

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 228 of 2024

STATE

v

VILIKESA KAUTANAINIMAKIBAU

Counsel: Ms. L. Latu for the State
Mr. A. Waqanivavalagi for the Accused

Date of Mitigation/Sentence Submission: 27 February 2025

Date of Sentence: 18 March 2025

SENTENCE

Caveat – The victim shall herein be referred as **‘EKO’** pursuant to the Name Suppression Order.

1. **Vilikesa Kautanainimakibau**, the accused, voluntarily and unequivocally pleaded guilty and duly convicted on 11 February 2025, of the offences of *Rape*, *Sexual Assault*, and *Indecent Assault*, laid out as follows in the Amended Information by the Director of Public Prosecutions dated 4 December 2024 and filed on 9 December 2024:

COUNT ONE

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(a) of the Crimes Act 2009.

Particulars of Offence

VILIKESA KAUTANAINIMAKIBAU, on the 2nd day of September 2024, at Lutu village, Naitasiri, in the Eastern Division, unlawfully and indecently assaulted **EKO**, by touching her vulva / vagina.

COUNT TWO

Statement of Offence

RAPE: Contrary to section 207(1) and (2)(b) of the Crimes Act 2009.

Particulars of Offence

VILIKESA KAUTANAINIMAKIBAU, on the same occasion as Count 1 above, penetrated the vulva / vagina of **EKO**, with his fingers, without consent.

COUNT THREE

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(a) of the Crimes Act 2009.

Particulars of Offence

VILIKESA KAUTANAINIMAKIBAU, on the same occasion as Count 1, unlawfully and indecently assaulted **EKO**, licking her vulva / vagina.

COUNT FOUR

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(a) of the Crimes Act 2009.

Particulars of Offence

VILIKESA KAUTANAINIMAKIBAU, on the same occasion as Count 1 above, unlawfully and indecently assaulted **EKO**, touching her naked breast.

COUNT FIVE

Statement of Offence

SEXUAL ASSAULT: Contrary to section 210(1)(a) of the Crimes Act 2009.

Particulars of Offence

VILIKESA KAUTANAINIMAKIBAU, on the same occasion as Count 1 above, unlawfully and indecently assaulted **EKO**, kissing and sucking her naked breast.

COUNT SIX

Statement of Offence

INDECENT ASSAULT: Contrary to section 212(1) of the Crimes Act 2009.

Particulars of Offence

VILIKESA KAUTANAINIMAKIBAU, on the same occasion as Count 1 above, unlawfully and indecently assaulted **EKO**, by kissing her lips.

Brief facts

2. The accused **Vilikesa Kautanainimakibau** who is 49 years old, a farmer and residing at Lutu village, Naitasiri, raped, sexually assaulted and indecently assaulted his niece the complainant **EKO** who at the time of the offending was 13 years old, a class 7 student and lives in the same village. The complainant **EKO** calls the accused '*Ta Lailai*' which in I-Taukei language means uncle.

On **2 September 2024** at about 12.30pm, the complainant **EKO** was at home in Lutu village, Naitasiri, doing chores and after cooking lunch she decided to return a skirt belonging to her cousin and friend Elenoa who is the accused's daughter. The complainant went to Elenoa's house and upon reaching that house, she saw the accused standing by the door and told him that she was returning Elenoa's skirt, to which the accused responded by telling the complainant to enter the house, and at that very moment the complainant thought that the accused wanted to give her something inside his house. Upon entering the accused's house, the accused then immediately grabbed the complainant's hand firmly and closed the door, causing the complainant to feel anxious and scared, but the accused told her not to be scared. The accused then took the complainant to a room in the house and pushed the complainant on to the bed. The complainant remained scared, wearing a t-shirt, panty, dark blue pants, with a sarong. While the complainant was on the bed, the accused then removed her pants and began touching her vulva/vagina using his right hand, then inserted his right fingers penetrating her vulva/vagina, and told her not to tell anyone. The accused also used his tongue to lick the complainant's vulva/vagina, and simultaneously kissed, sucked and touched her naked breast with his hands, and also kissed the complainant's lips. After the accused had raped, sexually assaulted and indecently assaulted the complainant, the complainant then grabbed her clothes and ran towards the living room saying that her mother's coming, and the accused opened the door and told her to return in the afternoon. The complainant was not pleased and she never consented to what the accused had done to her in his house. The complainant immediately proceeded to her home crying, and upon reaching her home she took hold of her father's phone and dialed 919 but disconnected that call due to being scared. This was witnessed by the complainant's mother Sereana Lewenisou (PW1) who was also at home setting their clothes in the sitting room, and

