

BETWEEN: Oral Kilman
Appellant

AND: Nanneth Melto, also known as Marie-
Antoinette Melterongrong
Respondent

Date of Hearing: 14 February 2022

Before: Chief Justice V. Lunabek
Justice J. Hansen
Justice R. White
Justice O. Saksak
Justice D. Aru
Justice G. Andree Wiltens
Justice E. Goldsbrough

Counsel: Mr R. Tevi for the Appellant
Mr H. Garae for the Respondent

Date of Decision: 18 February 2022

JUDGMENT

A. Introduction

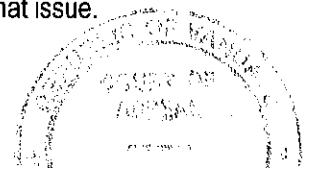
1. This was an appeal by a father against a Supreme Court decision to award custody of one of the couple's children to the mother.
2. Mr Kilman and Ms Melto are parents to Hereston Jeremiah Kilman, date of birth 1 February 2017, and Frozina Jemima Kilman, date of birth 2 September 2019. The elder child goes by the name of Jeremiah; the younger is called both her given names – the father using Jemima and the mother Frozina.
3. Mr Kilman resides with other family members, notably his sister, at Malekula Island, while Ms Melto resides with her family, notably her parents, at Pango, Port Vila.
4. Mr Kilman's application for custody of both children was filed on 10 November 2021. At that time, both children were in the custody and care of Ms Melto.

B. Application

5. The application was made on the basis that Mr Kilman was permanently employed and able to look after and care for the children with the assistance of his wider family. In particular, he was concerned that Jeremiah was not attending school.



6. Mr Kilman had made arrangements for Jeremiah to attend an afternoon kindergarten at Lakatoro. He also expressed concerns about Ms Melto's ability to look after the children due to her being unemployed and financially unable to care for the children, especially their education.
7. Mr Kilman provided evidence of his employment and the arrangements he had made for Jeremiah to attend school.
8. The application was opposed. Ms Melto provided a sworn statement evidencing that she was employed part-time at a Chinese Store at Pango and accordingly able to cater financially for her and the children; and that Jeremiah had been attending the Ecole Publique at Pango since June 2021. She further stated that, as a Year-12 leaver herself, she was able to assist Jeremiah with his homework; as was her father who is a teacher at another school in Port Vila.
9. Ms Melto alleged that Mr Kilman had strongly advised her to abort her pregnancy when she was 3-months pregnant with their first child. She had declined to take that advice. She further alleged that when she was 7-months pregnant, Mr Kilman had deserted her and went to live at Malekula. She maintained that he had provided her no assistance thereafter, despite difficulties she endured during her pregnancy.
10. In mid-2018, Mr Kilman returned to Efate with his sister, wanting to take Jeremiah to Malekula for 3 months. She agreed to that. However, after that period had passed, he did not return Jeremiah to her and ignored her efforts to get the child returned. Later in 2018, Mr Kilman returned by himself to Efate and the couple reconciled, but only for a short period of time. That led to Ms Melto's second pregnancy.
11. In December 2020, Ms Melto went, with her recently born daughter, to Malekula to retrieve her son. That did not go as planned, and Ms Melto alleged that she was not permitted to see her child or take him to the local village where she was residing. Her frustrations caused her to make an application to the Malekula Magistrate's Court, which led to a Temporary Protection Order being issued on 16 February 2021 against Mr Kilman. The local Police removed Jeremiah from Mr Kilman and his sister's custody, and returned him to Ms Melto.
12. The Court proceedings in Malekula Magistrate's Court also involved an application for maintenance. That issue was deferred until May 2021. Ms Melto decided in the meantime to return to Port Vila so that Jeremiah could attend school, and she intended to continue with the application for maintenance from there. On her return, she registered Jeremiah to attend the École Publique at Pango.
13. Ms Melto pointed to the fact that Mr Kilman has 2 other children by two other women for whom he is responsible. She stated that in August 2021, she obtained a Court order providing that Mr Kilman pay her maintenance towards the upkeep of Jeremiah. She alleges that despite such order, Mr Kilman has made no payments to her. She has subsequently also applied for maintenance for Jemima, and is awaiting a Court hearing on that issue.



