

(Appellate Jurisdiction)

**BETWEEN: JOHN MILLER SAMUEL, JOHN
SAMUEL, DAVID SAMUEL,
ABEL SAMUEL, MUNA
ALBERT, SELA ALBERT,
KALSANDI, HAP, GEORGE
ALBERT, WILLIAMSON
ALBERT, GRAHAMSON
ALBERT.**

Appellants

**AND: JACK TAMAI AND GABRIEL
NIPTIK**

Respondents

Date: 11th June, 2001, 4 p.m.

Coram: Mr Justice Oliver A. Saksak sitting at Lakatoro

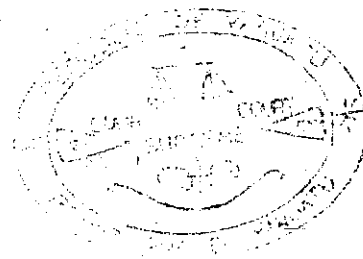
Clerk: Ms Wendy Wanemay

**Counsel: Mr Bill B. Tamwata for the Appellants
Mr Kiel Loughman for the Respondents**

RESERVED JUDGEMENT

This appeal arose out of two separate proceedings heard in the Magistrate's Court sitting in Lakatoro on 10th July 2000. These proceedings were Civil Case No.20 of 1998 between the respondent Jack Tamai as plaintiff against the appellants, and Civil Case No.21 of 1998 between the respondent Gabriel Niptik as plaintiff against the appellants herein.

In proceedings No.20 of 1998 Jack Tamai sued the appellants for damages for loss of crops destroyed by the appellants. His total amount of damages was VT170,740. In what appears to be the trial on 10th July, 2000 the court below found in favour of Jack Tamai and ordered the appellants:-



- (a) to pay damages to the plaintiff in the sum of VT127,280.
- (b) to pay costs of the plaintiff in the sum of VT4,000.
- (c) to pay both damages and costs by the end of October, 2000.

The defendants appealed against those Orders.

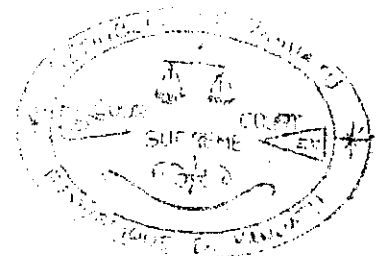
In Proceedings No.21 of 1998 Gabriel Niptik sued the appellants for damages for loss of crops destroyed by the appellants and also damages for personal injury. His total amount of damages was VT733,350. On 10th July, 2000 the Court below found in favour of the plaintiff and ordered the appellants:-

- (a) to pay damages jointly to the plaintiff for loss of crops in the sum of VT66,800.
- (b) to pay the plaintiff's costs in the sum of VT4,000.
- (c) the plaintiff's claim for personal injuries be dismissed.
- (d) to pay both damages and costs by the end of October, 2000.

The defendants appealed against those Orders.

On 20th February 2001 the appellants sought leave by Notice of Motion for the Court to enlarge time to enable the appellants to appeal the Orders of the Magistrate's Court of 10th July 2000 in relation to Civil Cases No.20 and 21 of 1998 respectively. They also sought orders consolidating the two cases for the purposes of the appeal. Leave was accordingly granted. Their Notice of Appeal which also contained their original grounds of appeal was filed on the same day. On 11th June, 2001 the appellants filed amended grounds of appeal which are as follows:-

1. The Court erred in law in making the order when there were no independent witnesses to verify the respondents' claims.
2. The Court erred in law in failing to ensure that the appellants be given the opportunity to cross-examine the respondents and/or any of their witnesses.
3. The Court erred in law in making the orders when there was insufficient admissible evidence to warrant the Court finding in favour of the respondents.



4. The Court erred in law in failing to allow the appellants the opportunity to prosecute their defence prior to the making of the Order.”

The appellants seek that the orders of the Court below be set aside in their entirety, and also claim costs.

Submissions were made orally in support of the grounds of appeal from Mr Tamwata to which Mr Loughman responded. I do not propose to state those submissions. Both counsels made references to the Records of Proceedings in both cases. I therefore consider the submissions made in the light of those Records in the following manner:-

Grounds No.1- “No independent witnesses to verify the respondents claims”.

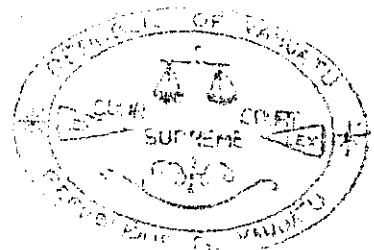
It appears from the Records of Civil Case No.20 of 1998 that the Plaintiff Jack Tamai himself gave evidence on oath concerning his damaged crops, their amounts and their prices. He also gave evidence relating to the assault and the injuries he sustained during the assault.

