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Supreme Court Judgment No. - 125.

IN THE SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA

ON APPEAL FROM THE COURT FOR NATIVE MATTERS

IN THE MATTER of the Native Regulations Ordinance 1908-1951 of the Territory of Papua

- and -

IN THE MATTER of the Appeal of AKO-AKO

AKO-AKO Appellant

SAMA KAVITA and BOSIAM KANAUI Respondents

REASONS FOR JUDGMENT

This is an appeal against a decision of a Magistrate for Native Matters sitting as a Court for Native Matters at Port Moresby on 23rd, 24th and 26th of April 1958 whereby it was decided that the Respondents Sama Kavita and his wife Bosiam Kanaui were entitled to the custody of the female child Angela Ako the subject of these proceedings.

Mr. Foster the Magistrate for Native Matters encountered in the course of the hearing several difficulties including the major question of jurisdiction and took the course of deciding the case upon the footing that he had jurisdiction and setting out fully his reasons, and then having an Appeal instituted so that the correctness of that decision could be investigated and decided. The course taken by the Magistrate was most proper and the views he has expressed in his reasons have been of great assistance on the hearing of the Appeal, as have been the arguments of Counsel which were largely based upon the considerations raised by the Magistrate.

The child Angela Ako is a native child of two or three years and is the daughter of the Appellant Ako Ako and his late wife Eleanor Awifo who died when the child was a small baby. The father Ako Ako found himself unable to look after the two children of the marriage at the time and after the Appellant's employer had made some efforts to have the children looked after by the local Mission, arrangements were made for the Respondents Sama and Bosiam to look after the two children.

It appears that Sama was a policeman stationed at

Kairuku and that his brother who had previously been a Sargeant of Police at Kairuku had shown kindness to the Appellant. Ako Ako belongs to the village of Maipa in the Sub-District of Kairuku and that was the home of his wife and children. The Respondent Sama comes from Orakaiva and his wife from Manus. I am satisfied however that this is a Papuan case and that Papuan law applies. The Ordinances of New Guinea are somewhat different in the terms but the question does not arise in this case whether if New Guinea law applied the position would be different.

There was some conflict of evidence as to the precise arrangement under which the Respondents took over the custody of the two children but their intentions or hopes are fairly plain since they showed a great deal of resistance to the Appellant's subsequent claims to the custody of the children, and although they were prevailed upon to return the elder child they kept the child Angela Ako and refused to hand her over. They treated this child as their own to such an extent that she became known as Nasapa Sama suggesting that she was the child of the Respondents.

The Magistrate has pointed to the problems in cases of this kind which might arise from the application of different native customs observed in different localities having regard to probable differences in rules as to inheritance of property amongst natives in Kairuku, Orakaiva and Manus. It becomes virtually impossible to say what would be the position of the child if she grew up with the Respondents.

The principal ground of the Appeal was to the effect that the Court for Native Matters had no jurisdiction to entertain a claim for custody of native children. In the course of argument as to the meaning of the word "claim" used in Regulation 132 of the Native Regulations 1939 to indicate the extent of the jurisdiction of the Court, it was suggested by reference to dictionary meanings that the word "claim" is normally referable to rights of ownership of property of all kinds, and that a perusal of Regulations 132 and 133 indicates that it is in this sense that the word is used. I do not think that there is to be found in this context any justification for giving any specific or narrow meaning to the word "claims". Such a meaning does not accord with paragraphs 3 and 4 of Regulation 133 and I think that it is quite consistent with the context to read the word "claim" more in the sense of "demand" or "complaint". The real question however is not whether this was a claim, but whether it was a claim of a kind contemplated by the very wide terms of Regulation 132.

The jurisdiction in question is part of that which was exercised in England by the Court of Chancery over infants who became wards of Court and is part of the inherent jurisdiction of the Court. The textbooks trace the jurisdiction back to the Sovereign power to provide for the protection and welfare of persons unable to look after their own affairs including infants, persons of unsound mind and others. This protection extends to all children within the realm regardless of nationality or status. This power was exercised on behalf of the Sovereign by the Lord Chancellor and became a normal function of the Court of Chancery which was the Lord Chancellor's Court. Although by Statute in different parts of the British Empire jurisdiction in various matters relating to the custody and maintenance and support of infants have been conferred on Courts of inferior jurisdiction, the general inherent jurisdiction to which I have referred has always been peculiarly that of the Royal Courts of Justice. Although the jurisdiction referred to was that of the Court of Chancery the principles of law relating to infants are not merely Equitable rules, but are the law applicable in every Court.

