

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO HAC 80 OF 2019**

**STATE**

**v**

**ELIKI KAE**

Counsel: Ms S. Swastika for Prosecution  
Ms L. Volau for Defence

Dates of Hearing: 25, 26 September & 5 October 2023

Date of Judgment: 19 October 2023

**JUDGMENT**

1. The accused is charged with one count of Rape contrary to Section 207 (1) and (2) (a) of the Crimes Act 2009. The information read as follows:

Statement of Offence

RAPE: Contrary to section 210 (1) and [2] [a] of the Crimes Act, 2009

## Particulars of Offence

ELIKI KAE on the 21<sup>st</sup> day of December 2018, at Lautoka in the Western Division penetrated the vagina of TAVAITA SENIBAI, without her consent.

2. The accused pleaded not guilty to the above charge. At the ensuing trial, the Prosecution presented the evidence of the complainant and two other witnesses. At the close of the Prosecution case, the accused was put to his defence. Only the accused presented evidence for the Defence. At the end of the trial, the counsel from both sides tendered written submissions.
3. Having carefully considered the evidence presented at the trial and the submissions filed by the counsel, I now proceed to pronounce my judgment as follows.
4. The Prosecution bears the burden to prove all the elements of the offence. That burden must be discharged beyond a reasonable doubt. The burden never shifts to the accused at any stage of the trial. The presumption of innocence in favour of the accused will prevail until the charge is proved beyond reasonable doubt.
5. The Prosecution alleges that the accused on 21 December 2018 penetrated the vagina of the complainant without her consent. A slightest penetration is sufficient to prove the element of penetration. According to Section 206 of the Crimes Act, the term consent means consent freely and voluntarily given by a person with the necessary mental capacity to give the consent. The submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force, threat or intimidation etc. will not be considered as consent freely and voluntarily given.
6. To establish the fourth element of Rape, the Prosecution must prove that the accused knew or believed that the complainant was not consenting or that he was reckless as to whether the complainant was consenting or not.

7. I shall now summarise the salient parts of evidence led in this trial.

PW 1: Tavaita Senibai

8. Tavaita said she is 23 years old. She could not recall her birthday. She was living in Nadi with her parents and then moved to her uncle's place in Lautoka when her parents went to Australia. She could not recall if she had ever gone to a school.
9. In 2018, Tavaita was residing in Naisoata, Navutu in Lautoka with her uncle Tomu, his wife Ema and their kids. On 21 December 2018, Tomu and Ema went to church in Nadi. Only her cousin's husband Tiri was home, and he was sleeping. When Tavaita was sweeping the room, Eliko came home drunk.
10. She knew Eliko as he was residing in the same village and was a frequent visitor to her house. When she questioned Eliko as to why he came home, Eliko, without speaking to her, pulled her into her uncle's room and started to torture her. He slapped her and closed her mouth. He took her sulu and panty off. She was trying to escape but she could not because Eliko was holding her down tightly. She was lying down on the bed sideways. He took off his  $\frac{3}{4}$  pants and underwear and inserted his penis inside her vagina. She was confused and scared. She started crying. Eliko told her to be quiet so that no one from outside could hear her.
11. While Eliko was inserting his penis into her vagina, she heard Rajjeli and Lynnette calling her name from outside. She was not able to respond or go outside because Eliko had tightly covered her mouth and told her not to answer. She was able to come out because Eliko's mother Sereima was looking for Eliko. When Eliko heard his mother, he went under the bed.
12. When Sereima arrived, Tavaita got dressed up and came out of the room. Rajjeli and Lynnette were there. Rajjeli asked her what had happened. She could only say that Eliko

had done something to her but could not talk much because she was crying and scared. Then Lynnette told her to go to her house. When she went to Lynnette's house, she told Lynnette what had happened.

