

TOMASI LAKEMBA, BULA O'BRIEN,
and MOSESE CAMA, Plaintiffs

v.

JAMES MILNE and ALEXANDER MILNE, Defendants

Civil Action No. 273

Trial Division of the High Court

Marshall Islands District

July 12, 1968

Appellate Court Opinion—4 T.T.R. 488

Civil action in admiralty, based upon a maritime contract. The Trial Division of the High Court, Joseph W. Goss, Temporary Judge, held that Trial Division had jurisdiction to hear case, that substantive and general rules of the law maritime as customarily applied in suits at common law in the United States applied and that defendants were liable to plaintiff master and seamen for damages due to defendants' actions which led to the breaking up of the voyage for which master and seamen were hired.

1. Trust Territory-Generally

Prior to adoption of the Trust Territory Code Section 15 in 1965, the flag of the United States was also the flag of the Trust Territory. (T.T.C., Sec. 15)

2. Admiralty-Jurisdiction-Generally

Except as limited by public international law, international agreement, or constitutional provision, a state has jurisdiction over all vessels flying the flag.

3. Trust Territory-Applicable Law

The Restatement of Law was adopted into the substantive law of the Trust Territory by the Trust Territory Code.

4. Courts-High Court

Section 123 of the Trust Territory Code accords to the High Court jurisdiction in admiralty and maritime matters. (T.T.C., Sec. 123)

5. Admiralty-Applicable Law-Law of the Flag

Under the doctrine of "law of the flag," certain maritime matters are determined pursuant to the law of the state or nation whose flag the vessel flies.

6. Admiralty-Applicable Law-Law of the Flag

The law of the flag, not the law of the forum, is generally applied in matters of substantive law, thus it has been applied to contracts made in a foreign port by the master on behalf of the owner.

7. Admiralty-Applicable Law-Generally

The Trust Territory Code does not specifically state the substantive law to be applied in maritime cases.

8. Trust Territory-Applicable Law

Section 22 of the Trust Territory Code incorporates the rules of the common law of the United States into the substantive law of the Trust Territory. (T.T.C., Sec. 22)

9. Admiralty-Applicable Law-Common Law

The common law and the maritime law are not synonymous.

10. Admiralty-Applicable Law-Common Law

In the United States the principles of the law maritime have been applied in suits in common-law courts.

11. Courts-High Court

Section 123 of the Trust Territory Code which gives admiralty jurisdiction to the High Court is somewhat similar to that of Article 3, Section 2 of the Constitution of the United States. (T.T.C., Sec. 123)

12. Admiralty-Applicable Law-Common Law

In the Judiciary Act of 1789, the first Congress declared the admiralty and maritime jurisdiction of the Federal Courts to be exclusive, yet reserved to suitors the right of a common-law remedy, where the common law is competent to give it.

13. Admiralty-Applicable Law-Admiralty Law

The general rules of admiralty law apply regardless of whether one sues in admiralty, in a Federal Court, or in common law in a state court.

14. Admiralty-Jurisdiction-State Courts

Under the Judiciary Act of 1789 it is only the privilege to prosecute for a maritime cause in the common-law courts that is saved to a state court, not the right of election to determine that the defendant's liability is to be measured by the common law.

15. Admiralty-Applicable Law-Admiralty Law

A claimant's recovery and the precise relief to be afforded him are determined by the admiralty law, which is applied whether he sues in the common law or in the admiralty court; while he may pursue his remedy at common law in the state court, that court must administer the admiralty law.

16. Admiralty-Applicable Law-Admiralty Law

The Trust Territory adoption of the rules of common law and the specific provision for jurisdiction in admiralty and maritime matters was intended to include adoption of the substantive and general rules of the law maritime as customarily applied in suits at common law in the United States. (T.T.C., Secs. 22, 123)

17. Admiralty-Voyage

The word "voyage" as used in connection with the rights and obligations of seamen, necessarily implies a definite beginning and end, and means a transit at sea from one terminus to another, the whole course of a vessel before reaching the port of final discharge.

18. Admiralty-Voyage

The word "voyage" as used in connection with the rights and obligations of seamen denotes the transit to be performed by the seamen, that is the whole term of the seamen's service.

