

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Matrimonial Jurisdiction)

MATRIMONIAL CASE No.16 OF 1998

BETWEEN: RACHAEL PRUNELLA KONG
of C/- PO Box 1051 Port Vila.

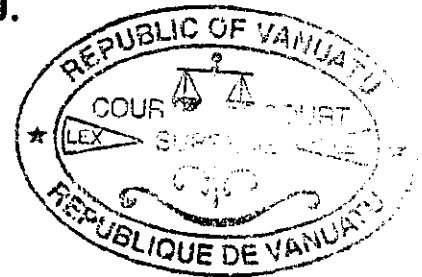
Plaintiff

AND: GEOFFREY DENNIS KONG of
PO Box 1665 Port Vila.

Defendant

Coram: Acting Chief Justice Vincent Lunabek J.

Counsels: Mr. Garry Blake for the Petitioner
Mr. Robert Sugden for the Respondent



JUDGMENT

By a petition filed at the Supreme Court on 3 December 1998, Mrs. Kong, the petitioner, sought the dissolution of the marriage between herself and the respondent on the ground of persistent cruelty. She also seeks for the following:

- *That she may have custody of the minor children of the marriage namely, David Malau Kong and Ellese May Taupa Kong;*
- *That the respondent pay spousal maintenance for herself and the children;*
- *That the respondent vacate the matrimonial home and allow the petitioner and the children to peacefully reside therein.*
- *That the respondent be permanently restrained from molesting, harassing, assaulting or abusing the petitioner or the children in*

any way whatsoever and that the respondent not attempt to contact the petitioner or come within 3 meters of her at all until further order.

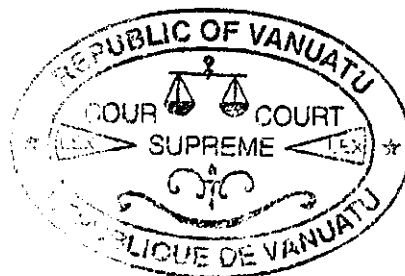
Accompanying the petition was a request for an urgent hearing to accommodate the petitioner's need for orders for material support and protection. During December 1998, the petitioner and the respondent attempted to sort matters out, however no resolution could be reached and the matter was listed for trial. The trial proceeded and final submissions were made by both the petitioner and the respondent, and the matter was adjourned for decision. However, on 22 June 1999, before judgment was delivered, the petitioner sought leave to reopen her case for the hearing of further evidence of cruelty which she alleged had occurred since the matter was adjourned for decision. The motion to reopen the matter was heard on 5 July 1999 and the court ruled that this decision would be included in the final judgment. Thus, before deciding on the issues contained in the original petition, I must first dispose of the preliminary issue of whether the proceedings be re-listed for the hearing of further evidence in respect of events occurring since the completion of final submissions in the matter.

1 THE ADMISSIBILITY OF FURTHER EVIDENCE PRESENTED AFTER CLOSING SUBMISSIONS.

The court heard final submissions on the petition on 11 May 1999. After that date, the petitioner by Motion dated 22nd June 1999, sought leave to reopen the matter to submit further evidence of violence. The respondent contended that the Court should refuse to reopen on the grounds that the application was too late and that the evidence sought to be presented was not relevant to the issues raised by the petition.

Counsel for the respondent presented the English authority of *Noble v Noble*¹ to persuade the court that the evidence was too late. In dicta, Scarman J. stated that had he simply been an umpire between conflicting parties, he would have said it was too late. However, he continued that in line with s.4 of the *Matrimonial Causes Act 1950* (England), which is duplicated in s.9 of the *Vanuatu Matrimonial Causes Act CAP 192*, he had a clear duty to enquire where facts warranted an investigation. He

¹ [1963] 3 All ER 387



therefore allowed the evidence. Section 9 of the Act has been discussed in this court's decision in *Niko v Niko*.²

Counsel for the respondent also presented the English case of *Burgess v Burgess*³ to persuade the court that the evidence would not be relevant to an issue already raised in the case. The facts of *Burgess'* case are very far removed from the petition presented before the court. *Burgess* centered on an allegation of adultery where a child was born to support the allegation. Any further adultery would of course be irrelevant. This present petition is brought on the ground of persistent cruelty.