13. Tavaita told Lynnette that Eliki forced her and inserted his penis inside her; she was trying to escape but could not because he was holding her tightly. After that, the police arrived when Ema called them. When Eliki's mother called Eliki, he came out of the room and went with her mother. She identified the accused in Court.
14. Under cross-examination by Ms Volau, Tevita agreed that Nasoata is a closely knitted settlement. The closest house to hers was about 2 to 3 metres in distance. Alifereti (Fido) is her cousin's husband. She agreed that when Fido and Eliki entered the house, she and Eliki went into her uncle's room. The door was not closed. Tevita agreed that she had removed her own clothes. She also agreed that Eliki kissed her lips and, when she laid down on the bed, Eliki had gone on top of her when Eliki inserted his penis into her vagina. She agreed that she did not at any time push Eliki and that Eliki did not slap her. She denied that the sexual intercourse with Eliki was consensual.
15. Tavaita agreed that whilst they were having sexual intercourse in the room, Fido was also in the house. She did not complain to Sereima about what was done to her by Eliki. She agreed that whilst they were having sexual intercourse, Eliki did not block her mouth with his hands.
16. She agreed that Raijeli and Lynnette had come to the house to confront her about the sexual intercourse that she had with Eliki. She agreed that the news that they were caught having sexual intercourse would have embarrassed her and her family and that it would have tainted the reputation of her uncle, who is the Turaga-ni-Koro. She agreed that to save the reputation of her and her uncle, she had told Lynnette and Raijeli that Eliki forced her to have sexual intercourse with her.

17. Under re-examination, Tevita said she told Raijeli and Lynnette that Eliko had forced her because she was in fact forced by the accused. She said that Eliko blocked her mouth. She didn't complain to Sereima, because she was scared. She didn't call for help from Fido because they had already planned it together. She didn't push Eliko because she was scared.

PW 2: Lynette Hoytte

18. In 2018, Lynette was residing in Nasoata. On 21 December 2018, she was seated by the beach with Raijeli and a few ladies. Melania and Ema came running with the phone and it was playing a video that was live on Facebook. The live video showed an image of a male and a female having sexual intercourse. Raijeli identified the male as Eliko and the female as Tavaita. By looking at the video, she couldn't make out whether it was forced or consensual sex. She could not hear any sound on the video.
19. After seeing the video, they went to Tevita's house and called out Tavaita's name, but there was no response. When there was no response, she went back home to save the live video on her own phone. On her way home, she saw Sereima, Eliko's mother. She told Sereima what Eliko was doing to Tavaita. She told Sereima to go and talk to Eliko because Fido was live on Facebook showing Tavaita having sexual intercourse, and that everyone could see the video.
20. Lynette took her phone and went back to Tavaita's house. When she reached Tavaita's house, Eliko's mother had already reached there, and she was growling at Tavaita about what had happened. Tavaita was crying when she came out of the room, and she looked scared because a group of people had gathered outside. Then Sereima told Eliko to get out of the house. Then Eliko came out of the house and left with his mother. She brought Tavaita to her house and asked her why she was not answering when she was calling out her name. Tavaita said that Eliko had covered her mouth so that she couldn't answer. When she asked why she wanted to do such things, Tavaita said that she did not want to do it, but she was pulled, slapped and forced by Eliko. Raijeli then called the police.

21. Under cross-examination, Lynnette said that there were a few people standing around the house when Sereima was growling at Eliki. She didn't hear any slapping or punching sounds from the video. She did not hear any sound at all.

PW3 Raijeli Lakeba

22. In 2018, Raijeli was residing in Nasoata. On 21 December 2018, she was sitting by the beach with Lynnette, Vani and Mere. Melania and Ema ran to them with a phone and showed a Facebook live video on Fido's Facebook account where her nephew Eliki and Tavaita were having sex. Tavaita is her eldest sister's niece and her neighbour. She saw Tavaita every day. Tavaita is a very slow-minded person who has clumsy behaviour.
23. Raijeli did not hear anything in the live video. When she identified Eliki and Tavaita in the live video, they started to look for the house where that video was done. She knew that Tavaita was a very slow person with a weak mentality, so she wanted to go and tell her that she was being videoed. They all went to look for Fido's family house and called out Tavaita's name. When they were still standing outside Eliki's mother had arrived. Eliki's mother entered the house and chased Eliki out of the house. At the same time, Tavaita exited the room crying.
24. Lynnette then asked Tavaita, what had happened. Tavaita said that Eliki had closed her mouth so that she could not answer when they were calling her name. They asked Tavaita why she had done that thing with Eliki. Tavaita answered saying that Eliki had forced her to do it. She then called the police.
25. Under cross-examination, Raijeli said that while observing the video she did not see Eliki slapping or punching Tavaita during their intercourse. What made it more awkward was that it was on a live Facebook feed recorded by Fido. She called Tavaita's name

numerous times for more than five minutes. She got angry because Tavaita was not responding. Eliko and Fido are cousins.

