

Procedure Act of 2009, Defense was called from the Accused and all the available options were explained to the Accused.

3. At this juncture, the Accused gave evidence under cross-examination and two (02) witnesses were summoned to give evidence on his behalf. At the end of the Defense case, the Court heard oral submissions from Counsel representing the Prosecution and the Defense. Having carefully considered the evidence presented at the trial, this Court now proceed to pronounce the judgment in this matter, as below:

Element of the offences

4. The main elements of the offence of Rape under **Sections 207(1) and (2) (b) and (3)** of the **Crime Act 2009** applicable to this matter are:
 - i) The Accused;
 - ii) Penetrated the vulva of the Complainant with his finger;
 - iii) The Complainant did not consent the Accused to penetrate the vulva with his finger;
 - iv) The Accused knew or believed or was reckless that the Complainant was not consenting for him to insert his finger in that manner.
5. However, in this matter since the victim was below 13 years of age, the iii) and iv) elements in relation to consent will not apply by the application of Sub-section (3) of Section 207 of the Crimes Act of 2009, which reads as follows:

“For this, a child under the age of 13 is incapable of giving consent”.

Burden of Proof

6. The Accused is presumed to be innocent until he is proven guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the Accused. There is no obligation or burden on the Accused to prove his innocence. The prosecution must prove the Accused’s guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the Court was not sure of the guilt of the Accused, or if there be any hesitation on the part of this Court of the establishment of the ingredients or on the of evidence led by the Prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The Accused has given evidence in this case. Thus, if this court accepts the defence evidence or is unable to reject or accept the defence evidence, then too the Accused is entitled to a finding in his favour.

Prosecution Case

7. The charges filed in this Court stems from the information received from the victim in relation to the act done to her by the Accused. Therefore, this Court considers it pertinent to succinctly stipulate the evidence given by the victim (**PW1**) **KA** in Court, as below:

Evidence in Chief

- I am 11 years old and was born in May. My mother is Siteri. My father is Revieli. I have brothers and sisters. They are Josaia, me, Leon, Jeli and Noa.
- My mother has sisters. I am closest to my namesake, Katarina.

- I live in Narere, River Road now with my aunt Katarina and with her family for few days.
- I have been living with my older aunt for over a year. Before in 2021 I was living with my mother in Govt. Barracks, Mana Street in Narere. At that time my younger siblings lived with me, together with my stepfather, the Accused.
- This house was single storied. Another house was also adjoined from one side. Other side was the garden. There were no bedrooms, there was one bed where the Accused and my mother slept. This bed was covered with curtains that would go to the floor from the top.
- We children would be sleeping 2 feet away. We couldn't see through the curtains. The Accused owned the house. The kitchen was inside the house, but the toilet was outside.
- My stepfather was referred to as daddy by me.
- I lived there with them for about 5 years.
- The Accused used to hit us kids in a bad way. He would get a cable and beat myself and Josaia. My mother and the Accused would fight and then it will come to us.
- Accused didn't like myself and my brother, where the Accused would not allow us to go to our father and hit us and spit on us. My mother would see this and would not do anything.
- It made me feel very weak at home and I would want to go to my father and that was right throughout the time we were living together.
- Accused would earn money for us and be in charge of everything at home. Accused was a taxi driver. My mother didn't work. The Accused's relative also lived with us.
- Leon, Jeli and Noah are his biological children.
- In 2021 I was in class 5. I changed home to live with my aunt because I was afraid of the Accused, since he has harassed me.
- He touched my body. He touched my pipi. My mother taught me this word pipi. We use this part of the body to urinate.
- Witness points to the groin of the Doll, which was given to the witness by the Prosecution.
- Picture of a female marked PEX1 is given to the witness, and she marks where the Accused touched on this document.
- At this time (first time), I was in class 3, I was lying on the bed in the house during daytime and the Accused touched my pipi about 5 times.
- He touched me the second time when I was in class 3. Then I was at home lying on the floor.
- Third time he touched when I was in class 4, this happened at home when I was lying on the floor.
- Fourth time he touched I was in class 4, this happened at home when I was lying on the bed.
- Fifth time he touched when I was in class 5. I was at home lying on the floor.
- **When it happened for the 3rd time** *it was a Saturday afternoon, it was not dark. Myself, Josaia, Leon, the Accused, and my mother were at home. My mom went to charge the phone to the neighbor's place and I saw her going there. Josaia went outside with Leon to play. I was lying down on the bed and the Accused was cooking in the kitchen, which was one and half meters away. Then the Accused came and start*

touching. I saw the Accused well. The Accused said don't tell anyone, my stepfather was kneeling next to me.