It also appears from the Records that the plaintiff’s witness was Gabriel Niptik, the Plaintiff in Civil Case No.21 of 1998. These cases were separate cases. The Court below heard them separately. When therefore the court heard Gabriel Niptik as witness for the Plaintiff Jack Tamai, he was an independent witness. In his evidence Gabriel Niptik said he was one of those persons who counted up the Plaintiff’s damaged crops. He told the Court that they had counted 115 young coconuts of 2 years old, 15 heads of kava of 2 years old and other crops. Indeed he had verified the Plaintiff’s claims concerning his damaged crops.

Grounds No.2 - “Appellants not given the opportunity to cross-examine the Respondents and/or their witnesses.”

Records of proceedings indicate that at least three of the appellants were given the opportunity to cross-examine the plaintiff. It appears these were Sela Albert, George Albert and John Miller who made ‘nil’ cross-examination.

The Plaintiff’s witness, Gabriel Niptik was cross-examined by one Albert, Kalsandi and Miller.



Grounds No.3 - "Insufficient admissible evidence to warrant Court finding in favour of the respondent, Jack Tamai."

The issues for the Court below to consider at that time were –

- (a) whether or not these defendants/appellants had damaged the Plaintiff's crops?
- (b) Whether or not these defendants/appellants had assaulted the plaintiff causing injuries to his person?

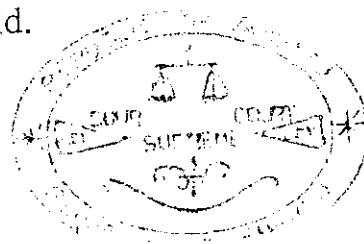
The claim for personal injuries was dismissed. It appears from the Records that there was not sufficient evidence in support of that head of damages. Concerning the first issue, it appears that the learned Senior Magistrate had found sufficient evidence of damage to the plaintiff's crops. It appears from the records that Albert Muna giving evidence on behalf of the defendants admitted by saying: "We went to uproot his crops on garden over which we were disputing."

In David Daniel's evidence-in-chief he told the Court:

"Jack moved into my garden in 1996, cleared it and planted. We sent him notices to stop but he continued. We sent him further notices through chiefs and people but he continued to work. When he did not stop so we did it for him."

The defendants had it appears, indicated to the Court that four (4) of the defendants would talk on their behalf. The Records shows: "4 will talk on behalf of all". However it appears that only Albert Muna and David Samuel gave evidence and they were both cross-examined by the plaintiff.

When Albert Muna and David Samuel made admissions concerning the damage to the Plaintiff's crops they made those admissions on behalf of all the defendants. It did not matter therefore whether four defendants gave evidence or just two as here, it appeared to the learned Senior Magistrate then that the defendants had no defence and it would be an academic exercise to hear further evidence from two other defendants who would say the same thing. In my view there was sufficient admissible evidence before the Senior Magistrate to enable him to have found as he did.



Grounds No.4 – “The Appellants did not have opportunity to prosecute their defence”.

The issue is whether or not the appellants had a defence? I have already expressed the view that the learned Senior Magistrate in view of the defendants' admissions came to the conclusion that there was no defence. It appears clear from the evidence of Albert Muna that ownership of the land on which the plaintiff planted his crops was in dispute. But ownership of land was not the issue for the court to decide. The issue was damage to crops and the defendants had clearly admitted doing the damage to crops which belonged to the plaintiff. Where there is therefore no defence, it follows that there is no opportunity to prosecute because there is nothing to prosecute.

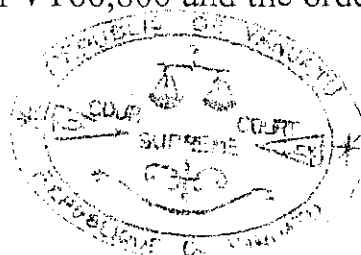
There is nothing to indicate that the defendants had a counter-claim against the plaintiff and therefore it was proper for the Senior magistrate to conclude that there was nothing for which the defendants could be given the opportunity to prosecute.

Summary and Conclusion

For the reasons given for each of the grounds of appeal, I summarise and conclude in respect of Civil Case No. 20 of 1998 as follows:-

1. Grounds 1 of the appeal fails.
2. Grounds 2 of the appeal fails.
3. Grounds 3 of the appeal fails.
4. Grounds 4 of the appeal fails.

The Plaintiff claimed for a total of VT733.350. The Court awarded the sum of VT66.800. I do not understand how that sum was calculated or arrived at by the Senior Magistrate as the records do not show the method of calculations. I note from the affidavit of John Miller Samuel in paragraphs 16 and 18 that the defendants had made offers first in the sum of VT20.000 which the plaintiff refused to accept, and secondly for VT40,000 which was also refused. Taking that offer into account in the light of their admissions, it is my view that the Senior Magistrate had made a reasonable assessment by awarding the sum of VT66,800 when the total amount of claim was VT733.350. I will therefore not interfere with the amount of the award. I uphold the order for damages in the sum of VT66,800 and the order for costs



in the sum of VT4,000. These sums are to be paid jointly by all the Defendants. And all amounts must be paid by or before 31st July, 2001. Further it is ordered that the appellants will pay Jack Tamai's costs of this appeal. Let me add that finding in favour of the respondent should not be an encouragement to the plaintiff to continue to plant crops and work on land which is in dispute so as to provoke or instigate further disturbances or incidents. He should well be advised to discontinue all farming or other activities unless and until ownership has been found in his favour. And it is within the responsibility of the chiefs to look into the issue of ownership in order to end all differences.