#### Defence Case

DW1: Eliko Kae

26. In December 2018, Eliko was working at FSC. On 21 December 2018, he was drinking with Fido by the beach. After they finished having drinks, he was going home. When he was going past Fido's house Tavaita spoke to him. He started joking with her. He told Tavaita that he wanted to have sex with her. She then told her to wait until her uncle and aunt left then he could come back to her. He did not go home. He turned back and went back to the beach where Fido who was on Facebook.
27. From the beach, he could see Tavaita's house. After he had seen Tavaita's uncle and aunty leave, he went to Tavaita's house. As he entered the house, he saw someone sitting inside the house. Eliko told this person that he wanted to see Tavaita. This person told him to go and see Tavaita inside her room.
28. He went into the room and kissed Tavaita. Tavaita also kissed him back. He laid her down on the bed and took off his clothes. She took off her own clothes. He then came on top of her and inserted his penis inside her vagina and had sex with her for about five minutes. Tavaita was just lying down still on her bed when they were having sexual intercourse as if she could not feel anything. He did not know that Fido had entered the house and was videoing while they were having sex until her mother said that somebody was recording. That was when Tavaita started crying.
29. He stopped when he heard his mother calling from outside. He went underneath the bed and was hiding there. When he came out, his mother asked Tavaita if she had liked him. Tavaita did not respond. His mother took her home. There were two people inside the house when this incident happened. Fido was in the other room and the other person was still lying in the living room. He just heard some people calling but did not know who they were. He did not care about the calls as they were having sexual intercourse. He

denied slapping, punching, blocking Tavaita's mouth and having had forceful sexual intercourse with her. The two ladies took Tavaita and that is when Tavaita said that the sex was not consented.

30. Under cross-examination, Eliko said that on 21 December 2018, he had bought at least eight bottles of Fiji Gold (beer) long neck to share between him and Fido (Alifereti). They finished all the bottles in just 15 minutes' time. He denied that there was no conversation between him and Tavaita because her uncle was still present at home. He denied that he was drunk when he reached Tavaita's house.

### **Evaluation /Analysis**

31. The identity of the accused is not in dispute. The accused admits that the sexual intercourse took place between him and the complainant on 21 December 2018. The only dispute is whether the complainant consented to the sexual intercourse. The Prosecution says that the sexual intercourse was not consensual. The Defence says that the complainant consented. The case turns on one word against the other. However, the Prosecution must prove the charge beyond a reasonable doubt.
32. Let me first examine the evidence of the complainant. The complainant in her evidence-in-chief said that the accused came home drunk when her uncle and aunty went to church. When she questioned why he came, the accused, without speaking to her, pulled her into her uncle's room, slapped her and closed her mouth. She was trying to escape but she could not because the accused was holding her down tightly. He took her *sulu* and panty off and inserted his penis inside her vagina. She was confused and scared. She started crying. The accused told her to be quiet so that no one from outside could hear her.
33. Under cross-examination, the complainant agreed that she removed her own clothes. She agreed that the accused did not slap her. She agreed that whilst they were having sexual intercourse, the accused did not block her mouth with his hands. Under re-examination, she confirmed that the accused blocked her mouth and forced her.