I am persuaded by *Noble's* case and the particular facts of this case that I have a duty to enquire and in particular, the fact that the conduct of the parties in dispute constitute the central issue already before the Court. However, I must add that this is a course I adopt with extreme caution. In my view, this Court may, in disputed matrimonial cases grounded on persistent cruelty and where there is alleged violence between husband and wife involving children of the marriage, and the evidence sought to be adduced after the close of the submissions intended to be proof of this violence, although occurring since the completion of final submissions, consider further evidence. This would be done by allowing the applicant to call that further evidence and allow the other party to exercise his right of cross-examination.

In this case, the petitioner sought to produce a statement to police arising out of an incident at the home in which the petitioner, the respondent and Simon, the petitioner's son from a previous relationship, were involved. Attached to the statement to police was a medical report dated 7th June 1999 certifying that the petitioner had been assaulted, and listing her injuries. The respondent also submitted a statement to the police with a medical report attached.

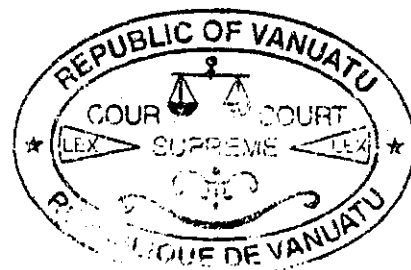
By paraphrasing *Muirhead J.*, in the case of *Murray v. Figge*⁴ it can be noted that:

"Here, I have seen the statements sought to be tendered. I will say no more than this. As my reasons for judgment will indicate they would in no way alter the views I have formed concerning what is, in this case, the important issue of credibility. Nor would they in any way affect my factual findings upon which I must determine

² Matrimonial Case No 9 of 1996, unreported

³ [1958] 2 All ER 63

⁴ [Murray v. Figge, S. C. (N. T.) 612 at 614].



whether persistent cruelty is proved. In short, they certainly would not influence the result in any event."

For these reasons, I am not prepared to grant the Petitioner's application to tender further evidence.

The court must now consider the application for dissolution of the marriage and the wellbeing of the children. If a decree nisi is granted, the petitioner has also requested the following:

1. custody of the two children;
2. spousal maintenance as well as maintenance of the children;
3. property settlement; and
4. a restraining order.

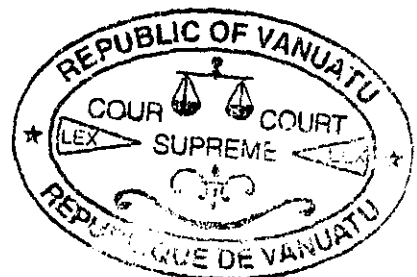
2. APPLICATION FOR DISSOLUTION OF MARRIAGE UNDER S. 5(A)(III) OF THE MATRIMONIAL CAUSES ACT 1986 (CAP 192).

The petitioner is Papua New Guinean. The parties were married on 19 March 1993 at Port Moresby, Papua New Guinea. They have two children from this marriage:

1. David Malau Kong, born 21 June 1994 in Papua New Guinea; and
2. Ellese May Taupa Kong, born 15 September 1996 at Port Vila, Vanuatu.

As well as these two children, the petitioner has three other children who live with them from two previous relationships. They are:

1. Harry Bacca, born 28 November 1981;
2. Simon Davis born 24 October 1983; and
3. Adele Davis born 21 February 1986.



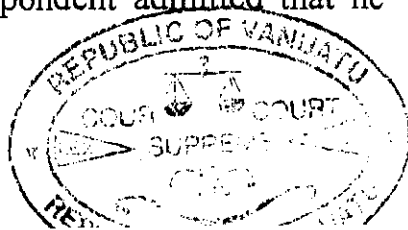
The parties cohabited in Papua New Guinea and are now living in Vanuatu. The dissolution of the marriage is sought on the ground of persistent cruelty under s. 5(a)(iii) of the Act.

SUMMARY OF THE EVIDENCE.

The petitioner's evidence concerning cruelty encompassed both physical and emotional cruelty. She stated that since their marriage, the respondent regularly insulted and assaulted her and her three older children, and she recounted several incidents of violence against herself and her older children. The petitioner indicated that the respondent had, in separate incidents, tried to choke her, struck her around the head and kicked her in her ribs and her back. She stated that the assaults emanated from minor incidents, such as when she forgot to turn on the hot water or when she had not done the shopping. The petitioner said that the respondent often swore at her and insulted her indicating to her that she was "brain dead" and useless. She recounted one incident where an argument developed because she had asked when they could leave the beach, and this resulted in the respondent kicking her in the ribs. She stated that she was in pain for the next week and finally had to call the doctor, as she was not able to move. The respondent admitted that there had been occasions when he hit the petitioner, however he did not recall the particular incidents described by the petitioner, and denied that he regularly assaulted her. He also disputed the degree of violence recounted by the petitioner.

