

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO. HAC 24 OF 2018**

**BETWEEN** :

**STATE**

**AND** :

**AKUILA MOMO**

*Counsel* : *Mr. J. B. Niudamu for the State*  
*Accused absent and unrepresented*

*Hearing on* : *09<sup>th</sup> of March 2020 – 10<sup>th</sup> of March 2020*  
*Summing up on* : *13<sup>th</sup> of March 2020*

#### **SUMMING UP**

Ladies and gentleman assessors;

1. It is now my duty to sum up the case to you. Your opinion is much important to me and I will be considering your opinion to a great extent in preparation of my judgment. In a short while, I will direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the assessors of facts.

2. As the representatives of the society, your duty here is sacred. Your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;

i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender goes scot-free, he'll be ridiculing this legal system. It is your duty to not to let that happen.

ii) An innocent person should never be punished.

There is a saying that it is better to let 100 offenders go free than to punish one innocent person. That is, unless you are very sure that the accused has committed the alleged offence, you should not find him guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated to you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the Counsel for the prosecution or for the defense are not evidence. A suggestion made by a counsel during the examination of a witness is not evidence unless the witness accepted

that suggestion. The arguments and comments made by counsel in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.

5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the available evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experiences and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe none, a part or all of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses that we all may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his evidence. That is, whether the witness

has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it isn't then you can disregard that inconsistency. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.

9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question of reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provide for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only a few guidelines. It is up to you, how you assess the evidence and what weight you give to a witnesses' testimony.

12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there more than one reasonable inference to draw, against the accused, as well in his favor, based on the same set of proved facts, then you should not draw the adverse inference.
13. As a matter of law you should remember that the burden of proof always rests on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond a reasonable doubt, in order for you to find him guilty. That is, you must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere or an imaginary doubt but a doubt based on reason. I will explain you the elements of the offences in detail in a short while.
15. You are not required to decide on every point the Counsels in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not the charges are proved against the accused.

16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not a must.
17. Let us look at the Information. Though the Director of Public Prosecutions has charged the accused of 5 counts, at the conclusion of the prosecution case the prosecution moved to amend the information and proceed with only two counts.

### **COUNT 1**

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

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

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

Akuila Momo, on the 19<sup>th</sup> day of January 2018, at Lautoka, in the Western Division, had carnal knowledge of Sainimere Tabua, without her consent.

### **COUNT 2**

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

**BREACH OF SUSPENDED SENTENCE**: Contrary to section 28(1) (2) (a) and section 26 of the Sentencing and Penalties Act 2009.

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

Akuila Momo, on the 19<sup>th</sup> day of January 2018, at Lautoka, in the Western Division, breached the suspended sentence of two months of imprisonment which was suspended for two years dated 13<sup>th</sup> day of March 2017 vide Lautoka Criminal Case File Number 808/16 by committing another offence namely rape.

18. Now I will deal with the essential elements of the offence of Rape.

Section 207(1) of the Crimes Act reads as;

207. —(1) Any person who rapes another person commits an indictable offence.

Section 207 (2) (a) of the Crimes Act reads as;

(2) A person rapes another person if —

- (a) The person has carnal knowledge with or of the other person without the other person's consent;

19. Section 206 (5) of the Crimes Act reads thus;

206. (5) "Carnal knowledge" includes sodomy.

20. Accordingly, in this case, to prove the offence of Rape as for the alleged 1<sup>st</sup> count the prosecution must prove the following elements beyond a reasonable doubt.

(i) The accused;

(ii) Penetrated the anus of Sainimere Tabua with his penis

(iii) Without the consent of Sainimere Tabua; and

(iv) Either the accused;

knew or believed that Sainimere Tabua was not consenting; or  
was reckless as to whether or not she was consenting.

21. The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.

22. In the second element 'carnal knowledge' means having sexual intercourse or in this case, the penetration of Sainimere Tabua's anus; with the accused's penis. The law states, the slightest penetration is sufficient to satisfy this element of penetration. This element is complete on penetration to any extent and it is not necessary to have evidence of full penetration. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused penetrated the anus of Sainimere Tabua with his penis, to any extent.

23. To prove the third element of the offence of rape, the prosecution should prove that the accused penetrated the complainant's anus without her consent.

24. You should bear in mind that consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give consent and the fact, that there was no physical resistance alone, shall not constitute consent. A person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances;
- i) by force; or
  - ii) by threat or intimidation; or
  - iii) by fear of bodily harm; or
  - iv) by exercise of authority.
25. Apart from proving that the complainant did not consent for the accused to insert his penis inside her anus, the prosecution should also prove that, either the accused knew or believed that the complainant was not consenting; or the accused was reckless as to whether or not the complainant was consenting. This is the fourth element of the offence of rape.
26. It is not difficult to understand what is meant by the words "the accused knew or believed". But you may wonder as to how you could determine whether the accused was reckless. If the accused was aware of the risk that the complainant may not be consenting for him to penetrate her anus and having regard to those circumstances known to him it was unjustifiable for him to take the risk and penetrate the complainant's anus, you may find here that the accused was reckless as to whether or not the complainant was consenting. Simply put, you have to see whether the accused did not care whether the complainant was consenting or not.
27. Please remember that no witness can look into an accused's mind and describe what it was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or



intention of an accused can only be inferred based on relevant proven facts and circumstances.

28. If you find a reasonable doubt in respect of any of the above, you shall find the accused not guilty of the count of Rape.