34. The Defence argues that in view of the inconsistencies in her own evidence, the evidence of the complainant is not reliable and therefore be rejected. If the complainant is a normal person, I would have accepted the argument of the Defence. However, I find the complainant to be a slow person as far as her mental capacity is concerned. This finding is based not only on my own observation of the complainant in Court but also on the evidence led in the trial.
35. At the outset, the complainant said she was 23 years old. However, by appearance, anyone could safely say that she is much older than a woman in her twenties. She could not recall even her birthday and whether she had ever gone to a school. Prosecution witness Raijeli is closely related to the complainant and also her neighbour. Raijeli knew the complainant from her childhood and saw the complainant every day. Raijeli confirmed that the complainant is a very slow-minded person who has clumsy behaviour. It appeared to me that the complainant was amenable to the Defence Counsel's suggestions because of her clumsy behavior thus paving way for her to give inconsistent evidence.
36. The Defence Counsel objected to Raijeli's said evidence on the basis that she (Raijeli) is not an expert to comment on the complainant's mental capacity and that the Prosecution failed to produce medical evidence to show that the complainant was mentally handicapped. It is true that no medical evidence was produced by the Prosecution. However, I do not need the evidence led in the trial to be supplemented by medical evidence to form an idea that the complainant is intellectually handicapped.
37. There is no dispute that the sexual intercourse between the complainant and the accused came to light when Fido was playing a live video of them on his Facebook page. Both Lynette and Raijeli had watched the video. Raijeli said that as she watched the video she was concerned because she knew that the complainant was a very slow person with a weak mentality and that is why she wanted to go and tell the complainant that she (complainant) was being videoed. As the sensible person she is, why would she ever be

concerned when two adults are engaged in sexual intercourse, which is a matter strictly private? Raijeli no doubt intervened in the matter because she knew the complainant was not a sensible person.

38. The complainant's manner of giving evidence in Court was far from normal. Her abnormality was amply demonstrated when she gave evidence in Court under cross-examination. I attribute the inconsistencies in her evidence to her clumsy behaviour.
39. It is the complainant's evidence that, while the accused was inserting his penis into her vagina, she heard Raijeli and Lynnette calling her name from outside and that she was not able to respond or go outside because the accused was tightly covering her mouth and he told her not to answer. This evidence is consistent with that of Lynette and Raijeli. Lynnette said she called out complainant's name more than five times and she got angry when there was no response. When the complainant eventually came out, Lynnette asked the complainant why she (the complainant) was not responding when she was calling out her name. The answer of the complainant was that the accused covered her mouth so she couldn't answer. Raijeli confirmed that she overheard this conversation between Lynnette and the complainant.
40. The complainant admitted that the accused kissed her lips. It was a unilateral action of the accused. She did not say that she kissed the accused at any time. She agreed under cross-examination that she did not at any time push the accused. Her explanation was that she didn't push the accused because she was scared. The complainant's conduct is not inconsistent with that of a rape victim. Different people react differently. There is no stereotype conduct for rape victims.
41. Both Raijelli and Lynnette in the live video had not seen anything to suggest that the complainant was physically resisting. By looking at the video, Lynnette couldn't make out whether it was forced or consensual sex. She could not hear any sound on the video at all. Even the evidence of the accused indicates that the complainant had gone into

hibernation during the sexual encounter. The accused said that the complainant was just lying down still on her bed when they were having sexual intercourse as if she could not feel anything. Is this the behaviour expected from a consensual sexual partner? I do not think. The inaction on her part of the complainant suggests that she succumbed to the aggression of the accused.

42. According to the Crimes Act definition of consent, the submission without physical resistance by a person to an act of another person shall not alone constitute consent. Consent obtained by force, threat or intimidation etc. will not be considered as consent freely and voluntarily given. It is reasonable for the complainant to behave in the way she behaved in the circumstances she was in. She vehemently denied that the sexual intercourse with the accused was consensual, and she maintained her stance under cross-examination.

43. Now I turn to the complaint made by the complainant to Lynette in the presence of Rajeli. Lynette said that when Rajeli asked the complainant what had happened. The complainant could only say that the accused had done something to her but could not talk much because she was crying and scared. When Lynette brought the complainant to her house, Lynette asked the complainant, why she (the complainant) had done that thing with the accused. The complainant answered saying that the accused forced her to do it. When asked why she was not answering when she was calling out her name, the answer of the complainant was that the accused had covered her mouth so that she couldn't answer. When Rajeli asked the complainant as to why she wanted to do such things, the complainant said that she did not want to do it, but she was pulled, slapped and forced by the accused. Rajeli said then only she informed the police. Rajeli confirmed that she overheard the conversation between the complainant and Lynette.