saw the complainant pick her husband's phone, dialed the police number, and heard someone speaking via the phone, but the complainant disconnected the phone call. Sereana Lewenisou (PW1) then told the complainant not to play with the police number, and the complainant started crying, to which Sereana Lewenisou (PW1) reacted by asking the complainant as to whether she missed her friend Elenoa, even though she was not aware that Elenoa had left for Suva on the 12 noon bus with her mother and siblings. The complainant responded by nodding her head, and then Sereana Lewenisou (PW1) asked her as to why exactly she was crying, to which the complainant responded telling her mother Sereana Lewenisou (PW1) that the accused had inappropriately touched her. Having heard the complainant's response, Sereana Lewenisou (PW1) then took hold of the complainant's hand and immediately proceeded to the accused's house to confront him. Upon confronting the accused, he initially admitted that he only kissed the complainant. Sereana Lewenisou (PW1) then asked the complainant, in the presence of the accused, if the accused had only kissed her, to which the complainant shook her head to indicate her response as 'No'. Sereana Lewenisou (PW1) continued asking the complainant as to whether the accused removed her pants, to which the complainant affirmed, and immediately thereafter the accused began to say sorry and admitted that he did it, and also told Sereana Lewenisou (PW1) to get her husband so that he can ask for forgiveness.

The rape, sexual assault and indecent assault complaint was subsequently reported to the police on the same day i.e. 2 September 2024. The complainant was also medically examined on the same day by Dr. Alusio Navosailagi who concluded, as per the medical report dated 2.09.2024 at D(16): Summary and conclusions, '*A female alleged to have been sexually assaulted by uncle. Mechanism – digital vaginal penetration. The injuries are consistent with mechanism of injury*'. Refer to Dr. Alusio Navosailagi's *medical report* dated 2.09.2024 adduced by prosecution – Annexure 'A'.

The accused was then arrested on 3 September 2024 and cooperated with the police. He was interviewed under caution on 3 September 2024 and admitted that he: (i) touched the complainant's vaginal area when she was still clothed; (ii) removed the complainant's clothing and licked her vagina for five (5) minutes; and (iii) used his right hand to touch the complainant's vagina and her breast, sucked her breast and kissed her lips. Refer to *Record of interview* of Vilikesa Kautanainimakibau dated 3.09.2024 adduced by prosecution - Annexure

‘B’.

The accused is not a first offender. Refer to the *Previous Conviction record* of Vilikesa Kautanainimakibau adduced by prosecution - Annexure ‘C’.

Rape sentencing analysis – Count 2

3. In this case, **Rape** is contrary to section 207(1) & (2)(b) of the Crimes Act 2009, and the maximum penalty is life imprisonment.
4. The sentencing tariff for rape of a child including persons under 18 years is 11 to 20 years imprisonment according to Aitcheson v State [2018] FJSC 29; CAV0012.2018 (2 November 2018), and at paragraphs 24 – 25, the Supreme Court held:

[24] The increasing prevalence of these crimes, crimes characterised by disturbing aggravating circumstances, means the court must consider widening the tariff for rape against children. It will be for judges to exercise discretion taking into account the age group of these child victims. I do not for myself believe that judicial discretion should be shackled. But it is obvious to state that crimes like these on the youngest children are the most abhorrent.