The respondent also recounted incidents where the petitioner had attacked him, once with a carving knife, and another time with scissors and a broomstick. The petitioner denied attacking the respondent with the carving knife and scissors, however admitted that out of anger and frustration she smashed the broomstick against a wall and a van.

The petitioner testified that in October 1998, there was a disagreement about the food served for dinner. She stated that the respondent smashed the plate of food onto the floor and went out to eat. When he returned later in the evening, the respondent forced the petitioner and her three older children out of the house to sleep in the shed. The shed had no windows, no floor or beds and they put cardboard and mats on the ground underneath the two single mattresses they used to sleep on. However, they came into the house during the day to look after the two smaller children and to clean and cook. This state of affairs continued for two months until December 1998. The petitioner stated that the older boys are still not allowed into the house. The respondent admitted that he

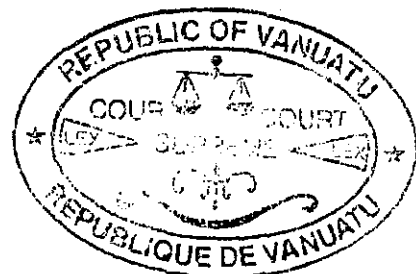


forced the petitioner and the two boys to sleep outside in the shed, however he stated that he did not force Adele. Further although the petitioner returned to sleep in the house, he also stated that the two older boys have chosen to go back into the shed rather than live in the house.

The petitioner testified that in 1994 the respondent became angry with Simon who was then 10 years old and kicked him in the head, the face, his mouth and his ribs. She stated that the respondent wore hard leather shoes and Simon was left bruised and bleeding. The petitioner gave evidence that she had noted some of the incidents in her diary including that one. However, her diary which was tendered in evidence does not show any entry around that time.

The petitioner stated that in 1995 when Harry was 14 years old and they were living on the yacht, the respondent made him stay in the water from 5.30pm until 7.30pm in the cold and dark to look for a piece of clothing that had fallen overboard. The petitioner recalled several incidents where the older children had been hit and verbally abused. She also stated that in November 1995, after the respondent had abused and assaulted her, he sent the three older children back to Alatu, New Guinea, the petitioner's hometown. The children stayed with the petitioner's sister and husband, however the petitioner stated that her brother-in-law raped Adele who was 9 years old at the time, and through this incident the three children came back to live with the petitioner and the respondent.

The respondent admits that he blames the three older children for the disharmony in the marriage. He stated that the petitioner could not control those children whose behaviour, especially the boys', was unacceptable. The respondent indicated that the reason the petitioner and her older children were banished to the shed was that he was concerned about the effect of their behaviour on the younger two children. The petitioner stated that right from the start, the respondent was always very critical of the older children and was negative about them and to them, especially about discipline and work. The petitioner clearly stated that the children are part of her, and that the marriage is not workable because the respondent cannot accept the children. She also stated that she is hurt and saddened by the respondent's attitude towards her and her children, and that she feels no warmth or affection from the respondent. However, the respondent states that apart from the three older children, the relationship is otherwise healthy.



The petitioner stated that in February 1999 she commenced counseling sessions at the United Pentecostal Church and from this she receives support and comfort.

Having heard all the evidence, and observing the demaneour of the petitioner and the respondent in the witness box, I find that the petitioner is a reliable witness whose evidence of cruelty which goes beyond that which has been admitted by the respondent should be accepted and that the admissions of the respondent only serve to support such allegations.

SUBMISSIONS OF THE PARTIES

Submissions of the Petitioner.

Counsel for the petitioner submitted that the petitioner asks for a life free from cruelty for both herself and all her children. Counsel presented instances of physical cruelty. As well as this, he presented instances of mental cruelty where the petitioner's children were both physically and emotionally abused by the respondent, and this caused emotional stress for the petitioner. The petitioner's isolation and lack of warmth and comfort from the respondent compounded this stress. Counsel also indicated that the older three children were considered children of the marriage by s.15(2) of the *Matrimonial Causes Act* CAP 192.

