

IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0123 OF 2020

[Suva High Court Case No: HAC 402 of 2018]

BETWEEN : **MELI KENAWAI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, P**
Qetaki, RJA
Andrews, JA

Counsel : **Daunivesi S for the Appellant**
: **Lal U for the Respondent**

Date of Hearing : **12 November, 2025**

Date of Judgment : **28 November, 2025**

JUDGMENT

[1] The appellant (Meli Kenawai) was charged and tried in the High Court in Suva, with the following offences:

COUNT ONE

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, unlawfully and indecently assaulted **IM**, by touching his penis.

COUNT TWO

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2) (c) of Crimes Act 2009.

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, penetrated the mouth of **IM** with his penis, without his consent.

COUNT THREE

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, penetrated the anus of **IM** with his penis, without his consent.

COUNT FOUR

Statement of Offence

ATTEMPT TO COMMIT RAPE: Contrary to Section 208 of Crimes Act 2009.

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, attempted to penetrate the mouth of **JT** with his penis, without his consent.

COUNT FIVE
(Representative Count)

Statement of Offence

ATTEMPT TO COMMIT RAPE: Contrary to Section 208 of the Crimes Act 2009.

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, attempted to penetrate the anus of **JT** with his penis, without his consent.

COUNT SIX

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, penetrated the anus of **JT** with his finger, without his consent.

COUNT SEVEN

Statement of Offence

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

Particulars of Offence

MELI KENAWAI, between the 1st day of January 2017 and the 31st day of December 2017, at Nasinu, in the Central Division, unlawfully and indecently assaulted **JT**, by touching his penis.

[2] The appellant pleaded not guilty to the seven charges and the ensuing trial was held over 4 days.

[3] At the conclusion of the evidence and after the directions given in the summing up, the three assessors unanimously found the appellant guilty of the said seven charges.

[4] In the judgment **dated 17 July 2020**, the trial judge held as follows:

[36] In my view, the Assessor's opinion was justified. It was open for them to reach such a conclusion on the available evidence. I concur with the unanimous opinion of the Assessors in respect of all seven counts.

[37] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offences of Sexual Assault (Counts 1 and 7), Rape (Counts 2, 3 and 6) and Attempt to Commit Rape (Counts 4 and 5), with which the accused (appellant) is charged.

[38] In the circumstances, I find the accused (appellant) guilty of the offences of Sexual Assault (Counts 1 and 7), Rape (Counts 2, 3 and 6) and Attempt to Commit Rape (Counts 4 and 5), as charged.

[39] Accordingly, I convict the accused (appellant) of the offences of Sexual Assault (Counts 1 and 7), Rape (Counts 2, 3 and 6) and Attempt to Commit Rape (Counts 4 and 5), as charged.”

[5] The appellant was **convicted as charged of the 7 counts in the indictment** in the judgment dated 17 July 2020. In the sentence ruling dated 12 August 2020, the appellant was sentenced to 18 years imprisonment with a non-parole period of 15 years.

Leave to Appeal – Enlargement of Time to Appeal

[6] On 2 October 2020 the appellant through counsel filed an untimely appeal against conviction and sentence. The Enlargement of Time to seek leave to appeal hearing, was heard before the single judge of this court on 4 August 2023. In the ruling dated 7 August 2023, the appellant’s application for enlargement of time to appeal against conviction was refused. However, the application for enlargement of time to appeal against sentence was granted by the court.

[7] Following the ruling of the single judge, the appellant have filed a Form 3 Notice of Abandonment of Appeal Against Conviction dated 15 October 2025, as required by

Rule 39 of the Court of Appeal Rules. At the full court hearing the appellant confirmed his intention to abandoned his leave to appeal.

Abandonment of Appeal Against Conviction

[8] The appellant was represented by Legal Aid Commission Counsel for his appeal. At the start of the hearing, Counsel informed the court that the appellant has just informed her, that he had made the decision to withdraw his appeal against conviction. The court ascertained from the appellant if what his counsel has just informed the court is correct. The appellant confirmed that same to be correct.

[9] In that light, the court directly addressed the appellant to find out if his decision to abandon his conviction appeal was his own and no one else. He confirmed it was his own. He was then asked whether he was under pressure of any kind from anyone in making his decision to withdraw his appeal, he stated that he was not under any pressure. The court informed the appellant if the court made an order today in light of his decision, he will not be able to bring the appeal back in the future. The appellant understood and accepted that.

[10] The Court being satisfied that the requirements of Rule 39 of Court of Appeal Rules have been satisfied and there being no other valid reason, the full **Court Ordered** that the appellant's appeal against conviction is abandoned forthwith.

Review of the Sentence

[11] The substantive matter before the court was the appeal against sentence. In particular the suggestion in the Leave Ruling that the sentence may have breached the principle of sentencing that is against double counting of factors in the choice of starting points in a sentence tariff and how the aggravating factors are factored in the computation of the final sentence.

[12] The court acknowledges the concession of the Respondent that double counting may have taken place when the sentence against the appellant was passed by the trial judge in the High Court. The respondent nevertheless submits on the basis **Tiko v State [2024] FJCA 95** (AAU 093 of 2020) the ultimate sentence in this case is still within

the sentence tariff of the offence committed therefore there is no need to amend the sentence.