*[25] **The tariff previously set in Raj v The State [2014] FJSC 12; CAV0003.2014 (20th August 2014) should now be between 11 – 20 years imprisonment.** Much will depend upon the aggravating and mitigating circumstances, considerations of remorse, early pleas, and finally time spent on remand awaiting trial for the final sentence outcome. The increased tariff represents the denunciation of the courts in the strongest terms.*

5. Furthermore, in Ram v State [2015] FJSC 26; CAV12.2015 (23 October 2015), at paragraphs 25 – 26, the Supreme Court *inter alia* provided a non-exhaustive list of factors to be considered by the court when sentencing a child rapist:

[25] In this case we are informed of pain having been caused to the 9 year old girl, but not as to whether she had required any medical treatment thereafter or whether she had suffered any psychological distress. Courts will be wise therefore to tread carefully before downgrading the type of penetration suffered, and instead to focus on the overall impact on the victim. The real consideration is, whatever the intruding object used, how horrific were the overall circumstances of the crime to

the victim.

[26] Factors to be considered in such cases could be:

- (a) whether the crime had been planned, or whether it was incidental or opportunistic;*
- (b) whether there had been a breach of trust;*
- (c) whether committed alone;*
- (d) whether alcohol or drugs had been used to condition the victim;*
- (e) whether the victim was disabled, mentally or physically, or was specially vulnerable as a child;*
- (f) whether the impact on the victim had been severe, traumatic, or continuing;*
- (g) whether actual violence had been inflicted;*
- (h) whether the injuries or pain had been caused and if so how serious, and were they potentially capable of giving rise to STD infections;*
- (i) whether the method of penetration was dangerous or especially abhorrent;*
- (j) whether there had been a forced entry to a residence where the victim was present;*
- (k) whether the incident was sustained over a long period such as several hours;*
- (l) whether the incident had been especially degrading or humiliating;*
- (m) If a plea of guilty was tendered, how early had it been given. No discount for plea after victim had to go into the witness box and be cross-examined. Little discount, if at start of trial;*
- (n) Time spent in custody on remand;*
- (o) Extent of remorse and an evaluation of its genuineness;*
- (p) If other counts or if serving another sentence, totality of appropriate sentence.*

6. The complainant **EKO** was 13 years old at the time of the offending, thus a ‘child’ pursuant to:

- Juveniles Act (Cap 56), s.2 - “child” is a person who has not attained the age of fourteen (14) years’; and
- Interpretation Act (Cap 7) s.2(1) – *In this Act and in every other written law and in all public documents enacted, made or issued before or after the commencement of this Act the following words and expressions shall have the meanings hereby assigned to them respectively unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided:- “child” means a person under the age of fourteen years; ...*

7. Given the sentencing tariff of 11 to 20 years imprisonment for child rape, for this instant, I choose a **starting point** of 13 years imprisonment.

8. The starting point of 13 years is enhanced by 6 years due to the following **aggravating factors**, bearing in mind the list of factors provided by the Supreme Court in Ram v State (supra):

- a) The accused digitally raped EKO who is his 13 year old niece and of the same age as his youngest daughter, by intentionally penetrating EKO's vagina with his right fingers without EKO's consent.
- b) The accused had acted opportunistically and atrociously, taking advantage of the fact that he was home alone when the complainant EKO came to his house to return his daughter's skirt, then forced the complainant to his room and sexually assaulted, indecently assaulted and raped her knowing full well that the complainant did not consent to him inserting his right fingers into her vagina.
- c) This is an incestuous and heinous rape of a vulnerable 13 year old girl and a class 7 student, and blatant betrayal of trust by the accused who is a 49 year adult married man with 3 daughters aged 18, 14 and 13 years, deemed and obliged to uphold good morals and values, protect and prevent vulnerable young girls from being raped and sexually abused.
- d) The complainant EKO, being raped by her uncle within the same village has undoubtedly caused emotional and psychological trauma to her, and feeling shunned and despised by the community, and her village is no longer a safe haven for her from sexual predators and exploiters. In the *Victim Impact Statement* dated 10 December 2024, the complainant EKO wrote:

I have been traumatized by your actions and have been seen differently by the community. I am afraid being amongst boys or men as the mentally of being abused is always on my mind. My lifestyle have changed, I find myself lost in a corner and being on my own, I've lost having friends by my side. Please do not do this to any other girl or woman again.