29. The second count is the Breach of Suspended Sentence. Having considered the evidence adduced by the prosecution, if you are satisfied that;

- (i) There was a suspended sentence,
- (ii) Imposed against the accused, and
- (iii) Within the operational period of the said suspended sentence,
- (iv) The accused has committed another offence,

You would find the accused guilty of the second count.

30. The first three elements are to be established by the document PE1. Having carefully considered the said PE1, if you are convinced of the first three elements, the final outcome or the fourth element, would depend on your opinion on the 1<sup>st</sup> count. That is whether the accused has committed the offence alleged in the 1<sup>st</sup> count.

### **Summary of evidence**

31. The PW1, Sainimere Tabua is the main witness for the prosecution. The law requires no corroboration. Therefore you can act on the evidence of a sole witness. However, my direction is that if you are to rely on a sole witnesses' evidence you must be extremely cautious of the credibility and the dependability of such evidence. Her evidence is that;

- i) In 2018, she was residing at Naikabula, Lautoka with Akuila Momo.
- ii) Akuila Momo was her *de-facto partner*. They have been together since 2005. They have had five children together.

- iii) They together with two of their children were residing in his house with his 3 siblings and his mother.
- iv) The house consisted of one bedroom, a living room, a kitchen, a toilet and a washroom.
- v) The witness, Akuila and their 8 months old youngest child sleep on a mattress in the living room.
- vi) On the 19<sup>th</sup> of January 2018, when they went to sleep, Akuila wanted to have sex with her through her anus. She has refused it and informed that she doesn't like the way he treats her.
- vii) However, Akuila had forced himself onto her, lifted her skirt and pulled down her panty and inserted his penis into her anus. He has penetrated her anus and continued for about 5-10 minutes until he ejaculated. She has felt sorry for herself and has cried. She was angry and scared too.
- viii) Though she tried to free herself, he had assaulted her and threatened to keep still. She was told if she did anything he is going to kill her. He was bigger than her and she wasn't able to protect herself.
- ix) Describing the incident further, the witness states that he had turned her upside down, she was lying down on her stomach, and he was on top of her from the back and penetrated her anus with his penis.
- x) She did not call for help because Akuila has already threatened her that he would kill her and also because nobody would believe her. After that alleged incident Akuila has tied one of her legs to his leg by a raffia, a plastic string so that she cannot run away from him.
- xi) The witness goes on describing few more incidents. However, those would not be relevant as the allegations associated with the said incidents were not proceeded with.

32. The PW2 was WDC 5341, Barbara Salele. Her evidence was that;

- i) She has been in the Fiji Police Force for 16 years and is presently attached to the Lautoka Police Station.

- ii) On 23<sup>rd</sup> of January 2018, she was on duty at the Lautoka police station and was on stand-by duties at the sexual offences unit. On that day around 08.00pm the complainant Sainimere Tabua was brought to her with two kids. She looked very tired and when taken to the office and asked, has stated that her husband Akuila Momo has inserted his finger into her anus at the Balawa Cemetery.
  - iii) Then she has recorded the statement of the complainant and taken her for a medical examination.
  - iv) The witness states that the accused, Akuila Momo was sentenced on 13 march 2017 for an imprisonment of two months and that was suspended. A true copy of the said sentence was marked and produces as PE1. On perusal of the said PE1, it is apparent that on the 13<sup>th</sup> Of March 2017, he was sentenced for a period of two months and the said sentence was suspended for a period of 3 years. Therefore, if the accused has committed the alleged 1<sup>st</sup> offense, thereby he violates the terms of suspension and will be liable to be dealt with.
33. With leading the above evidence of the prosecution closed their case.
34. That was a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think appropriate. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.
35. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts.

Then you should consider whether the elements of the offences have been proven beyond a reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.

36. The Accused has not indicated his stance. You should consider that he denies all the allegations and weigh the available evidence in that light. In other words you should consider that his stance is that he did not do any of the alleged acts. Even in case you do not accept the accused's stance as true, you should not consider it in-order to strengthen the prosecution case. The accused need not prove that he is innocent. A person may lie as sometimes as it is easier than telling the truth. Therefore even you decide to not to accept the accused's stance, you should not use it to overlook the weaknesses of the prosecution case if any.
37. With the submission of the accused's stance, one of the three situations given below would arise;
- (i) You may accept his stance and, if so, your opinion must be that the accused is 'not guilty'.
  - (ii) Without necessarily accepting his stance you may think, 'well what he says could be true'. If that is so, it means that there is a doubt in your mind and if you can reason it out in your mind, and call it a reasonable doubt, again your opinion must be 'not guilty'.
  - (iii) The third possibility is that you reject his stance. But, that itself does not make the accused guilty. Then the situation would then be that you should consider whether the prosecution has proved all the elements beyond a reasonable doubt. If the prosecution has proved all the necessary elements of the offence and also you reject the accused's stance only, you should find the accused guilty of the alleged counts.
38. Any re-directions? *none*

39. Lady and Gentleman Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges against the accused. You have the copies of the documents tendered as exhibit "PE 1". When you have reached your separate opinion, you will come back to court and you will be asked to state your opinion.
40. Your opinion should be;  
In respect of the 1<sup>st</sup> and 2<sup>nd</sup> counts, whether the accused is guilty or not guilty.



**Chamath S. Morais**  
**JUDGE**

*Solicitors for the State* : *Office of the Director of Public Prosecutions, Lautoka*  
*Solicitors for the Accused* : *Accused absent and unrepresented.*