- [13] The appellate court on sentence appeal, is guided by the factors, endorsed by the Supreme Court in **Naisua v State [2013] FJSC 14**, which was outlined by the Court of Appeal in **Kim Nam Bae v State [1999] FJCA 21** as follows:

The Supreme Court, in Naisua v State [2013] FJSC 14; CAV0010.2013 (20 November 2013), endorsed the views expressed in Bae (supra): 5 "It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal Appeal No.AAU0015 at [2]. Appellate courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors: (i) Acted upon a wrong principle; (ii) Allowed extraneous or irrelevant matters to guide or affect him; (iii) Mistook the facts; (iv) Failed to take into account some relevant consideration.

- [14] In reviewing the sentence with the facts of this case in mind, the relevant starting point of 11 to 20 years enunciated in **Aitcheson v State [2018] FJSC 29** (CAV 012 of 2018) is the correct sentence tariff to be followed in this case. The judge adopted the sentence tariff and chose 12 years as the starting point. On the facts of this case, that starting point is not unreasonable: see **Koroivuki v State [2013] FJCA 15 (AAU 018 of 2010)**.

- [15] The difficulty of the sentence in this case is the additional 8 years for the aggravating factors. The aggravating factors taken into consideration by the judge to increase the sentence by 8 years are set out in paragraph 32 of the Sentence Ruling. These were: **State v Kenawai [2020] FJHC 648**;

“[32] The aggravating factors are as follows:

- (i) You have committed these offences on two separate victims.*
- (ii) Your father is a Senior Pastor at the Assembly of God Church. Both complainants testified that they attended the same church as you and your father. They used to even stay over at your residence. Thus the two complainants trusted you, your father and your family. Being so, you should have protected them. Instead you have breached the trust expected from you and the breach was gross.*

- (iii) *There was a disparity in age between you and the two complainants. The 1st complainant, IM, was between 14 and 15 years of age, and the 2nd complainant, JT, was between 13 and 14 years of age, at the time you committed these offences on them. At the time of the offending, you were 26 years of age. Therefore, you were older in age by over 10 years.*
- (iv) *You took advantage of the two complainant's vulnerability, helplessness and naivety.*
- (v) *You have exposed the innocent mind of two children to sexual activity at such a tender age, and thereby robbed the two complainants of their innocence.*
- (vi) *The impact of the crimes on the two victim was traumatic and is said to be continuing.*
- (vii) *You are now convicted of multiple offending.*

[33] Meli Kenawai, you are now 29 years of age (Your date of birth being 15 February 1991). You have been residing with your parents at the Laqere settlement. Currently you are said to be single as you have committed yourself to supporting your parents and your younger brother. However, these are all personal circumstances and cannot be considered as mitigating circumstances.

[16] Aggravating factors Paragraph 32 (ii) and (iv) cover essentially the same thing and (vii) is not an aggravating factor arising from any acts/omission as part of the commission of the offences, he was found guilty for in this case. It is a consequence of his conviction of the charges for which he was found guilty.

[17] The aggravating factors should attract additional 3 years imprisonment; taking the sentence to 15 years imprisonment.

[18] With respect to mitigating factors, under section 4 (2) Sentencing and Penalties Act 2009, a sentencing court **must have regard to 11 factors identified in that provision.** The appellant's previous good character was not considered (subparagraph (i)) and the conduct of the appellant during the trial as an indication of remorse (subparagraph (g)) was not referenced in the sentence ruling of the high court. These are important factors in sentencing and as a matter of fairness to the appellant should have been considered and assessed. In terms of mitigation an appropriate reduction should have been considered by the court. There was none given by the trial judge.

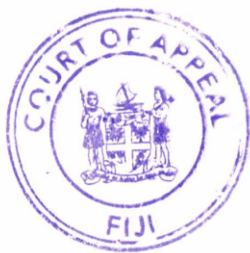
[19] The court considers a reduction of 2 years imprisonment is needful to allow for rehabilitation on the part of the appellant. The sentence is now 13 years imprisonment.

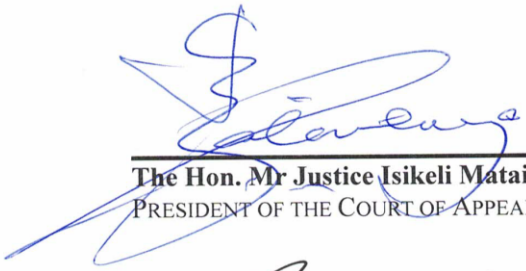
[20] It is required under section 24 of the Sentencing & Penalties Act 2009 for any in-remand period be deducted as imprisonment served. This will lead to a reduction in 6 months in the final sentence being the period in which the appellant was in remand for his trial.


[21] The result of the above review of the sentence of the appellant will now result in the sentence passed by the trial judge to be quashed. The new sentence will be 12 years 6 months imprisonment with a non-parole period of 10 years imprisonment.


ORDERS:

1. The sentence passed in the High Court against the appellant is quashed;
2. The new sentence to be substituted is 12 years 6 months imprisonment with a non-parole period of 10 years effective from 12 August 2020.
3. The Appellant's application to abandoned his appeal against conviction is hereby ordered.




The Hon. Mr Justice Isikeli Mataitoga
PRESIDENT OF THE COURT OF APPEAL


The Hon. Mr Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL


The Hon. Madam Justice Pamela Andrews
JUSTICE OF APPEAL