I come now to Civil Case No.21 of 1998. The Plaintiff was Gabriel Niptik. The defendants were the appellants. The Plaintiff's claim was for damages for loss of crops in the sum of VT170,740. The defendants did not deny causing the damage but they disputed the prices of the crops claimed for. Now for the grounds –

Grounds 1 - "No independent witnesses to verify the respondent's claims."

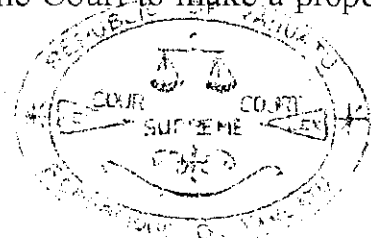
It appears from the Records that the Plaintiff himself gave evidence on oath relating to the date and place of the incident and the crops destroyed by the defendants and their respective prices.

It does not appear from the Records that the Plaintiff called any independent witness to verify his claims, in particular the prices of crops since these were the only matter in issue before the Court.

Muna Albert gave the following evidence on oath –

"We do not agree with the claim because of the price claimed has changed today from the last time. We do not agree with the whole claim. Further we do not agree because there was no independent assessment of the charge claimed. Price should be agreed upon by all Parties. The final claim..... amount because it was not signed by our FAO."

From the evidence it is clear that the prices of the crops claimed were clearly in issue. It appears that the standard requirement relating to claims of this nature is that an independent assessment done by the Agriculture Field Officer of the region should be available to assist the Court to make a proper



assessment of the prices. It is clear that no such assessment was available and the agriculture officer was not called to verify the plaintiff's claims or the prices claimed.

Ground No.2 - "Appellants not given the opportunity to cross-examine the Respondent and/or witnesses."

Firstly, it is all too clear that the plaintiff did not have any witnesses.

Secondly as to whether or not the defendants were given the opportunity to cross-examine the plaintiff, the records show as follows:-

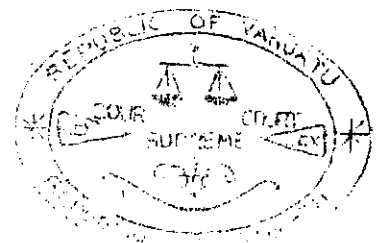
"XXD - Defendants have no questions to put to the plaintiff."

From that it is clear that the defendants had the opportunity of cross-examining the plaintiff. They simply did not have any questions to ask him.

Ground No.3 - "In sufficient admissible evidence to find in favour of the Plaintiff."

From the records the only evidence as to the prices came from the plaintiff himself. The prices were in issue and therefore it was necessary for the Plaintiff to have called further evidence to verify his evidence as to prices. This did not happen.

The onus of proof rests with the Plaintiff on a balance of probabilities. The learned Senior magistrate sat as the judge of both law and fact. Whether or not there was sufficient evidence before him to find in favour of the plaintiff was a question of fact. And whether or not the evidence before him was admissible was a question of law. He found in favour of the plaintiff and awarded him damages in the sum of VT127,280. That indicates that the learned Senior Magistrate had found sufficient and admissible evidence based on the relevant balance of proof. The Learned Senior Magistrate made an assessment and awarded damages in the sum of VT127,280 some VT43,460 less than the total sum claimed. In my view the Court below could not do so without an independent assessment by an independent witness. Although the evidence of the plaintiff in itself was admissible, it was in-sufficient in my view for the Court to rely upon to make the finding for the plaintiff as it did.



Grounds No.4 - "The Appellants did not have the opportunity to prosecute their defence".

The defendants had no defence. They only disputed the prices of the crops. From the Records three of the defendants gave evidence on oath. These were Muna Albert, David Samuel and John Miller Samuel. Muna. Albert was cross-examined where-as with David Samuel and John Miller there were "nil" cross-examination.

It was always open to the defendants to call their witnesses or to produce an independent assessment from the Agriculture Field Officer to show prices different from those claim by the plaintiff. But as indicated earlier, the burden of proof was on the plaintiff and he did not do so.

Summary and Conclusions


For the reasons given for each of the grounds of appeal, I summarise and conclude in respect of civil case No.21 of 1998 as follows:-

1. The appellants succeed on their grounds No.1.
2. The appellants fail on their grounds No.2.
3. The appellants succeed on their grounds No.3.
4. The appellants fail on their grounds No.4.

Having succeeded on grounds No.1 and 3, that is sufficient in my view to allow the appeal. The appeal is allowed. All the orders of the Court below in respect of Civil Case No.21 of 1998 are dismissed. The Plaintiff's action is accordingly dismissed. There will be no order as to costs. Each party is to pay their own costs in this Court and in the Court below.

DATED at Luganville this 20th day of June, 2001.

BY THE COURT


OLIVER A. SAKSAK
 Judge

