

IN THE HIGH COURT OF FIJI  
AT SUVA

CRIMINAL JURISDICTION  
CRIMINAL CASE NO.: HAC 162 of 2012

BETWEEN: THE STATE

A N D: SAMUELA KINIBOI

**Counsel** : Ms. A. Vavadakua for the State  
: Ms. N. Nawasaitoga for the Accused

**Date of Sentencing** : 07<sup>th</sup> August 2013

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**SENTENCE**

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1. It is hereby ordered to permanently suppress the name and the identity of the victim.
2. **Samuela Kiniboi**, you have been convicted for one count of **Attempted Rape**: contrary to **section 208** of the **Crimes Decree No. 44 of 2009** and one count of **Rape**: contrary to **section 207 (1) and (2)** of the **Crimes Decree No. 44 of 2009** on your unequivocal plea of guilty entered on **10<sup>th</sup> of July 2013**.

3. **First Count:**

Statement of Offence (a)

**ATTEMPTED RAPE:** Contrary to 208 of the Crimes Decree No. 44 of 2009

Particulars of Offence (b)

**Samuela Kiniboi**, between the 01<sup>st</sup> day of January 2011 and 31<sup>st</sup> day of December 2011 at Tumavia, Nakelo in the Central Division, attempted to have carnal knowledge of **M.R.** without her consent.

## Second Count

### Statement of Offence (a)

**RAPE:** Contrary to Section 207 (1) and (2) (b) of the Crimes Decree No. 44 of 2009

### Particulars of Offence (b)

**SAMUELA KINIBOI**, on the 29<sup>TH</sup> DAY OF March 2012 and 30<sup>th</sup> day of April 2012 at Tumavia village, Nakelo in the Central Division penetrated the vagina of M.R. with his finger without her consent.

4. There is an alternative charge of **SEXUAL ASSAULT** as the third count. You pleaded guilty to the alternative count as well. In sentencing you, I do not consider that as it was for the alternative count. The Summary of Facts produced in court revealed that between the 01<sup>st</sup> day of January 2011 and 31<sup>st</sup> December 2011 at Tumavia in Nakelo, you had undressed yourself and laid the victim on a bed after undressing her. Then you being naked had lay on top of the victim and attempted to insert your penis into the victim's vagina. Further to that, you between 29<sup>th</sup> day of March 2012 and 30<sup>th</sup> day of April 2012, at the same vicinity had penetrated the vagina of M.R. with your finger. You were 71 years at the time of the commission of the offences whilst the victim was just 6 years old.
5. Later the incidents had been reported to Nausori Police. The victim had been medically examined by a medical examiner and observed that "Mild abrasion at 7 o'clock site at the border of the hymen and inner labia minora. Hymen regular and intact." You had made a full admission to the police under caution as well.
6. The maximum penalty for the offence of Rape is life imprisonment. When a child victim is involved, the tariff in our jurisdiction for the offence of rape ranges from 10 – 15 years imprisonment. (see **Mark Mutch v The State**, *Criminal Appeal No. AAU 0060 of 1999, Fiji Court of Appeal*; **State v Lepani Saitava**, *Criminal Case No. HAC 10 of 2007, High Court, Suva*; **The State v AV**, *Criminal Case No. HAC 192 of 2008, High Court, Suva*; **State v VV**, *Criminal Case No. 084 of 2009, High Court, Suva* and **State v Waqabaca**, *Criminal Case No. HAC 139 of 2008, High Court, Suva*, **State v NK**, *Criminal Case No. HAC 155 of 2010*, **State v Nacanieli Yavala**, *Criminal Case No. HAC 129 of 2012* and **State v Simione Taleusila**, *Criminal Case No. HAC 11 of 2010*).
7. It is worthy of reminding once again what was highlighted in the case of **Mohammed Kasim v State** (1994) *FJCA 25; AAU 0021j.93S* (27 May 1994):

*“It must be recognized by the Courts that the crime of rape has become altogether too frequent and that the sentences imposed by the Courts for that crime must more nearly reflect the understandable public outrage. We must stress, however, that the particular circumstances of a case will mean that there are cases where the proper sentence may be substantially higher or substantially lower than that starting point.”*