19. Admiralty-Seamen's Rights-Wages

It was implied in plaintiff seamen's contracts that they were to receive prompt payment of salaries and such plaintiffs were entitled to recover damages from defendant owners of the vessel for failure of defendants to make prompt payment during their periods of employment and for defendants' practice of providing credit at defendants' stores rather than paying in cash or, when the ship was in a port with check cashing facilities, by check.

20. Admiralty-Seamen's Rights-Damages

Seamen are entitled to damages when discharged without their consent on account of the voyage being broken up by lack of funds, fault of the master, or the unseaworthiness, disability, or sale of the vessel, but not by perils of the sea.

21. Admiralty-Seamen's Rights-Wages

Where the voyage is broken up by the act or fault of the owner, the seamen are entitled to wages for the period up to the time of abandonment and for such reasonable time as may be required for the return home of the seamen, subject to deduction of such sums as they may earn in the meanwhile.

22. Admiralty-Seamen's Rights-Maintenance

Where the seaman is unable to return to his port of shipment in the vessel of his original employment, the general rule is that the seaman becomes entitled to maintenance ashore while awaiting a chance to go home, and to the expenses of his return to the port from which he shipped.

23. Admiralty-Seamen's Rights-Liens

While a master is not entitled to any lien against a ship for non-payment of wages and damages a seaman is entitled to such a lien if he elects to proceed against the ship rather than the owner.

24. Admiralty-Masters' Rights-Generally

The rights and privileges of a master depend upon the terms of his contract.

25. Admiralty-Masters' Rights-Dismissal

The owner cannot, without incurring liability in damages, dismiss before the end of the term one employed as master for a definite term, as for a particular voyage, except for sufficient cause.

26. Admiralty-Masters' Rights-Generally

The master's rights did not terminate with the final disabling of the ship because the voyage had been broken up by the defendant owners

prior to that time and because such owners could have protected the ship by taking reasonable precautions.

GOSS, *Temporary Judge*

FINDINGS OF FACT

1. Defendants purchased the vessel Nei-Raete II on September 2, 1963, in Suva, Fiji Islands. They flew the flag of the United States on the ship. Defendants are not citizens of the United States.

2. Effective September, 1963, Plaintiffs were employed as seamen at Suva by an authorized representative of Defendants. Plaintiffs are citizens of the Fiji Islands. The oral contract terms included that Plaintiffs would serve as crew to the Marshall Islands on the Nei-Raete II, train a Marshallese crew and then return as crew of the ship to their port of employment in Fiji. The contract was to be for approximately six months. Plaintiffs were to receive a salary, board, and sleeping accommodations until returned. It was implied in the contract that the salaries were to be paid promptly, the food was to be adequate, and the ship was to be kept in repair. From time to time the contract was informally extended and amended as to term, salary, and position.

3. On behalf of the Defendants, Defendant James Milne requested Trust Territory of the Pacific Islands' assistance in obtaining Navy clearance for the Plaintiffs. He indicated they would be in the Trust Territory four to six months, and guaranteed their welfare while in the Marshall Islands and their transportation to Fiji.

4. Plaintiff Mosese Cama was subsequently promoted to Master of the ship, with the implied understanding that certain of his rights (prompt payment, adequate food, sleeping accommodations, repair of the ship, and return

voyage to Fiji) would continue in the manner previously agreed.

5. Plaintiff Tomasi Lakemba was fired for cause.

6. Neither Plaintiffs Cama or O'Brien gave Defendants any cause for any reduction in pay or discharge.

7. Deducted from Plaintiff Cama's salary was \$60, which was to be sent by Defendants to his family in Fiji. The money was not sent.

8. Since approximately March, 1965, the ship has been laid up in Uliga Harbor, Majuro Atoll. Plaintiffs Cama and O'Brien were selected to stay with the ship. In April, 1965, they consented to substantial pay reductions (to \$75 and \$55 per month respectively) and continued their work on the ship.

9. Defendants afforded Plaintiff Lakemba the opportunity of returning to Fiji in May, 1965, but he did not do so.

10. Throughout the employment Defendants repeatedly failed to make reasonably prompt payment of salary and frequently required Plaintiffs to accept credit in Defendants' stores rather than making payment in cash. For a period prior to May 31, 1965, Defendants failed to supply adequate food.