The Supreme Court in Aitcheson v State (supra) at paragraph 72 held, '[72] [u]ndoubtedly it has been accepted by the society that rape is the most serious offence that could be committed on a woman. Further it is said that; "A murderer destroys the physical body of his victim; a rapist degrades the very soul of a helpless female."

- e) Child rape is becoming prevalent in Fiji, thus a scourge and menace to the entire society, compelling the need for holistic means to properly and effectively deter and prevent such societal bane. Deterrence is highly warranted weighed together with *inter alia* the sentencing objectives of punishment, retribution and rehabilitation.
9. The 19 years is reduced by 3 years due to the **mitigating factors** considering that the accused is 49 years old, married with 3 daughters aged 18 studying at the University of the South Pacific, Laucala Campus, Suva, 14, and 13, sole breadwinner for his family earning approximately \$100 per week from farming, and an active member of the Lutu Methodist Circuit according to Reverend Niko Ramalua the Lutu Methodist Circuit Minister, thus arriving at the interim custodial term of 16 years.

Early guilty plea

10. In Aitcheson v State (supra), at paragraph 15, the Supreme Court held:

[15] The principle in Rainima must be considered with more flexibility as Mataunitoga indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.

11. Bearing in mind the Supreme Court's view on guilty plea highlighted above, I further reduce the 16 years by 3 years for the **early guilty plea**, resulting in the interim custodial term of 13 years.

Time spent in custody

12. Of the 13 years imprisonment, a further deduction of 3 months 8 days is made for **time spent in custody** pursuant to section 24 of the Sentencing and Penalties Act 2009, thus arriving at the custodial term of 12 years 8 months 22 days.

13. Therefore, the head sentence for Count 2 – Rape is 12 years 8 months 22 days.

Sexual assault sentence analysis – Counts 1, 3, 4 and 5

14. In this case, *Sexual assault* is contrary to section 210(1)(a) of the Crimes Act 2009, and the maximum penalty is 14 years imprisonment, read in conjunction with section 210(2) which state:

210-(2) The offender is liable to a maximum penalty of 14 years imprisonment for an offence defined in sub-section (1)(a) or (1)(b)(i) if the indecent assault or act of gross indecency includes bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person.

15. The sentencing tariff for *Sexual assault* is 2 to 8 years imprisonment according to State v Vuli [2019] FJHC 1091; HAC205.2017 (12 November 2019) and at paragraphs 30 – 32, Justice Riyaz Hamza held:

[30] The offence of Sexual Assault in terms of section 210(1) of the Crimes Act carries a maximum penalty of 10 years imprisonment.

[31] In the cases of State v Abdul Khaiyum [2012] FJHC 1274; Criminal Case HAC 160 of 2010 (10 August 2012) and State v Epeli Ratabacaca Laca [2012] FJHC 1414; HAC 252 of 2011 (14 November 2012); Justice Madigan proposed a tariff between 2 years to 8 years imprisonment for offences of Sexual Assault in terms of section 210(1) of the Crimes Act.

[32] It was held in State v Laca (supra), “The top of the range is reserved for blatant manipulation of the naked genitalia or anus. The bottom range is for less serious assaults such as brushing of covered breasts or buttocks.”

