

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 88 of 2019**

**STATE**

**V**

**EMOSI BANUVE alias EMOSI QALOBULA**

**Counsel:** Mr. Rajneel Kumar for the State  
Ms. Shantel Hazelman for the Accused

**Sentence Hearing** : 5 September 2019

**Sentence** : 24 October 2019

## **SENTENCE**

[1] Emosi Banuve alias Emosi Qalobula you were charged with the following offence:

### ***Statement of Offence***

**ACTS INTENDED TO CAUSE GRIEVOUS HARM:** Contrary to Section 255 (a) of the Crimes Act 2009.

### ***Particulars of Offence***

**EMOSI BANUVE alias EMOSI QALOBULA**, on 03 March 2019, at Maravu Settlement, Laucala Beach Estate, Suva, in the Central Division, with intent to do some grievous harm to **JOSEVA DULAKI**, unlawfully wounded **JOSEVA DULAKI** by stabbing him with a knife.

[2] This matter was first called before the High Court on 15 March 2019 and the State was granted time to file Information and Disclosures.

- [3] On 30 April 2019, the Director of Public Prosecutions (DPP) filed the Disclosures relevant to the case; and the Information was filed on 10 June 2019.
- [4] When the matter came up before me on 2 July 2019, you were ready to take your plea. You pleaded guilty to the one count in the Information. This Court was satisfied that you pleaded guilty on your own free will and free from any influence. Court found that you fully understood the nature of the charge against you and the consequences of your plea.
- [5] Thereafter, on 9 July 2019, the State filed the Summary of Facts. The Summary of Facts were read out and explained to you and you understood and agreed to the same. Accordingly, Court found your guilty plea to be unequivocal. I found that the facts support all elements of the charge in the Information, and found the charge proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of the charge of Act with Intent to Cause Grievous Harm.
- [6] I now proceed to pass sentence on you.
- [7] The Summary of Facts filed by the State was as follows:

- “1. **The accused** in this matter is Emosi Banuve alias Emosi Qalobula, 36 years old labourer of Maravu Settlement, Laucala Beach Estate, Suva.
2. **The victim** in this matter is Joseva Dulaki, a 33 year old self-employed man also of Maravu Settlement, Laucala Beach Estate, Suva.
3. *The accused and the victim are related to each other as the victim is the accused’s brother in law.*
4. *On 3 March 2019, at about 15.30 hours the accused and the victim, together with the accused’s elder brother Mr. Taka Kacilala were drinking Joske’s Brew (rum and cola) at Maravu Settlement, Laucala Beach Estate, Suva.*
5. *The victim thereafter, began swearing in the I-Taukei language at Mr Taka Kacilala where the victim and Mr. Taka Kacilala began fist fighting with each other.*
6. *The accused had kept on drinking and minding his own business when the first fight between the victim and Taka Kacilala spilled over onto the accused who was punched. The accused got angry and joined into the fight where Mr. Taka Kacilala and the accused were fighting against the victim by punching and kicking him. The victim also punched back and then was going away from both the accused and Mr. Taka Kacilala.*

7. *The accused and Mr. Taka Kacilala followed the victim and while Mr. Taka Kacilala continued fighting with only his fists, the accused got a kitchen knife and stabbed the victim's back 3 times before stabbing his neck with the said kitchen knife.*
8. *The kitchen knife remained lodged in the victim's neck and other residents of Maravu Settlement intervened where the accused and Mr. Taka Kacilala both left the victim, who was lying on the ground, while the said other residents of Maravu Settlement took the victim to the hospital.*
9. *The victim was medically examined at Colonial War Memorial Hospital on 3 March 2019 where the specific medical findings showed the knife blade had been plunged into the side of his neck and there had been 3 stab wounds on the lower back of the victim (attached: Medical Report of Joseva Dulaki dated 3/3/19).*
10. *The accused was arrested on 3 March 2019 and interviewed under caution on 4 March 2019. The accused voluntarily admitted to having stabbed the victim at the material time, but advanced that he couldn't recall where he got the knife from or which parts of the victim's body he had stabbed. The accused also took part in scene reconstruction and co-operated with the Police by showing them where the fight had started and where he had stabbed the victim (attached: Record of Interview of Emosi Banuve).*
11. *The accused was later charged with one count of Acts Intended to Cause Grievous Harm, contrary to Section 255 (a) of the Crimes Act 2009. The accused has nil priors for the purposes of sentencing."*

**[8]** Emosi you have admitted to the above Summary of Facts and taken full responsibility for you actions.

**[9]** Section 4 of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the purposes for which sentencing may be imposed by a Court; and sets out the relevant factors that a Court should take into account during the sentencing process. I have duly considered these factors in determining the sentence to be imposed on you.