11. The voyage was broken up by the Defendants on May 31, 1965. No salary was paid to Plaintiffs Cama and O'Brien for work after that date.

12. The damage to the ship from hitting the Uliga dock approximately October 11, 1965, and from grounding on the reef approximately November 1, 1965, could have been prevented by the Defendants had they caused reasonable precautions to be taken.

13. In August, 1965, Plaintiffs embarked on the M/V Ralik-Ratak for Tarawa with the understanding that Defendants, through intermediaries, had sent to Tarawa funds for Plaintiffs' onward transportation to Suva. These

funds were not made available to Plaintiffs in Tarawa, and Plaintiffs were officially prohibited from remaining in Tarawa to await the Suva-bound vessel. Plaintiffs were returned to Majuro on the Ralik-Ratak, the total trip being eighteen days.

14. Plaintiffs Cama and O'Brien were not paid for the cost of lodging and meals for sixty-one days in June and July, 1965, nor were any Plaintiffs paid the cost of suitable food for the eighteen days on the Ralik-Ratak.

15. In 1965, the cost of adequate, though unprepared, food on Majuro Atoll or on a ship between Majuro and Tarawa was \$2 per day. The cost of suitable restaurant-meals was \$4.50 per day on Majuro. Minimum hotel accommodations were \$4.50 per day.

16. After return from Tarawa, Plaintiffs Cama and O'Brien were lodged and fed in the Trust Territory Hotel, by order of the then Assistant District Administrator.

17. On January 10, 1966, Plaintiffs obtained permission from the Trust Territory Government to change employers and work for M.I.E.C.O. On January 11th, they commenced that work.

18. All Plaintiffs suffered damage from the Defendants' breaches of duty, in the amounts set forth in the award.

OPINION

This is a civil action in admiralty, based upon a maritime contract: 2 Am. Jur. 2d 753, Admiralty, § 60. It involves the claims of three citizens of the Fiji Islands against their employers, the Defendants, who are owners of the vessel Nei-Raete II. The vessel was purchased September 2, 1963, in Fiji. The Plaintiffs' employment as crew was effective in September after purchase of the ship. This action is to recover unpaid salaries, subsistence, and damages for hardship. Original contract was entered into in Suva. At Defendants' request, Defendants were granted

permission to fly the United States flag (Defendants' Exhibit No.3 and Plaintiffs' Exhibit No.4). The Defendants are not citizens of the United States. The first question to be determined is that of the law which should be applied to the case.

[1,2] Defendants are residents of the Trust Territory and their businesses are located in the Marshall Islands. Prior to adoption of the Trust Territory Code Section 15 in 1965, the flag of the United States was also the flag of the Trust Territory. Under the general provisions of the law maritime, the flying of the Trust Territory flag determines that the Trust Territory Courts have jurisdiction. Section 45 of the Restatement of Conflict of Laws reads:

"Jurisdiction of State over Vessels. Except as limited by public international law, international agreement, or constitutional provision, a state has jurisdiction over all vessels flying the flag."

[3-6] The Restatement was adopted into the Substantive Law of the Trust Territory by Trust Territory Code. T.T.C. 123 accords to the High Court jurisdiction in admiralty and maritime matters:

"Section 123. Original jurisdiction.

The Trial Division of the High Court shall have original jurisdiction to try all causes, civil and criminal, including probate, admiralty and maritime matters and the adjudication of title to land or any interest therein."

The flying of the Trust Territory flag also determines that Trust Territory law applies to the case:-

"Law of flag.

Under the doctrine of "law of the flag," certain maritime matters are determined pursuant to the law of the state or nation whose flag the vessel flies. That doctrine is perhaps the most venerable and universal rule of maritime law bearing on the question of conflict of laws.

"The law of the flag, not the law of the forum, is generally applied in matters of substantive law

"The law of the flag has been applied to contracts made in a foreign port by the master on behalf of the owner." 2 Am. Jur. 2d 770, Admiralty, § 90. See also: *The Snetind* (DC Maine) 276 F. 139 (1921).

