

**IN THE MAGISTRATE'S COURT AT LABASA**  
**CRIMINAL JURISDICTION**

*Criminal Case No.329 of 2013*

**STATE**

v

**MIKAELE TAWAKE**

For the Prosecution : **CPL Monish**  
For the Accused : **Mr Paka. A**  
  
Judgment : **21 July 2017**

**JUDGMENT**

1. The accused, Mikaele Tawake, is charge for *Indecent Assault* contrary to *section 212(1)* of the *Crimes Decree 2009*.
2. The name of the victim is suppressed to protect her privacy and interest and will be referred to as "BD" in this judgment.
3. The particulars of the offence is that ;-

*Mikaele Tawake on the 11<sup>th</sup> day of June 2013 at Labasa in the Northern Division, unlawfully and indecently assaulted BD*

4. On 18 June 2013, the Accused waived his rights to counsel and pleaded not guilty to the charge. The case proceeded to trial on 28 September 2016.
5. On the trial date, the accused did not appear and the Prosecution make an application under *section 171(1)(c)* of the *Criminal Procedure Decree 2009*, for the trial to proceed in absence of the accused. The application by the Prosecution was granted and the case proceeded to trial in absence of the accused.
6. At the trial, the Prosecution called two witnesses.
7. *Section 212(1)* of the *Crimes Decree 2009*, state;-  
“*A person commits a summary offence if he or she unlawfully and indecently assaults any other person*”
8. The elements of the offence that the prosecution must prove beyond reasonable doubts are;-
  - a. *the accused,*
  - b. *has indecent contact with the victim,*
  - c. *without the victim’s consent,*
  - d. *by forcible compulsion.*
9. PW1- BD stated in her evidence that on 11 June 2013, she board the FFI bus from Vuo bus stop at 7am to go to school. The bus was full and she went to seat beside a Fijian guy. The Fijian guy touched her thigh, open the button of her dress and touch her private part. When the bus reaches school he took out his hand and she got off the bus and went to school. She knows the person but do not know him and his name. She had not seen him before and that is the first time she saw him. The person was wearing a pompom and is a ball headed person with short hair cut. He was wearing a black t-shirt and ¾ pants. In cross-examination, she stated that she never saw the man again after that and still do not know his name. In re-examination, she stated that no one else seated with them at the back seat.

10. PW2 is the mother of BD and her evidence is about the unusual behaviour of BD on that afternoon of 11 June 2013, and how BD informed them about the incident. She confirmed that BD travel to school by bus on 11 June 2013 from Vuo. BD was in class 2. BD told her and her husband (BD's father) that BD sat in a seat where only two people can sit and about four seats from the back. The man was sitting there and he makes way for BD to sit at the window side. As the bus move forward the man start touching BD's thighs. After a while the man put his hand inside BD's dress in between the button. He used two fingers to open BD's panty. BD said the man almost touch her private part when the bus reach school.
11. The caution interview was tendered as PE1. The accused in his answer to question 26 stated that "*When the small girl came, I helped her to sit since the gap for her to enter is small. I held the waist of the small girl then I felt that one of my finger went in the gap of her dress and touched her panty.*" Further in the interview, the accused stated that it was not her intention to touch her but to help her to sit.
12. The act of sexual assault was not particularise in the particulars of the offence. From the evidence of BD, it can be inferred that the act of sexual assault in this case is the touching of BD's thigh and private part by the accused.
13. The courage of BD to come and testify in court on what happened to her gives weight to her complaint. The evidence of PW2 on the behaviour of BD on that afternoon shows trauma BD has gone through from the alleged incident.
14. The accused deny the allegation and that give primary consideration on the issue of identity of the accused. The issue is whether it was the accused who did offended against BD in this case.

15. The accused make partial admission in his caution interview. There was no evidence led by the Prosecution to link and relate BD to the accused partial admission. There was no evidence led to show that the small girl referred to by the accused in his caution interview is BD. There was nothing in the caution interview to show that BD was shown to the accused during the caution interview so it can be identify by the accused if that is the small girl he referred to in his caution interview.
16. It is unsafe to rely on the evidence of BD alone on the identity of the accused considering that the accused was wearing a pompom and at the time of the incident that was the first and the last time BD has seen the accused. BD does not even know the accused or his name. There was no identification parade carried out. The accused was not present in court so he can be identified by BD.
17. This is a proper case where the Prosecution should ask for the accused to be present during the trial. The Prosecution decided to proceed to trial in absence of the accused and I will give my judgment based on the evidence that are now before the court.
18. There are doubts on the identity of the accused in this case. The evidence of the Prosecution was not able to clear this doubt. The failure of the Prosecution to prove the element of identity of the accused beyond reasonable doubts has affected the Prosecution case. There is no need to further consider other elements of the offence as the Prosecution is unable to discharge the burden of proof in this case on the element of identity.
19. In assessing the evidence as a trier of facts, I find that the Prosecution has failed to prove his case beyond reasonable doubt.

20. In my judgment, I find the Accused not guilty as charged and I acquit the accused accordingly.

28 days to appeal.



C. M. Tuberi  
RESIDENT MAGISTRATE