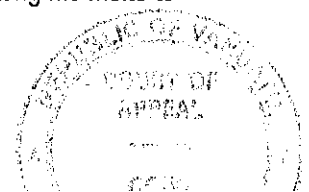
14. Ms Melto further evidenced that both her children are healthy and well fed. They are content to be growing up together. They regularly attend Church and are loved by Ms Melto's parents.

C. Decision

15. Significantly, no notice of intention to cross-examine was filed by either counsel. Accordingly, the primary judge heard this matter by way of considering only the pleadings, the sworn statements filed by both parties, and the written and oral submissions of counsel.
16. At the hearing, Mr Tevi, on behalf of Mr Kilman, withdrew the application for custody of Jemima. The primary judge therefore dealt only with the application in relation to Jeremiah.
17. The primary judge accepted the uncontradicted evidence of Ms Melto regarding Mr Kilman's refusal to return Jeremiah until a Court order was obtained.
18. The primary judge accepted also that Ms Melto was employed part-time, that the children were well cared for and healthy, that they were content to be growing up together, that Ms Melto is supported by her parents and that Jeremiah has attended school since June 2021.
19. The primary judge rejected the contention that Ms Melto's application for maintenance evidenced impecuniosity or an inability to financially care for her children. Ms Melto had the right to make such application. On the other hand, the primary judge considered the fact that Mr Kilman had yet to make any maintenance payments to count against Mr Kilman's application. It did not sit well with his claims of financial capacity, nor did it evidence consideration for Jeremiah's welfare.
20. The primary judge concluded that Ms Melto has the ability to support Jeremiah's welfare and to take care of him. The best interests of the children, especially given their tender ages, was found to be that they remained in the custody of their mother. Mr Kilman's application for custody was accordingly declined.

D. Appeal

21. Leave to file the appeal out of time, due to difficulties caused by the Court's Registry being closed due to the Christmas recess, was granted.
22. There were two main grounds of appeal advanced. It was contended that there was no evidence to prove Ms Melto's employment or to show that Jeremiah was attending school.
23. Further, it was contended that the primary judge had erred by failing to consider the evidence of Mr Kilman, which was supported by exhibits; and that the primary judge had placed emphasis on mere allegations by Ms Melto.
24. There were no submissions filed by the Respondent due to difficulty in locating Ms Melto to take instructions.



E. Discussion

25. The first ground of appeal is misconceived. The actual contention advanced was not that there was no evidence of the matters complained of, but that there was no independent supporting evidence of those facts. Mr Tevi was unable to point to any authority establishing that was required. The primary judge was presented with two versions of the core facts and had to make an evaluation of credibility and reliability without the benefit of cross-examination. The decision to accept Ms Melto's evidence was entirely open to the primary judge, given the lack of challenge to this evidence by Mr Tevi. This Court is unable to see any error. This ground of appeal is rejected.
26. The second ground of appeal is also rejected. In accepting Ms Melto's evidence, the primary judge had to place less weight on the evidence of Mr Kilman, regardless that he had provided independent evidence. Once it was accepted that Ms Melto was able to take care of the needs of Jeremiah, and was better placed, due to their tender ages, to care for both of them, Mr Kilman's personal circumstances were of less significance.
27. This Court concurs with the primary judge's view that Mr Kilman's failure to pay the Court-ordered maintenance for Jeremiah counted against his application. It was open to Mr Kilman to contradict that statement by way of evidence – however, that was not done. In the circumstances, the primary judge's view was open on the evidence.

F. Result

28. The appeal is dismissed.
29. As Mr Garae had no instructions and did not file written submissions, we consider costs should lie where they fall.

Dated at Port Vila this 18th day of February 2022

BY THE COURT

Chief Justice V. Lunabek