[7-9] Nowhere, however, does the Trust Territory Code specifically state the substantive law to be applied in maritime cases. T.T.C. 22 incorporates the rules of the common law of the United States into the substantive law of the Trust Territory:-

"Section 22. Common law applicable; exceptions.

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Trust Territory in cases to which they apply, in the absence of written law applicable under Section 20 hereof or local customary law applicable under Section 21 hereof to the contrary and except as otherwise provided in Section 24 hereof;"

Was the reference to the common law intended to include the adoption by reference of the law maritime? The common law and the law maritime are not synonymous: *15A Corpus Juris Secundum* 42, Common Law, § 1.

[10J] In the United States the principles of the law maritime have been applied in suits in common-law courts.

[11-15] The language of T.T.C. 123 (*supra*) is somewhat similar to that of Article 3, Section 2 of the Constitution of the United States:-

"Section 2. The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction"

In the Judiciary Act of 1789, the first Congress declared the admiralty and maritime jurisdiction of the Federal Courts to be exclusive, yet reserved to suitors "the right of a common-law remedy, Where the common law is competent to give it." 15 Am. Jur. 2d 804, Common Law, § 8. This statement has been construed to mean that the general

rules of admiralty law apply regardless of whether one sues in admiralty, in a Federal Court, or in common law in a state court.

"... it is only the privilege to prosecute for a maritime cause in the common-law courts that is saved to a state court by the clause involved, not the right of election to determine that the defendant's liability is to be measured by the common law. His recovery and the precise relief to be afforded him are determined by the admiralty law, which is applied whether he sues in the common-law or in the admiralty court. He may pursue his remedy at common law in the state court, but that court must administer the admiralty law." 2 Am. Jur. 2d 787, Admiralty, § 113. *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 66 L.Ed. 927, 42 S.Ct. 475 (1922).

The effect of the Constitutional provision and 1789 statute was further clarified in *Romero v. International Terminal Operating Co., et al.*, 358 U.S. 354; 3 L.Ed. 2d 368, 375; 79 S.Ct. 468 (1959):-

"Article 3, Sec. 2, cl. 1 (3d provision) of the Constitution and Sec. 9 of the Act of September 24, 1789, have from the beginning been the sources of jurisdiction in litigation based upon federal maritime law. Article 3 impliedly contained three grants ... (2) *It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction,' Crowell v. Benson*, 285 U.S. 22, 55, 76 L.Ed. 598, 615, 52 S.Ct. 285, and to continue the development of this law within constitutional limits" (Emphasis added).

[16] It would be unreasonable to hold that when the High Commissioner promulgated the Trust Territory Code, he intended to provide jurisdiction in admiralty and maritime matters and also intended for the courts to ignore the general law thereof. With this background it is concluded that the Trust Territory adoption of the rules of common law (T.T.C. 22) and the specific provision for jurisdiction in admiralty and maritime matters (T.T.C. 123) was intended to include adoption of the substantive

and general rules of the law maritime as customarily applied in suits at common law in the United States.

[17,18] Plaintiffs were hired and given entry permits for a temporary purpose-to bring the ship to the Marshalls, train Marshallese, and return the ship to Fiji. In a letter of July 6, 1963, to the Marshall Islands District Administrator, Defendant James Milne stated in part:-

"In order to bring this ship to the Marshall Islands, we have hired a Fijian crew to run it. This crew will bring the ship to the Marshall Islands and will turn over the ship to a Marshallese crew. But since the ship is a diesel steam driven one, the Fijian crew will probably need four to six months to train our Marshallese crew to operate the ship. We also guarantee return transportation for the Fijian crew, and we will be fully responsible for their welfare while in the Marshall Islands."

There is no evidence of a changed arrangement with the Trust Territory. For the purpose of applying maritime law, it is considered that the Plaintiffs were on a single extended voyage which was to begin and end in Fiji:-

"The word 'voyage' as used in connection with the rights and obligations of seamen, necessarily implies a definite beginning and end, and means a transit at sea from one terminus to another . . . the whole course of a vessel before reaching the . . . port of final discharge. It denotes the transit to be performed by the seamen, that is the whole term of the seamen's service." (79 Corpus Juris Secundum, p. 495, Seamen, § 3.) *Hamilton v. U.S. C.C.A. Va.*, 268 F. 15, 17 cert. den. 41 S.Ct. 15, 254 U.S. 645, 65 L.Ed. 454 (1920).