“A very helpful guide to sentencing for sexual assault can be found in the United Kingdom’s Legal Guidelines for Sentencing. Those guidelines divide sexual assault offending into three categories:

Category 1 (the most serious)

Contact between the naked genitalia of the offender and naked genitalia, face or mouth of the victim.

Category 2

(i) Contact between the naked genitalia of the offender and another part of the victim’s body;

(ii) Contact with the genitalia of the victim by the offender using part of his or her body other than the genitalia, or an object;

(iii) Contact between either the clothed genitalia of the offender and the naked

genitalia of the victim; or the naked genitalia of the offender and the clothed genitalia of the victim.

Category 3

Contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)."

16. The *Sexual assaults* in Counts 1 & 3 and Counts 4 & 5 respectively fall within Categories 2 and 3 highlighted above.
17. Regarding the *Sexual assault* in Count 3 of the Information, I choose a starting point of 5 years imprisonment.
18. The starting point of 5 years is enhanced by 3 years for the aggravating factors, especially the accused licking his niece's i.e. complainant's vulva/vagina, and at the same time violating the sacrosanct relationship of uncle and niece including cultural and religious taboos, when instead he is obliged to protect her from being violated, sexually or otherwise. The accused's conduct was opportunistic and atrocious, and a blatant disregard of trust, causing his niece the complainant to suffer emotional and psychological trauma and concurrently being shunned and despised by the very community where she should find solace and security. The prevalence of child sexual assault cases is also an aggravating factor.
19. For the mitigating factors, I reduce the sentence by 1 year considering the accused's age, marriage and father to 3 daughters, sole breadwinner of his family, and previous good character being an active member of the Lutu Methodist Circuit, thus arriving at the interim custodial term of 7 years.
20. The 7 years is further reduced by 2 years for the early guilty plea, and further deduction of 3 months 8 days for time spent in custody, thus arriving at the custodial term of 4 years 8 months 22 days.
21. Hence, the head sentence for Count 3 – *Sexual assault* is 4 years 8 months 22 days imprisonment.

22. The custodial term of 4 years 8 months 22 days for Count 3 – Sexual assault, is also the same head sentence respectively for the *Sexual assault* in Counts 1, 4 & 5.

Indecent assault sentence analysis – Count 6

23. In this case, ***Indecent assault*** is contrary to section 212(1) of the Crimes Act 2009, and the maximum penalty is 5 years imprisonment.
24. The sentencing tariff for *Indecent assault* is 1 to 4 years imprisonment according to State v Singh [2024] FJHC 387; HAC048.2021 (21 June 2024) and at paragraph 8, Justice Sunil Sharma held:

8. The maximum penalty for the offence of indecent assault is 5 years imprisonment. The accepted tariff is a sentence between 1 to 4 years imprisonment (Rokota vs. The State, criminal appeal no. HAA 0068 of 2002).

25. In Rokota v The State [2002] FJHC 168; HAA0068J.2002S (23 August 2002), Justice Nazhat Shameem (as she then was) considered a number of sentencing precedents for *Indecent assault* to determine the appropriate sentencing tariff for the said offence and held:

From these cases a number of principle emerge. Sentences for indecent assault range from 12 months imprisonment to 4 years. The gravity of the offence will determine the starting point for the sentence. The indecent assault of small children reflects on the gravity of the offence. The nature of the assault, whether it was penetrative, whether gratuitous violence was used, whether weapons or other implements were used and the length of time over which the assaults were perpetrated, all reflect on the gravity of the offence. Mitigating factors might be the previous good character of the accused, honest attempts to effect apology and reparation to the victim, and a prompt plea of guilty which saves the victim the trauma of giving evidence.

These are the general principles which affect sentencing under section 154 of the Penal Code (now repealed). Generally, the sentence will fall within the tariff, although in particularly serious cases, a five (5) year sentence may be appropriate. A non-custodial sentence will only be appropriate in cases where the ages of the victim and the accused are similar, and the assault of a non-penetrative and fleeting type.