8. **Justice Gates**, as he was then, stated in **State v. Marawa (2004) FJHC 338**, that:

*“Rape is the most serious sexual offence. Courts have reflected increasing public intolerance for this crime by hardening their hearts to offenders and meting out harsher sentences” (paragraph 10)*

9. In terms of **Section 208** of the **Crimes Decree**, the maximum penalty for the offence of **“Attempted Rape”** is 10 years imprisonment. **Justice Shameem**, in the cases of **Jioji Aunima v. State (HAA 033 of 2010)** and **Bulimawai v The State [2005] FJHC 261; HAA 0068J.2005 S(02<sup>nd</sup> of September 2005)** had identified the tariff for the offence of attempted rape should be **12 months to 05 years** imprisonment.

10. After a careful consideration of the legal background on Sentencing for the offences of **Rape** and **Attempted Rape**, I now turn to identify the Aggravating and Mitigating grounds in this particular instance. The learned State Counsel submitted a comprehensive **Sentencing Submission** along with the **Victim Impact Assessment Report**. The learned Counsel for the defense filed pertinent submissions in **Mitigation**. The **Victim Impact Assessment Report** clearly reflects that the emotional and psychological effects to the victim over the alleged sexual acts are enormous. It says that after these incidents, the victim is at a loss and always day dreaming at the home and in the class. She does not perform in the school. The most alarming portion in the report is that “when she looks at older people she is afraid. She is frightened to be alone in class.”

11. The huge **disparity in ages** between you and the victim, in all means aggravates the background of offending. The victim was just six years of age at the time of the commission of the offence whilst you were 71 years old. The age gap was 65 years. This fact alone is not reconcilable or compensated in any way. Your children must be having their own children older than the victim. On the other hand your conduct amounts to a serious **breach of trust**. You were an elderly person, almost like the grandfather of the victim, in the close vicinity of the victim’s native environment and should have been a role model to the younger generations. Instead, you simply lured the small girl with some oranges. The victim would not have come to your house anticipating this disastrous

experience resulting her to be afraid of every old man comes across her entire life. This background undoubtedly **aggravates** your offending.

12. In **Mitigation**, you claim that you are 72 years of age and residing alone in Tumavia, Nakelo, Tailevu after separated from your wife and three children in 1980. You are unemployed, but engaged in subsistence farming. You pleaded guilty to both the counts without going for a full trial, saving the time and resources of the state and the court. You had no intention to do such an act to the complainant. Nothing was pre-planned and all happened in the spur of the moment. You acknowledge that what you did was wrong and inexcusable. You are sincerely remorseful and seek for forgiveness from court. You admit that your action brought much embarrassment and humiliation to the family. You promise not to reoffend and now engage Evangelism work in the Apostles Church as a pioneer. You have maintained a crime free record for over a decade and had co-operated with the police being truthful and honest of the allegation. You seek forgiveness from court and an opportunity to reform and rehabilitate. You have been in remand custody for one week since 30<sup>th</sup> of July 2013 in relation to this case. Finally, you are seeking for leniency as you are not a habitual offender and a longer custodial sentence would not serve justice.
  
13. Having considered the legal and factual background, I take a **starting point of 12 years imprisonment** for the charge of **'Rape'**. I add **06 years** for all the **Aggravating factors** stated in paragraph 11. This court is of the view that this is a fit and proper instance to award you a deduction of a full third for your early plea of guilty as it indicates the true colors of remorse. Further, this court thinks fit to **deduct another 2 years** from the interim period for all the other **mitigating factors** averred in paragraph 12 inclusive of your previous good character for over a decade and the one week incarceration. Your final sentence for the count of **Rape** is **10 years imprisonment**.
  