[19] Pursuant to this doctrine, it was implied in Plaintiffs' contracts that they were to receive prompt payment of salaries. All three Plaintiffs are entitled to recover damages from the Defendants, as owners, for failure of Defendants to make prompt payment during their periods of employment and for Defendants' practice of providing credit at Defendants' stores rather than paying in cash or, when the ship was in a port with check cashing facilities, by check.

With regard to the claim of Tomasi Lakemba for salary from December, 1964, to September of 1965, the Plaintiff has not sustained his burden of proof of showing by testimony what salary was not paid and any such salary which is now due. Defendants claim he was fired for cause. The Plaintiff's deposition shows that he had taken a boat out while drunk and had to be rescued by the Coast Guard and the Nei-Raete II. In the Memorandum of pre-trial conference, Plaintiff Lakemba is quoted as agreeing that he did no work for the Defendants after about January, 1965. It is also clear from the evidence that this Plaintiff had every opportunity to return to the Fiji Islands on the M/V Fetuao in May of 1965.

Plaintiffs O'Brien and Cama were still with the ship when in March, 1965, it was brought from Jaluit to Uliga Harbor, Majuro, with disabling engine trouble. The Court has determined that the Plaintiffs O'Brien and Cama recognized the difficulties which the Defendants faced, and consented to the reduction of their salaries to \$75 and \$55 per month, respectively. This is indicated by their acceptance of a reduced payment for April, 1965.

[20] During April and May Defendants failed in their obligation to provide adequate food and make prompt payment of salaries. The last salary payment was for May, 1965. In June, 1965, O'Brien and Cama left the ship. In a storm of approximately October 11, 1965, the ship broke from its moorings and battered against the dock. Approximately November 1, 1965, a second storm cast the ship onto the reef at the harbor. The voyage is deemed to have been broken up by fault of the Defendants on May 31, 1965, when adequate food was no longer provided, payment of salaries ceased and the ship remained disabled.

"... Seamen are entitled to damages when discharged without their consent on account of the voyage being broken up by lack

of funds, fault of the master, or the unseaworthiness, disability; or sale of the vessel, but not by ,perils of the sea." 48 Am. Jur. 113, Shipping, § 164.

[21,22] Plaintiff O'Brien is entitled to recover damages for the failure to provide adequate food for the period prior to May 31, 1965. Further and despite the breaking up of the voyage, Defendants remain responsible for his wages at \$55 per month until his return to Suva, less the amount of his earnings from M.LE.C.O. or other sources:-

"Where the voyage is broken up by the act or fault of the . . . owner, the seamen are entitled to wages for the period . . . up to the time of abandonment and for such reasonable time as may be required for the return home of the seamen, subject to deduction of such sums as they may earn in the meanwhile." (79 Corpus Juris Secundum 542, Seamen, § 71, and p. 624, § 161.)

With the *Nei-Raete II* disabled, O'Brien also retained his right to maintenance and his right to be returned to the point of hire : –

"Where the seaman is unable to return to his port of shipment in the vessel of his original employment, the general rule, subject to the qualifications considered infra Sections 56-61, is that the seaman becomes entitled to maintenance ashore while awaiting a chance to go home, and to the expenses of his return to the ,port from which he shipped The right of return arises from the legal presumption that is implicit in the contract." (Ibid., p. 531, § 55.) *Worth and Others v. Steam-Boat Lioness No.2*, D.C. Mo., 3 F. 922 (1880).

[23] The position of Plaintiff Cama, as master, is different from that of Seaman O'Brien but similar. While a master is not entitled to any lien against a ship for non-payment of wages and damages (48 Am. Jur. 82, Shipping, § 115), Plaintiff O'Brien as a seaman would have been entitled to such a lien **if** he had elected to proceed against the ship rather than against the Defendants. (Ibid., p. 110-11, § 161.)