In support of the petitioner, counsel presented three recent unreported Vanuatu cases, *Niko v Niko*⁵, *Molu v Molu*⁶ and *Lawac v Lawac*⁷. He presented the following findings from those cases:

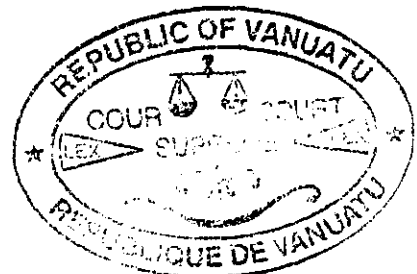
- the standard of proof is the civil standard;
- the court is entitled to take into account the petitioner's statement that she can no longer live with the respondent, reinforcing this with the Solomon Islands case of *Bui v Makasi*;⁸
- that the court is entitled to act on the uncorroborated testimony of the petitioner relating to cruelty;
- that the whole matrimonial relationship must be considered and not only the violent acts, and in what constitutes cruelty the circumstances

⁵ Matrimonial Case No 9 of 1996, unreported

⁶ Matrimonial Case No 2 of 1996, unreported

⁷ Matrimonial Case No 5 of 1997, unreported

⁸ Civil Case No 108 of 1992 of the High Court of the Solomon Islands



of each case must be examined in line with the physical and mental condition of the parties, their character and their social status.

Submissions of the Respondent

Counsel for the respondent submitted that persistent cruelty must be proved. In persuading the court, he presented the English authority of *Russell v Russell*⁹ upon which he relied for the definition of cruelty which read “[T]here must, however, be bodily hurt – not trifling temporary pain, or a reasonable apprehension of bodily hurt”.¹⁰ He submitted that *King v King*¹¹ indicated that the whole matrimonial relationship must be considered when considering cruelty, and reinforced this with the case of *Lauder v Lauder*,¹² which indicated that the subjective characteristics of the husband and wife would determine what constitutes cruelty for the particular marriage. Counsel stated that persistent cruelty implies some degree of repetition, (*Barker v Barker*)¹³.

Counsel for the respondent also indicated that for the alleged cruelty by the respondent against the older children to be relevant, it must be shown that these children were children of the family and the cruelty towards them was so distressing to the wife that her health was injured (*Birch v Birch*).¹⁴ Counsel submitted that the older children were not children of the marriage, as according to 4Halsbury Volume 13, both parties must accept the child and in this instance the respondent did not accept the children.

Counsel for the respondent also submitted that there was condonation on the part of the petitioner because of the Christmas card and letter sent by the petitioner and the children to the respondent as well as evidence given by the petitioner that she contemplated an overnight visit to a resort. Counsel also submitted that the petitioner’s willingness to continue the household duties as well as sleeping in the same bed as the respondent was evidence of condonation.

The issue of corroboration was also submitted to the court. Counsel stated that in *Niko v Niko*¹⁵ Lunabek J indicated that lack of corroboration

⁹ [1897] AC 395

¹⁰ p.457

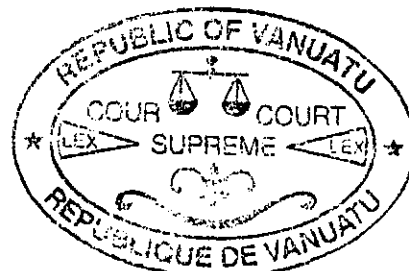
¹¹ [1953] AC 124

¹² [1949] All ER 76

¹³ [1949] All ER 247

¹⁴ (1875) 42LJ (P&M) 23

¹⁵ Matrimonial Case No 9 of 1996, unreported



is an important point to consider when assessing the degree of violence. Counsel submitted that the petitioner's diary entries did not coincide with her evidence, and the evidence given by her older son, Harry, did not refer to any of the incidents recounted by the petitioner.

THE LAW AND ITS APPLICATION TO THE FACTS

The relevant provisions of the *Matrimonial Causes Act* CAP 192 to be considered by this court are s. 5(a)(iii) and s.15(2).

Section 5 provides:

"... a petition for divorce may be presented to the Court whether by the husband or the wife -

(a) on the ground that the respondent -

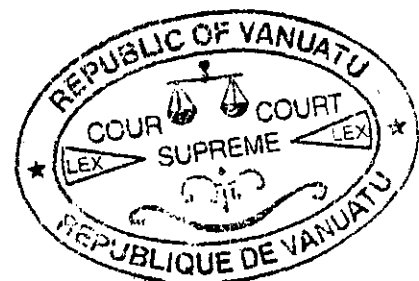
...