A frequent but by no means the only way of invoking the aid of the Court was by Writ of Habeas Corpus which could be made returnable in any of the Royal Courts. Upon such proceedings being taken precisely the same rules and principles are observed regardless of whether the Court is one which normally exercises jurisdiction at Common Law or in Equity. This is made plain in Re Agar-Ellis 1883 24 Ch. D. 317 (a case to which Mr. Clay for the Appellant referred in argument).

I think that the general empowering words contained in Regulation 132 of the Native Regulations are apt to include broadly all kinds of disputes which may arise as to incidental liabilities relating to the support and maintenance of children but in the absence of specific words I would be reluctant to hold as a matter of construction that it was intended to vest in the Courts for Native Matters such a specialized jurisdiction as that to which I have referred. Certainly the Court for Native Matters cannot be regarded as one having any prerogative or inherent jurisdiction beyond the jurisdiction conferred on it by legislation.

It was not argued that the regulations prescribing the jurisdiction of the Court exceeded the powers conferred in very wide terms by Sections 2 and 3 of the Native Regulation Ordinance 1908-1930. It is not necessary for me in this case to determine how far such Regulations might validly extend in creating various Civil jurisdictions for the Court for Native Matters; but I think that upon a proper construction of Regulation 132 I must hold that it was not the intention expressed by the Regulations to confer

upon the Court the Special Jurisdiction of the Supreme Court in relation to infants or indeed any jurisdiction in relation to the care or control of persons under disability.

At this point I should refer to the provisions of the Infants Ordinance 1912 (Papua). The purpose of this Ordinance is to make alterations of a specific nature to the law relating to the guardianship and custody of infants and under the provisions of this Ordinance certain powers are invested in the Court which by definition means the Central Court of the Territory of Papua or a Judge thereof. By virtue of the Ordinances Interpretation Ordinance 1911-1940 references to the "Central Court" are to be read as references to the Supreme Court of the Territory. So far as any new jurisdiction is conferred by this Ordinance it is a jurisdiction exclusively exercisable by the Supreme Court. By Section 21 of this Ordinance the general jurisdiction of the Supreme Court to appoint or remove guardians or otherwise in respect to infants is not to be restricted.

I think therefore that the Court for Native Matters had no jurisdiction to entertain the claim in this case.

It was also argued that even if the Court for Native Matters had jurisdiction to deal with this matter the conclusion reached was wrong in law having regard to the special right of a father to the custody of his children. The question was extensively argued before me and I think it desirable for me to set out what I think the legal position is in Papua today. By virtue of the Courts and Laws Adopting Ordinance of 1889 there were adopted for the Territory of Papua the principles and rules of Common Law and Equity for the time being in force in England so far as they shall be applicable. Booth v. Booth (53 C.L.R. 1) seems to me not to decide specifically whether the Common Law and rules of Equity observed in England are to be applied as amended by Statute or not but rather to be based upon the view that the particular problem that arose in that case could be solved by construing the Ordinance so as to produce a workable and sensible result. In this particular case I am not aware of any Statutory provisions in England which would have any material effect upon the Common Law or Rules of Equity, nor do I find any necessity to depart from established rules either to make them applicable to the Territory or to produce a sensible result.

Upon principle it seems to be clear that the custody of infants is normally an incident of guardianship. The position of the father of a legitimate child as the guardian was from early times regarded not as a mere right created by the law but as a fundamental

natural right which the law recognized and enforced transcending even the claims of the mother. No appointed guardian was recognized as having quite the same strength of right as the father, and so although the Court would in a proper case readily remove a legal guardian other than the father, the father's right of guardianship would only be disturbed if it could be established by the most cogent evidence that he was unfit to discharge the duties of that office.

Normally as a matter of practical necessity the guardian, whether the father or not, required to have the custody of the child, although, without in any way disturbing the rights of guardianship, a guardian might part with actual custody from time to time for such necessary purposes as education. If however a guardian abandoned the custody of the child or otherwise showed an unfitness to have custody the Court did not hesitate to grant custody to somebody else, and this jurisdiction was exercised in appropriate cases even where the father was the guardian. In such cases it was sometimes the result that the father or other guardian was left with a general responsibility for the superintendence of the child's education and upbringing and welfare but without the actual custody of the child. There is therefore a clear distinction to be drawn between guardianship and custody but in relation to both in the normal case a father's right and responsibilities were regarded as paramount.

In Matrimonial cuases questions as to the custody of infants arise in a limited aspect and the guardianship is not generally involved. Recent legislation has tended to place both parents on an equal footing and to provide that the paramount question is to be that of the welfare of the child. The application of this equality is however restricted to disputes as between the parents of the child in question.