**[10]** In terms of Section 255 (a) of the Crimes Act No. 44 of 2009 (Crimes Act) "A person commits an indictable offence if he or she, with intent to maim, disfigure or disable any

*person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person—*

*(a) Unlawfully wounds or does any grievous harm to any person by any means.....”*

The prescribed penalty for this offence is imprisonment for life.

[11] The offence of Act with Intent to Cause Grievous Harm also existed under the Penal Code (Section 224 of the Penal Code), with the same prescribed penalty of life imprisonment.

[12] In ***State v. Maba Mokubula*** [2003] FJHC 164; HAA 52J.2003S (23 December 2003); Her Ladyship Madam Justice N. Shameem said:

*“On the basis of these authorities, the tariff for sentences under section 224 of the Penal Code, is between 6 months imprisonment to 5 years imprisonment. In a case of an attack by a weapon, the starting point should range from 2 years imprisonment to 5 years, depending on the nature of the weapon.*

*Aggravating factors would be:*

1. *Seriousness of the injuries;*
2. *Evidence of premeditation or planning;*
3. *Length and nature of the attack;*
4. *Special vulnerability of the victim;*

*Mitigating factors would be:*

1. *Previous good character;*
2. *Guilty plea;*
3. *Provocation by the victim;*
4. *Apology, reparation or compensation.*

*In general terms, the more serious and permanent the injuries, the higher the sentence should be. As a matter of principle, a suspended sentence is not appropriate for a case of act with intent to cause grievous harm.....”*

[13] His Lordship Justice Madigan in ***State v. Emosi Taku Tuigulagula*** [2011] FJHC 163; HAC 31.2010 (15 March 2011); stated thus:

*“The maximum penalty for this offence is life imprisonment and the Court of Appeal has said in ***Shaukat Ali*** (1976) 22 FLR 87 that for this offence a custodial sentence is inevitable. The offence is akin to section 224 of the old Penal Code and so the authorities pertaining to that section are relevant. In the case of ***Mokubula*** (2003) FJHC 164, Shameem J set out several cases of*

*assault intending to cause grievous bodily harm and came to the conclusion that the then prevailing "tariff" was between 6 months imprisonment to 5 years imprisonment, but stressing that where a weapon was used the starting point should be 2 years."*

[14] However, in the above case, Justice Madigan sentenced the accused, who pleaded guilty for striking his wife with a cane knife, severing her fingers in both hands, excluding the thumbs, and also injuring the head, to 6 years imprisonment.

[15] In ***State v. Asesela Rabia*** [2012] FJHC 877; HAC074.2011 (22 February 2012); the Fiji High Court followed the tariff that had been adopted in ***Mokubula and Tuigulagula*** (*supra*).

[16] In ***State v. Seremaia Nalulu & 4 others*** [2013] FJHC 358; HAC 155.2010 (23 July 2013); His Lordship Justice Paul Madigan, while adopting the above tariff held as follows:

*"The maximum penalty for act with intent to cause grievous harm contrary to Section 255(a) of the Crimes Decree 2009 is life imprisonment. Despite the accepted tariff being between 6 months and 5 years (as set by Shameem J in ***Mokubula*** (2003) FJHC 164) much higher sentences have been passed when the circumstances dictate. In ***Tuigulagula*** HAC 81 of 2010 this Court passed a sentence of six years on a husband who did very serious harm to his wife. The penalty being life imprisonment, it is to be regarded as a very serious offence indeed and sentences of up to 8 years would not be out of order."*

[17] In ***State v. Taniela Vakalaca*** [2018] FJHC 455; HAC027.2018 (31 May 2018); His Lordship Justice Goundar held:

*"The offence of Act with Intent to Cause Grievous Harm is punishable by discretionary life imprisonment. The tariff for this offence is between 6 months imprisonment to 5 years imprisonment, and in cases where a weapon is used, the starting point should range from 2 years imprisonment to 5 years, depending on the nature of the weapon (***State v Mokubula*** [2003] FJHC 164; HAA0052J.2003S (23 December 2003)). Further, the offence may be aggravated by the seriousness of the injuries, premeditation or planning, length and nature of the attack and vulnerability of the victim....."*

[18] Having regard to the above authorities, and since a weapon (namely a kitchen knife) had been used to commit the offence, I consider the tariff for the offence of Act with Intent to Cause Grievous Harm in the instant case to be between 2 years to 5 years imprisonment.