(iii) has since the celebration of the marriage treated the petitioner with persistent cruelty; or"

The general definition of cruelty is given by the court in *Niko's* case. In that case, it was stated that "[C]ruelty is generally described as such character as to have caused danger to life, limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger."¹⁶ This is reaffirmed in *Molu's* case. Both of these cases cover the aspects of cruelty submitted by the respondent who referred to English cases. I cannot understand why English cases, especially cases which are 200 years old, could possibly be considered more persuasive than cases from this jurisdiction.

I must reiterate in this case that in considering the allegation of cruelty, the whole of the matrimonial relations must be considered and that it is not just violent acts which need to be considered. As I have stated in previous cases, the Court must consider the impact of the personality and conduct of one spouse on the mind of the other and all incidents and quarrels between the spouses must be weighed from that point of view. In determining what constitutes cruelty regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties and their character and social status.

¹⁶ p.4



In this case, the petitioner's evidence establishes that there were assaults on her by the respondent. The respondent admits hitting her and acting aggressively towards her. This, as well as banishing her and some of the children to sleep in the shed for two months satisfies me that the respondent was persistently cruel. I have no doubt that the situation has become intolerable for both the respondent and the petitioner as well as the five children living with them. The respondent clearly blames the older children for the unhappy situation, and the petitioner cannot deny her responsibility for the welfare of those children.

S.15 (2) of the *Matrimonial Causes Act* CAP 192 states:

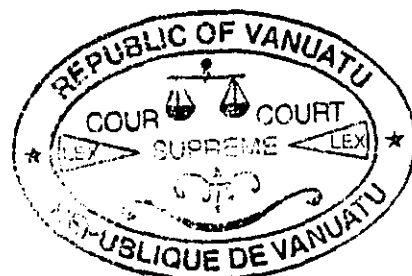
"15 (2) For the purposes of this Act the expression "children of the marriage" shall include any child of one party of the marriage (including any illegitimate or adopted child) who has been accepted as one of the family by the other party."

Even though the respondent denies ever having accepted these older children as children of the marriage, he has supported them and they have all lived together for a considerable time during the marriage. I accept that this behaviour indicates an acceptance of the children and therefore am satisfied that the effect of the respondent's dealings with the children form part of emotional cruelty shown by the respondent towards the petitioner.

The issue of corroboration has been dealt with by this court in both *Molu v Molu* and *Niko v Niko* and does not need to be reiterated except to say that this court is entitled to act on uncorroborated testimony of the petitioner relating to cruelty.

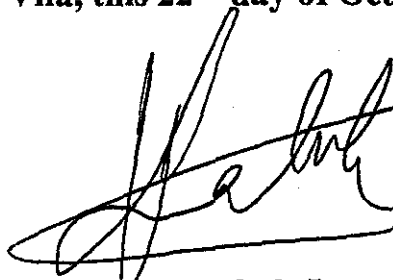
Having considered all the evidence in this case, I am satisfied that the allegation of persistent cruelty is established and that the marriage between the petitioner and the respondent is not reconcilable. On this basis, I made the following orders:

1. That the marriage between the Petitioner and the Respondent be dissolved;
2. That the Petitioner may have custody of the minor children of the marriage namely, David Malau Kong and Ellese May Taupa Kong;



3. That the Respondent/father will have reasonable access to the minor children of the marriage namely, David Malau Kong and Ellese May Taupa Kong;
4. That the Respondent be permanently restrained from molesting, harassing, assaulting or abusing the Petitioner or the children in any way whatsoever;
5. That the Respondent vacate the matrimonial home and allow the Petitioner and the children to peacefully reside therein;
6. That the Respondent pay maintenance to the Petitioner by way of spousal maintenance and maintenance for the children,
7. That the petitioner and the respondent have liberty to apply within 2 days notice to the other party in respect to the following:
 - (a) The determination of the amounts of spousal maintenance and the maintenance of the children;
 - (b) The property settlement;
 - (c) Practical arrangements as to the right of access to the two (2) minor children of the marriage above-named in particulars 2 and 3 of the Order.
8. That the costs of the action follow the event and be taxed failing agreement.

Dated at Port Vila, this 22nd day of October 1999.



Vincent Lunabek J.
Acting Chief Justice.

