SC244

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

CORAM : MANN, C.J.

BETWEEN:

HEVAGO KOTO

Applicant

and

SUI SIBI

Respondent.

REASONS FOR JUDGMENT.

This has been a long and difficult and in many ways unsatisfactory case. It started as an application for the custody of the infant, ABERE, it being common ground that the applicant was the father of the child and the husband of the respondent. In my judgment of the 25th August, 1962, I dealt with some of the conflicting facts and adjourned the case sine die so that the respondent might have an opportunity to establish her fitness to undertake the responsibilities involved in the care and custody of the child. The matter came on for hearing on several subsequent occasions and orders were made for access and to vary orders previously made. During what was to be a final hearing of the matter I was told from the Bar table that the respondent was a party to a subsisting marriage celebrated in a Church, and that it would appear to follow that the child could not be a child of the applicant in law, and that the respondent alone was responsible for the child's upbringing.

I asked for proper evidence of the supposed marriage and on the 3rd June, 1964, an officer of the Registrar-General's office produced an official record comprising an Index of Marriages. Although these records are by no means complete, there seems no

doubt that they do establish that the respondent was legally married to one HENAO or William Francis HENANU in 1933. The evidence identifying the parties to the marriage and asserting that it was still subsisting, was not challenged and it follows that the respondent is the lawful wife of HENANU. She was his wife when she was living with the applicant and when the child was born. This raises a firm presumption that the child is the child of the parties to this marriage and not the child of the applicant, but this is a presumption which may be rebutted, and there is ample evidence on both sides that the child is not in fact the child of this particular union but is the child of the applicant and the respondent. So far as the general law is concerned this means that the child is illegitimate and that prima facie the mother alone is responsible for her custody.

But the problem does not finish here. Under the Child Welfare Ordinance 1961, Part IX, the applicant is a person who might be liable to contribute towards the support of the child and has an interest in the child's upbringing. Where the circumstances warrant it, it is clear that under its parental jurisdiction the Court is prepared to take notice of the wishes of the father of an illegitimate child and will consider his proposals as a matter going to the welfare of the child. It does not mean that he has any rights to assert, but it does mean that the Court will take all the facts into consideration. cf. Re A. (an infant) 1955 2 All E.R. 202. That the parental jurisdiction of the Court still subsists seems well established. See Child Welfare Ordinance 1956 Section 24, and Ako Ako -v- Kavita and another, 23rd June, 1958 (unreported) and the Queensland case of Hain -v- Hain 1949 Q.W.N. No. 49.

It was argued that under Sections 4, 6 and 7 of the Infants Ordinance 1956, the applicant shares an equal right and claim with the respondent. This argument involves extending the definition of the word "parent" to include the word "father",

and reading "liable at law" as including a case of possible liability under the operation of the Child Welfare Ordinance. This, in my view, reads too great a change into the law by unnecessary implication. "Liable at law" generally means "liable at common law". "At law", "in equity", and "by statute" is a set of commonly associated and contrasted phrases. It is in this sense that I most naturally read Section 4.

It was argued that the child should be regarded as the product of a union recognized as a native customary marriage. The difficulty arises here out of the use of the words "customary" and "marriage". The parties belong to completely unrelated native groups. The applicant is from the Southern Highlands, the respondent is related to people from the Western and Eastern parts of Papua. She can apparently please herself to a large extent to which group she may choose to attach herself, but leading an urbanized life, she does not appear to have made any decisive choice. Whatever the position may be, there appears to be no community of native people recognising any notion of customary marriage whose customs could extend to both parties in this case. Customary rules might apply by the usual process of tolerance if the family settled down as a unit within any of the groups concerned, but the differences between the parties are so great that it appears to be certain that this will never happen.

Another kind of difficulty arises from the word "marriage". The Marriage Ordinance 1912, of Papua as in force at the time of the proceedings provides in Section 18 that a marriage celebrated as required by the Ordinance is to be a legal and valid marriage and that no other marriage is to be valid for any purposes If this is to be taken at its face value and applied to native people, it might be taken to mean that many native children are to be regarded as illegitimate. This Ordinance is not intended to

regulate native customs, but can I treat this child as legitimate by native custom when the Ordinance gives an exclusive validity to the subsisting statutory marriage? Of course, other difficulties would arise and questions of bigamy and matrimonial offences generally would be difficult to resolve if a native union could be treated as the equivalent of or as displacing a statutory marriage. The Marriage Ordinance 1964 in Section 56, expressly excludes a party to a subsisting marriage from the provision validating native marriages so that as the law stands the position of the applicant is not likely to improve. I have no authority to help me here, but the view has been commonly held that the legal concepts of marriage and legitimacy are not present in and are not appropriate to native society. Within a single unit of native society children who are in fact treated as the children of their supposed parents would be accorded the care and privileges appropriate to that condition without reference to legal concepts of marriage or legitimacy. But in the present case since there appears to be no possibility of the parents adopting the habits and customs of any native community, I can see no footing upon which the applicant can establish himself as occupying the role of a father of the child for any purpose. I think that I must treat him as the acknowledged natural father of the child who is illegitimate according to our statutory law, and therefore as having no better prospects than when the case falls for determination under the established equitable rules of the prerogative jurisdiction. It follows that he is in a weaker position than a true father of a legitimate child for in a case of an illegitimate child it is by no means the general rule that it is better for the child to have contact with both parents. (See Re G. (an infant) - 1956 2 All E.R. 876). The applicant's case is that he is prepared to take the child and have her adopted as his daughter into his family group where at his standard of

living she would have many material and other advantages. He has a strong case and has behaved well throughout these difficult and prolonged proceedings. He comes from a more primitive group but one which is advancing rapidly. On the other side of the question must be considered the desirability of a young illegitimate daughter continuing to live with her mother amongst friends and relatives known to her. She has been willing to continue in this life and provided that the respondent is prepared to take proper care of her education so as to qualify her to earn an urbanised livelihood, I think that the balance of considerations for the benefit of the child is strongly in favour of her continuing in the custody of her natural mother.

The respondent has behaved very badly on the question of access by the father but some legal justification for this now emerges, and in any case she has more recently shown some improvement. I do not think that her conduct or character are so bad that I should regard her as unfit to have the care of the child, or as having forsaken her in any sense. Rather the contrary.

I think the experience of these proceedings may have brought the parties into communication sufficiently to enable them to discuss the possibility of some arrangement being made for the benefit of the child, to enable the applicant to see her from time to time, but unless this can be done in an amicable way between the parties, I think that under existing circumstances it would not help the child and might cause great distress for her if I were to make any sort of order for access. My conclusion therefore is that the application must be dismissed and the child left in the custody of the respondent.