14. It has been well established that the courts will often look into the higher end of the tariff when there is a serious breach of trust or the age gap between the offender and the victim is considerably high. Therefore, in this instance, I take a **starting point of 04 years imprisonment** for the offence of **'Attempted Rape'**. I add **02 years** imprisonment for all the **Aggravating factors** mentioned earlier and **deduct 1 year** for all the **Mitigating factors**. It has to be borne in mind that though the charge remains as 'attempted rape', you were almost there in achieving the target. Your final sentence for the offence of 'Attempted Rape' is **05 years imprisonment**.
  
15. Your final sentences stand as follows.
  - Count No. 1 – Attempted Rape – 05 years imprisonment.
  - Count No. 2 – Rape – 10 years imprisonment.

16. Having considered the concepts of ‘totality principle’ it is hereby ordered that the sentence for the 01<sup>st</sup> count of ‘Attempted Rape’ be served concurrently with the sentence for the 02<sup>nd</sup> count of ‘Rape’. Thus, your final sentence is 10 years imprisonment.
17. It is at this juncture, this court has to decide whether to proceed ahead with the final sentence of 10 years imprisonment or to grant ‘some concession’ to you because of your elderly age. In the case of **Ratu Penioni Rokota v The State**, [2002] FJHC 168; HAA0068J.2002S [23 August 2002] Justice Shameem cited the following paragraph from **Principles of Sentencing of D. A. Thomas**, (2<sup>nd</sup> Ed at page 196).
- “Recognition of age as a mitigation factor does not mean that imprisonment should never be imposed on elderly offenders, and the Court has upheld sentences of imprisonment on men in their seventies. It is however a long-established principle that a sentence should normally be shortened so as to avoid the possibility that the offender will not live to be released.”*
18. The case of **Wilkinson**, (14.11.74, 3025/C/74 in Thomas, (supra) page 196) a 05 years imprisonment given to a 60 year old man for committing the offences of indecency over a period of several years with his grandnieces was reduced to 30 months and said though ‘a substantial custodial sentence’ was inevitable, the offender had a perfectly good record and the offences began when he became ‘desperately lonely’ widower. In **Nicholls** (27.6.75, 1233/B/75 in Thomas, (supra) page 196) a 10 year sentence ordered for committing the offences of buggery and gross indecency to a man of 62 years without previous convictions, was reduced to 07 years in appeal saying that even though such a sentence is justified on facts, the sentencer ‘did not pay sufficient attention to the factor of age’.
19. A careful consideration of **Wilkinson** and **Nicholls** show that even though a considerable attention have to be paid to the ‘age factor’ in sentencing an elderly person, the final sentence has a bearing on the gravity of the offence as well. The concept of avoiding the elderly persons to be sent to prison for longer periods, though principally correct, this court is of the view that such an approach should not attach a message to the society that one can get rid of a substantive amount of his criminal responsibility due to the elderly age. It is simply because that, as it is quite understood, the more one gets older with maturity, the more he or she should bear the conviction of being a socially, morally and legally responsible person. Therefore, whilst endorsing the long standing principle of awarding short terms of sentences to elderly offenders, this court stresses that whatever the sentence is to be granted to the accused person should reflect the actual gravity of the crime of which the accused is been charged with.

20. This is an instance, as stated above, where a six year old girl is been victimized by the lust of a very elderly offender. It is been stressed time and again that the future of a country or a nation is children. Thus, children must have the right to freedom and especially to spend their childhood without any undue disturbances to its smooth functioning. This court considers that the shocking and shameful sexual activities of this nature expose the small children to the much polluted adult world. The egregiousness of the existing facts of this case and the brazen attitude of the accused towards a small girl will have to get prominence over the elderly age of the accused. Thus, this court is of the view that there is no need of being flexible with the tariff to accommodate any 'special treatment' to you or your elderly age. You will receive an immediate custodial sentence.
21. Your final sentence stands as 10 years imprisonment. You will not be eligible for parole for 06 years. In determining the parole period, this court seriously considered your age factor and thought it fit not to impose a longer non parole term.
22. You have 30 days to Appeal to the Fiji Court of Appeal.

Janaka Bandara  
**JUDGE**

**At Suva**  
07<sup>th</sup> of August 2013

Office of the Director of Prosecutions for the State  
Office of the Legal Aid Commission for Accused