[19] In determining the starting point within the said tariff, the Court of Appeal, in **Laisiasa Koroivuki v State** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

*“In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.”*

[20] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 2 years imprisonment.

[21] The aggravating factors in this case are as follows:

- (i) You had pursued the victim after the initial brawl- As revealed in the Summary of Facts, the victim had been going away from both you and your older brother, Taka Kacilala. However, the two of you had then followed the victim and continued fighting with him.
- (ii) You attacked the victim multiple times with the kitchen knife- you had stabbed the victim’s back three times and thereafter stabbed his neck with the said kitchen knife.
- (iii) The kitchen knife remained embedded in the victim’s neck.
- (iv) The frequent prevalent of offences of this nature.

[22] The mitigating factors in this case are as follows:

- (i) You are a person of recent good character. This has been confirmed by the State.
- (ii) That you fully cooperated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.

(iii) You have submitted that you are truly remorseful of your actions. It is also submitted that you deeply regret your acts and has already sought forgiveness from the victim in this matter and that the victim has accepted your apology.

(iv) That you entered a guilty plea at the first available opportunity in these proceedings.

[23] You are 36 years of age. You are said to married with three children. Currently your wife is said to be pregnant with your 4<sup>th</sup> child. You are said to be working at Viti Levu Construction earning \$170.00 per week. It is the opinion of this Court that these are personal circumstances and cannot be considered as mitigating circumstances.

[24] Considering the aforementioned aggravating factors, I increase your sentence by a further 3 years. Now your sentence is 5 years imprisonment.

[25] I accept that you are a person of recent good character and that you have fully co-operated with the Police in this matter. I also accept your remorse as genuine. Accordingly, considering these mitigating factors, I deduct 2 years from your sentence. Now your sentence would be 3 years imprisonment.

[26] I accept that you entered a guilty plea at the first available opportunity. In doing so, you saved precious time and resources of this Court. For your early guilty plea I grant you a further discount of one year. Now your sentence would be 2 years imprisonment.

[27] Accordingly, I sentence you to a term of 2 years imprisonment.

[28] The next issue for consideration is whether your sentence should be suspended.

[29] Section 26 of the Sentencing and Penalties Act provides as follows:

(1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*

*(a) does not exceed 3 years in the case of the High Court; or*

*(b) does not exceed 2 years in the case of the Magistrate's Court.*

**[30]** The victim in this case is your own brother in law. On the date of the offending, you, the victim and your older brother Taka Kacilala were drinking together. Court is mindful that the victim had sworn at your brother and a fist fight had ensued between the two of them. That fist fight had spilled over and you were punched. This no doubt could have provoked you and you had punched back at the victim. At this point in time the victim was going away.

**[31]** However, you and your brother had pursued the victim and continued fighting with him. Thereafter, you had got hold of a kitchen knife and attacked the victim multiple times with the said knife. Not only did you stab the victim's back three times, but thereafter you went on to stab his neck with the said kitchen knife. The kitchen knife remained embedded in the victim's neck.

**[32]** Fortunately, the victim did not sustain any serious injuries. However, your act and the manner in which you caused the injuries to the victim could have led to serious repercussions.

**[33]** For these reasons, I am not inclined to suspend your sentence. I am of the opinion that a custodial sentence is appropriate in the given circumstances so as to deter you and other like persons from committing such criminal acts, and also to protect the community.

**[34]** However, since it is my opinion that the chances for your rehabilitation is high, pursuant to the provisions of Section 18 (2) of the Sentencing and Penalties Act, I will not impose or fix a non-parole period to be served by you.

**[35]** Section 24 of the Sentencing and Penalties Act reads thus:

*"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."*



[36] You have been in remand custody for this case from 3 March 2019 until 30 April 2019, the day on which you were granted bail by this Court. This is a period of nearly 2 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that a period of 2 months be considered as served by you in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[37] In the result, you are sentenced to a term of 2 years imprisonment. Considering the time you have spent in remand, the time remaining to be served would be 1 year and 10 months.

[38] You have 30 days to appeal to the Court of Appeal if you so wish.



**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**

AT SUVA

Dated this 24<sup>th</sup> Day of October 2019

**Solicitors for the State** : **Office of the Director of Public Prosecutions, Suva.**  
**Solicitors for the Accused** : **Office of the Legal Aid Commission, Suva.**