44. By the time Lynette and Rajeli received the complaint mentioned above, they had already watched the sexual intercourse live on Facebook. Therefore, nothing was left to be complained or inquired of as far as the sexual act was concerned. It appears that Lynette and Rajeli had just wanted a clarification from the complainant if she was

consenting to the sexual act of the accused. When Raijeli was assured that the sexual intercourse was not consensual, she had informed the police. The complainant confirmed that she complained to Raijeli and Lynnette only because the accused forced her.

45. The complainant agreed that it was a closely knitted community and the news had spread like a wildfire in Nasowata community. She also agreed that her uncle, who is the Turagni-Koro of the village, in whose house the incident happened, earned much respect in her community. The Defence argues that the complainant made up the complaint as a cover up to save her image and that of her family from embarrassment since she was caught in the act, and it was live on Facebook.

46. It is logical for the Defence to raise that argument. However, I am not convinced that the complainant made up this allegation against the accused to protect her image and that of her family. The complaint was so spontaneous, and I do not believe that the complainant had the capacity to make up such an allegation on the spur of the moment.

47. Both the complainant and the two recipients of the complaint testified as to the truthfulness of the complaint. The evidence of Lynnette and Raijeli is materially consistent not only with the evidence of the complainant but also to a greater extent with that of the accused. Raijeli is closely related to the accused, and she had no apparent reason to lie under oath. I accept that Raijeli and Lynnette told the truth in Court.

48. The complaint was made soon after the incident. In the circumstances the complaint was made, I am satisfied that complaint discloses evidence of material and relevant unlawful sexual conduct on the part of the accused which supports credibility of the complainant.

49. The complainant had not complained either to Sereima, the mother of the accused or Fido. She gave the reasons why. She said that she didn't complain to Sereima because she was scared. She didn't call for help from Fido because she knew the accused and Fido had planned the event together.

50. Let me now analyse the evidence on the distressed condition of the complainant soon after the incident. The complainant said that she was confused and scared when the accused invaded her body, so she started crying. Both Lynnette and Raijeli confirmed that the complainant looked scared and was crying as she came out of the room.
51. Lynnette said that there was a group of people gathered outside the house when the complainant came out of the room and she speculated that the complainant was scared because of the gathering. It was argued for the Defence that the complainant started crying only when she came to know that they were being video recorded and posted live on Facebook and that when she saw the gathering outside. The accused in his evidence also said that the complainant started crying when she heard about the video recording.
52. Neither Lynnette nor the accused can say what made the complainant cry and what she was scared of. It can best be explained by the complainant herself. The evidence of the complainant was that she got scared and started crying when she was invaded and tortured by the accused. Whilst in the room, when she started crying, the complainant did not know anything about the video recording and of the gathering outside. Therefore, I am sure the crying started in the room and she cried only because she was sexually invaded and not because of what she saw or heard outside the room when she came out.
53. I observed the demeanour of the complainant in Court. She was not evasive. Despite the inconsistencies which I alluded to above, I am sure the complainant, when she said that the sexual intercourse was not consented, told the truth in Court. I accept her evidence as the truth.
54. Now I turn to the evidence of the accused. The accused said that when he was on his way home and going past the complainant's house, he cracked a joke with the complainant and indicated his desire to have sex with her. The complainant responded positively and told him to wait until her uncle and aunty leave home. When he saw her uncle and aunty

leave, he said he came back to the complainant. When he entered the house, he saw someone sitting inside the house. This person told him to go and see the complainant inside her room.