Because of the vast differences in different types of indecent assault, it is difficult to refer to any more specific guidelines than these.

26. Considering Rokota v The State (supra) and State v Singh (supra), the tariff of 1 to 4 years imprisonment remain applicable thus far, despite the repeal of the Penal Code and enactment of the Crimes Act 2009, and sentencing courts can still apply the said tariff, but in conjunction with *inter alia* the Sentencing and Penalties Act 2009.

27. In this case due to the gravity of the offending, I choose the starting point of 3 years, and enhance it by 2 years for the aggravating factors, reduce it by 1 year for the mitigating factors, and further deduct 1 year for the early guilty plea, and 3 months 8 days for time spent in custody, resulting in the head sentence of 2 years 8 months 22 days.

28. Thus, the head sentence for Count 6 – *Indecent assault* is 2 years 8 months 22 days imprisonment.

Totality principle of sentencing

29. Based on the *Totality principle* of sentencing, the custodial terms of 12 years 8 months 22 days for Count 2 – *Rape*; 4 years 8 months 22 days for Counts 1, 3, 4 & 5 – *Sexual assault*; and 2 years 8 months 22 days for Count 6 – *Indecent assault*, are hereby made **concurrent** to the effect that Vilikesa Kautanainimakibau is sentenced to a concurrent custodial term of 12 years 8 months 22 days.

Non-parole period

30. As for the **non-parole period**, based on section 18 of the Sentencing and Penalties Act 2009 including the Supreme Court decision in Timo v State [2019] FJSC 22; CAV0022.2018 (30 August 2019), I have decided to fix a non-parole period of 11 years imprisonment for the concurrent custodial term of 12 years 8 months 22 days imprisonment.

Breach of suspended sentence

31. In his previous conviction record, Vilikesa Kautanainimakibau was convicted in the Suva

Magistrate's Court in CF 584/23 for *Indecent assault*, and sentenced to 12 months imprisonment, of which 3 months to be served in custody, and 9 months is suspended for 2 years.

32. The suspension period for the 9 months sentence remains operational, and pursuant to section 28 of the Sentencing and Penalties Act 2009, I order that the 9 months be activated, but to be served concurrently with the sentence of 12 years 8 months 22 days, with the non-parole period of 11 years.

Conclusion

Sentence

33. **Vilikesa Kautanainimakibau** stands convicted of the offences of *Rape, Sexual assault* and *Indecent assault* in the Information by the Director of Public Prosecutions, and hereby sentenced to **12 years 8 months 22 days imprisonment, with the non-parole period of 11 years imprisonment**, and the activated 9 months in CF 584/23 is to be served concurrently to the aforesaid main custodial term.

Permanent DVRO, standard non-molestation, non-contact orders

34. In addition to the imprisonment sentence, pursuant to the Domestic Violence Act 2009, I hereby issue a *Permanent Domestic Violence Restraining Order* [s.22] with the standard non-molestation conditions [s.27] including a non-contact order [s.29] against **Vilikesa Kautanainimakibau**, and the protected party being the complainant EKO.

35. Thirty (30) days to appeal to the Fiji Court of Appeal.

Orders of the Court

- 1) **Vilikesa Kautanainimakibau** having being convicted of the offences of *Rape, Sexual*

assault and *Indecent assault*, is sentenced to **12 years 8 months 22 days imprisonment, with the non-parole period of 11 years imprisonment**, and the activated 9 months in CF 584/23 is to be served concurrently to the aforesaid main custodial term.

- 2) In addition to the imprisonment sentence, pursuant to the Domestic Violence Act 2009, I hereby issue a *Permanent Domestic Violence Restraining Order* [s.22] with the standard non-molestation conditions [s.27] including a non-contact order [s.29] against **Vilikesa Kautanainimakibau**, and the protected party being the complainant EKO.



Hon. Mr. Justice Pita Bulamainivalu
PUISNE JUDGE

At Suva

18 March 2025

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for the Accused