justice. It is at that point that customary considerations would come into play,



such that, if possible, the Court's determination on the basis of substantial justice would also conform with custom. Of the above basis on which the Court must make a determination, customary considerations are the least significant or compelling. The most compelling bases requires the Court to determine the matter in accordance with law are in place, then the next basis of determination is substantial justice. If the matter is to be determined on the basis of natural justice, it is only then, if possible, that conformity with custom is to be considered."

And at paragraph 34 and 35:

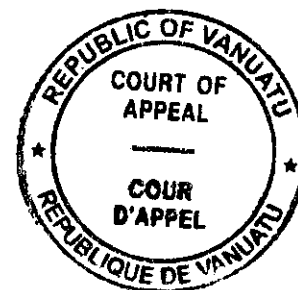
"Article 95 of the Constitution was inserted into the document to deal with transitional matters. What it plainly says is that customary law will continue to have effect as part of the laws of Vanuatu. Pre-independence, customary law played a relatively minor part in the way the laws were administered. Some thirty-eight years later, that continues to be the position. Article 95 was now ever intended to give greater prominence to customary considerations – just to maintain the status quo.

There has been no diminution of significance; neither has customary law taken on added significance; except in one area and that relates to ownership and use of land. [unclear] Parliament wished, customary law in the area of alleged criminal misconduct could also have been devolved to the chiefs – that has not occurred. There cannot be a clearer message of Parliament's intent with 38 years of silence in the face of many calls for change."

14. We further agree with the statement made in *PP v George [Lingbu]* Appeal case 3 of 1983 where Chief Justice Cooke held that unfamiliarity with the Constitution was no excuse and that customary law was applied only to matters not covered by the Constitution or the Penal Code; and in *PP v Kola [1995]* VULaeRb 7 Justice Downing made several pertinent comments as follows:

"There is a conflict I believe between the Constitution and the Statutory Law of Vanuatu on the one hand, and Custom. I wish to make it clear that this conflict is not a conflict between Custom and English or Penal Law, but between Custom and the Law of Vanuatu as passed by Parliament and [the] people of Vanuatu. It raises the question of the role of Chiefs. I think it stems from a misunderstanding of the power that the Chiefs now are able to exercise, and I think that the Chiefs must realise that any powers the wish to exercise in Custom is subject to the Constitution of the Republic of Vanuatu, and also subject to the Statutory Law of Vanuatu.

The Constitution by Article 5(2)(b) provides for the liberty of people. It also by Article 5 [i] provides for the freedom of movements. The Constitution provides therefore that no person should be forced by another to do something against his or her will. The section 105 of the Penal Code makes it quite clear that no person shall by force compel any person to go from any place to another...



...this has arisen again from the fundamental understanding of the constitutional rights by Chiefs, together with those around the Chiefs, whether they be assistants or members of committees of the communities."

12. Our conclusions that customary law can have no application in this case can be summarised in this way:

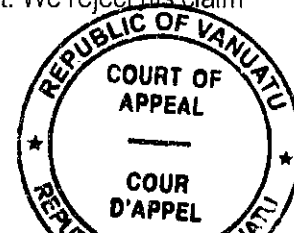
- a) Article 95(3) of the Constitution provides that customary law is part of law of Vanuatu;
- b) Article 47(1) of the Constitution provides as follows:

"the administration of justice is vested in the judiciary who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom"

- c) Article 47 provides that the administration of justice and resolution of proceedings is the function of the judiciary appointed under the Constitution. We therefore reject the assertion that a custom court should have heard these proceedings;
- d) In terms of Article 47(1) there is a law which governs the litigation in this case. The respondent's case in the Supreme Court was that the Appellant had unlawfully destroyed their property. And so, they sought damages for the unlawful act. In terms of Article 47(1) therefore there was a relevant law in Vanuatu and so the question of custom does not arise;
- e) Article 16 of the Constitution provides:

"Parliament may make laws for the peace order and good government of Vanuatu. This Parliament has passed a criminal code dealing with criminal actions of Vanuatu citizens"
- f) Given Article 16, we reject the appellant's claim that he should have been subject to custom law relating to any criminal responsibility for his actions;
- g) It is this Court's function as identified in Article 50 of the Constitution to hear appeals from the Supreme Court.

13. In those circumstances therefore we reject Mr Leo's claims that the proper venue for consideration of the damages claim is some form of customary court. We reject his claim

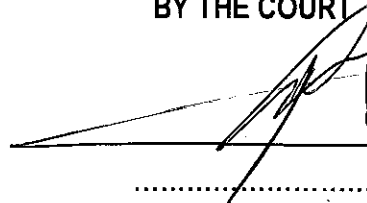


that customary law should decide the merits of the respondent's summary judgment application.

14. Mr Leo's "counterclaim" cannot be considered by this court. We are not a trial court. There was no counterclaim filed by Mr Leo in the Supreme Court and so for the purpose of these proceedings there is no valid counterclaim before the court.
15. Given that conclusion there being no substantive challenge to the Judge's summary judgment decision, the appeal will be dismissed.
16. We order costs in favour of the Respondents against the Appellant of VT100,000.

DATED at Port Vila this 18th day of November, 2022

BY THE COURT


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Hon. Chief Justice Vincent Lunabek