Turning again to the Infants Ordinance 1912 (Papua) there are several provisions as to the guardianship of the mother of a child and persons appointed in certain circumstances by the mother to act as guardian in her place. The powers conferred on a guardian under Section 5 of the Ordinance are I think clearly referable to guardians whose appointment is made under that Ordinance and not to the guardianship of the father whose powers do not arise by virtue of the Ordinance. The same applies I think to Section 7 dealing with the removal of guardians appointed or acting by virtue of the Ordinance. I think therefore that it is clear that the father's position as a father and as a guardian as against strangers or persons other than the mother is largely unaffected by this Ordinance, although Sections 10 - 12 disentitle him to an order for custody

where he has abandoned or deserted the infant or has been guilty of the conduct specified in these Sections. The evidence before the Magistrate did not lead him to suppose that either of these Sections would have been applicable.

I think therefore that it is plain that a father who is in fact discharging his proper obligations to the child and has custody of the child will not be deprived of his clear right either to guardianship or custody unless an enquiry into his conduct or capacity discloses a strong case for interference. A father who is the lawful guardian but who has not in fact the custody of the child at the moment can apply to the Court to recover custody and in the ordinary case his right will be upheld as paramount. He is not however in quite the same position as a father who has actual custody, for the Court may exercise its discretion to refuse to help him.

The enquiry in this case and the Magistrate's decision were largely concerned with the question of what was the best thing to do for the benefit of the infant but such a question cannot be determined at large and it must be decided with reference to accepted principles and standards of society. It is recognized as a fundamental principle, in a dispute as between a father of a child and a stranger, that the proper place for the child is with the father, and no question can really arise whether it can be for the benefit of the child to be with somebody else, unless it has been established in the appropriate jurisdiction that the father is unfit to discharge his normal duties and should be relieved, as it were, of the responsibilities which are his by law. The question which arises in relation to custody as between divorced or separated parents of a child is entirely different, and it becomes an immediate question whether the child is better off with one parent or the other, each of whom is given equal standing by Statute.

In this case the child has not been adopted by any process of law or with the consent of the father and therefore the guardianship remains unchanged. However fit and proper the Respondents may be to be the foster parents of the child (and nobody has suggested that they are unfit or that they would treat the child with anything but kindness and consideration) this question does not arise and cannot arise so long as the father is willing and able to carry out his proper functions. Apart from one incident which on the evidence carries no suggestion that it forms a pattern of conduct likely to be repeated, there has been no real challenge as to the fitness of the father to carry out his

proper functions as guardian and custodian, and therefore in my opinion there are no facts so far disclosed upon which a Court would deny the father's right to the remedy which he seeks. However since I am of the opinion that the Court for Native Matters has no jurisdiction to determine this question no useful purpose would be served by sending it back for further enquiry as to the facts, and I think that the proper course is for proceedings to be brought in the Supreme Court, and for the facts to be further investigated if necessary in relation to the conduct of the appellant.

Another ground for appeal was that the Magistrate acted wrongly in allowing himself to be influenced by the opinions expressed by Dr. Refshauge and Dr. Janousek, who were not called as witnesses upon the hearing, and whose evidence therefore was not made the subject of cross-examination, nor was it translated to the Appellant into a language understood by the Appellant as provided by Regulation 51 of the Native Regulations 1939. It was argued that the views expressed by the two medical experts did not come within the provisions of that regulation and did not constitute evidence in the case, but I think it is clear that the question upon which they expressed their opinions though not a proper question, was in fact the question being determined by the Court, and that their opinions should not have been allowed to influence the Magistrate's decision unless expressed as evidence of expert witnesses in Court. I do not imply any criticism of either of these persons whose opinions were sought by Mr. Foster for his guidance having regard to their knowledge of matters of Infant Welfare and Health.

It has been suggested to me that since the Court for Native Matters has no power to compel the evidence of European witnesses the Magistrate is virtually deprived of the benefit of expert evidence unless he can consult Europeans on subjects of this kind away from the Court.

The right of cross-examination upon any evidence which might in any way influence the decision of the tribunal is so essential to the proper trial of any proceedings that mere expedience cannot be a valid excuse. Although Mr. Foster has shown adequate independence of mind in rejecting the view on another matter expressed by a legal office, and I am sure that if he disagreed with the medical experts he would not hesitate to say so, I think that the mere making of enquiries of this kind is enough to give rise to such a danger of the Court being influenced by improper material that it would constitute in itself ground for setting aside the decision on Appeal under Section 4 of the Ordinance.