55. If the complainant had invited the accused for a sexual intercourse as he said, she would have wanted it to happen in utmost secrecy and that is why she wanted him to wait until her uncle and aunty leave. The accused confirmed that he saw another person in the house when he entered the house. The complainant also knew that her cousin's husband was home at that time. If that is the case, will the complainant ever invite the accused for a secret sexual intercourse knowing very well that her cousin's husband was home?
56. The accused said Fido was in the other room and the other person was still lying in the living room. The door to the room where sexual intercourse took place was not closed. Fido is none other than the son of her uncle Tomu in whose absence, according to the accused, the complainant wanted the sexual intercourse to take place with the accused. If that was the case, will the complainant ever agree to engage in sex knowing very well that her uncle's son Fido was present in the next room?
57. The accused said that he kissed the complainant, and the complainant also kissed him in return. However, his counsel did not put it to the complainant that she had also kissed the accused. The complainant's evidence was that only the accused kissed her. The fact that the complainant also kissed the accused is an important piece of evidence when it comes to ascertaining the issue of consent. It is reasonable to assume that the accused had not given instructions to his counsel to that effect (her kissing him), and he did not do so because he made up his evidence to bolster his Defence.
58. The accused agreed that he went underneath the bed and was hiding there when his mother entered the house. If he did in fact engage in consensual sex with the complainant, why would he want to hide underneath the bed?

59. The accused said that he just heard some people calling out but did not know who they were. If the complainant could clearly recognize the voice of Raijeli, why can't the accused, who is Raijeli's nephew?
60. The accused said that he was never drunk when he entered the complainant's house. However, he agreed that he had bought at least eight bottles of Fiji Gold (beer) long neck and shared them with Fido and finished all the bottles in just 15 minutes' time. The evidence of the accused that he was not drunk cannot be accepted. The accused had been drinking with Fido at the beach after which both of them had come to the complainant's house when the complainant's uncle and aunt had left. While the accused was engaged in the sexual intercourse, Fido had been video recording the scene and posting on Facebook. It is hard to believe the accused's evidence that he was totally unaware of the video recording. There is a reasonable basis for complainant's suspicion that the accused and Fido had planned everything together.
61. No reasonable explanation was forthcoming in evidence for any of the queries I have raised. The evidence of the accused is not appealing to me. However, I bear in mind that he does not have to prove anything and the people tell lies for various reasons, perhaps because of fear or to avoid embarrassment. Sometimes, an accused faced with a serious charge, would want to lie or fabricate things to bolster his defence. However, I am sure the accused in this case lied in Court because he is guilty. His demeanour in Court is consistent with his guilty mind. I reject the evidence of the Defence.
62. The rejection of the Defence version however does not mean that the Prosecution has proved the case beyond reasonable doubt. I went a step further and considered totality of the evidence led in the trial to satisfy myself that there is no reasonable doubt in my mind

as to the guilt of the accused. Having considered all the evidence led in trial, I am satisfied that the accused penetrated the complainant's vagina without complainant's consent.

63. The complainant admitted under cross-examination that she did not push the accused at any time. The accused said that the complainant was just lying down still on her bed when they were having sexual intercourse as if she could not feel anything. Is this conduct of the complainant sufficient for the accused to believe that she was consenting? The evidence does not allow me to answer this question in the affirmative.
64. The accused's warning to her to be quiet and his act of blocking her mouth when Lynnette was calling out her name suggest that he wanted to silence her because he knew that she was not consenting. Furthermore, Raijeli, her neighbour and the relative, said the complainant was a very slow person with a weak mentality. The accused had been a frequent visitor to the complainant's house and they were living in the same village. The accused must have known the complainant's mental capacity which her niece Raijeli was well aware of.
65. The accused had reasonable basis to believe that the complainant was not intellectually normal. In the circumstances, the accused should not have taken the risk that he took in having sex with the complainant who appeared intellectually handicapped. The Prosecution proved that the accused knew that the complainant was not consenting and was also reckless when he proceeded to have sex with the complainant. The fourth element of rape is satisfied.
66. The Prosecution proved the charge beyond reasonable doubt. I find the accused guilty of Rape as charged. The accused is convicted accordingly.



Aruna Aluthge

Judge

19 October 2023



Solicitors:

Office of the Director of Public Prosecutions for State  
Legal Aid Commission for Defence