[24-26] The rights and privileges of Master Cama depend upon the terms of his contract with Defendants. (80 Corpus Juris Secundum, 787, Shipping, § 67.) He was hired from his home port as a seaman, and his promotion to master was not intended to alter the implied terms of his contract, including his rights to a seaworthy vessel, prompt payment, adequate food, and return to Fiji at the end of the voyage. Plaintiff Cama, as well as Plaintiff O'Brien, suffered damages prior to leaving the ship from the Defendants' failure to furnish food in adequate amounts, and they have suffered substantial hardship thereafter. The breaches of his contract entitled Plaintiff Cama to the same type of damages as Seaman O'Brien.

"The owner cannot, without incurring liability in damages, dismiss before the end of the term one employed as master for a definite term, as for a particular voyage . . . , except for sufficient cause." (Ibid., p. 775-76, § 58.)

Master Cama's rights did not terminate with the final disabling of the ship on November 1, 1965, because the voyage had been broken up by the Defendants on May 31, and because the Defendants could have protected the ship by taking reasonable precautions.

Plaintiff Cama is entitled to payment of the \$60 withheld from his salary which had not been sent to his family in Fiji.

Both Plaintiffs O'Brien and Cama are entitled to payment for food and lodging during the sixty-one days in Majuro in June and July 1965, at \$6.50 per day. The original contract has been construed by the parties as providing that all Plaintiffs were to receive transportation from Majuro to Suva and also their food while on board. It was arranged in August 1965 that they be sent to Tarawa on the Ralik-Ratak and hence tranship to Suva. The Defendants, dealing through intermediaries, were to have their onward fare to Suva waiting for the Plaintiffs

in Tarawa. Because the Defendants did not pay the Plaintiffs directly, Defendants must bear the extra costs incurred by the funds not being available to Plaintiffs in Tarawa. Plaintiffs are entitled to claim eighteen days' subsistence during the Ralik-Ratak voyage, but the Court considers that \$2 per day per Plaintiff is a more appropriate amount than the \$5 per day claimed. All Plaintiffs suffered general damages from the abortive trip.

Upon return from the abortive trip to Tarawa, Plaintiffs O'Brien and Cama were lodged and fed in the Trust Territory Hotel upon the instructions of the Assistant District Administrator. The hotel was then being administered by M.LE.C.O. At the time of trial the then District Attorney declined to have the Trust Territory added as a party hereto. There is no indication in the record that either the Trust Territory or M.LE.C.O. has claimed or intends to pursue any claim against the Plaintiffs for food and lodging furnished at the hotel, nor is there any indication that Plaintiffs are to be billed for any trip to Tarawa or Fiji. For these reasons the above factors are not included in the monetary damages awarded hereunder, but the judgment makes provision against any contingent liability of Plaintiffs. The Court makes no finding as to whether the arrangement for the Hotel restaurant at \$4.50 per day was necessary considering Defendants' circumstances, nor does it purport to prejudge the issue of whether there is any liability of Plaintiffs O'Brien and Cama or Defendants to the Trust Territory or to M.LE.C.O.

There is no indication in the record as to whether the salary paid by M.LE.C.O. to Plaintiffs O'Brien and Cama was less or more than the reduced salary paid by Defendants. The awards made are not intended to bar Plaintiffs from seeking any additional damages they may have suffered in that regard. Counsel have stipulated that Plaintiffs O'Brien and Cama should pay their own room and

board bills after they became employed by M.LE.C.O. on January 11, 1966.

JUDGMENT

It is ordered, adjudged, and decreed as follows : -

1. Defendants shall pay to Plaintiff Tomasi Lakemba the amount of \$76.

2. Defendants shall pay to Plaintiff Bula O'Brien the amount of \$985.65.

3. Defendants shall pay to Plaintiff Mosese Cama the amount of \$1,192.25.

4. Defendant shall pay on behalf of Plaintiffs Cama and O'Brien any valid claim by the Trust Territory or M.LE.C.O. against said Plaintiffs for lodging and food in the Trust Territory Hotel between Plaintiffs' return from Tarawa and January **11**, 1966.

5. Defendants shall pay on Plaintiffs' behalf any valid claim against Plaintiffs for reasonable expenses of the trip to Tarawa and the return trip to Fiji, not otherwise covered herein.

6. The Clerk of Courts is instructed to cause this judgment to be docketed and furnished to Counsel.

7. Time for appeal herein is extended to sixty days following entry of this judgment.