- *At that time, I was on the floor. The Accused was kneeling beside me on the floor. That was the first time he told me that. On the previous times he didn't tell me that. I was afraid of the Accused. On that day I was wearing pants and a shirt. I was also wearing a panty. The Accused touch me with his hand, he used his 3 middle fingers. He put his hand in an upward motion (**Witness demonstrates how the Accused caressed her pipi**). He used his left hand for this. This was only for a short time, I felt afraid. I felt pain in my pipi area since he was doing that very hard. He touched my skin.*
 - *The Accused put his hand from the top of my pants, and he put his hand inside my panty. I was wearing my panty when he was doing this. He didn't say anything, and I also didn't say anything because I was afraid.*
 - *Thereafter Accused stood up and left to the farm in our garden, I cried then.*
 - *I didn't tell my mother when mom returned since I was worried that the Accused would hit me and my mom.*
 - *This happened before my birthday. I went to school next week.*
 - *I told my teacher, Mrs. Bulatale of this after the 4th and 5th time. However, fourth and the fifth times the Accused didn't tell me not to tell anyone.*
 - *Mrs. Bulatale took me to my mother, and we went home. My mother told me off when we went home. She smacked me on my face, and I cried. I went to school the following day and I went to my name's sake aunt's home in Narere. Her husband and my other aunt were there. My mother came there later to take me home and I didn't want to go. Then my mom said that she will tell that to the Accused, and he will smack me. Since I remained next to my aunt my mom went home.*
 - *Then I told my aunts that the Accused would hares me. Then my aunts went to the police, and I went with them to the Nasinu police station.*
 - *At the police my aunt Lina informed the police officer that the Accused had harassed me, and we went home. Later, police recorded my statement on a Monday.*
 - *When I was in class 3 and class 4, I didn't talk about these incidents because I was afraid that the Accused would hit me. After I complained of this matter I went to live with my aunt.*
 - **Witness identifies the Accused on the dock in Court.**
8. Facing cross-examination, this witness alluded that she was harassed for the 3rd time by the Accused before her birthday in May 2021, but she didn't complain this to anyone before the 4th and 5th time. Further, she mentioned that at the time the incident happened for the 3rd time though the Accused asked her brothers to play outside in the garden, he didn't allow her to go outside and play. Therefore, she claimed that she lied on the ground and read a story boo when the Accused started touching her pipi. She also claimed that she did not run out of the house at that point, since she was afraid of the Accused. In the course of this cross examination, Defense marked an omission as **X1**, where this witness had failed to mention in her police statement that “mother went to recharge the phone to the neighbor's when the 3rd incident happened”, though she mentioned this position in Court.
9. The second witness for the Prosecution (**PW2**) was **Katarina Malumuvatu**, the aunt of the victim. Giving evidence in Court she informed that Siteri is her eldest sister and Katharina (victim) is her daughter. She mentioned that Siteri lives in Government

Barracks in Narere and Katherina is not a biological child of the Accused. She claimed that Siteri and her husband (Accused) always had altercations mainly in relation to older children who were not biological children of the Accused. She further claimed that the Accused used to physically reprimand Katherina and Josaia regularly. She alluded that on the 14th of February 2022 the victim returned to her home with her child after school and didn't want to return home when her mother requested, which she had never witnessed before. At this time the victim had started crying and had stayed back at her home. Thereafter, when she called her to dinner the victim had started crying and informed her that the Accused touches her body. At that juncture, herself with another sister had informed Siteri, where she had told them to go and report while in tears.

10. In her evidence, she confirmed that next day Siteri came to her house and informed that she is not going to report about the allegation of the victim. At that point, this witness had told her to tell her daughter of her position in front of all the adults. According to her, then Siteri had told the victim that the lord told her not to report, where the victim started crying. Being disappointed with her sister, this witness had told Siteri that she is not going to take it lightly and went and reported the matter to the police with the victim on the 16th of February 2022 and there onwards the victim stayed at her place. In cross examination, she mentioned that the victim told them of her grievance and what happened on Monday, they went to the police station on Tuesday late and went again on Wednesday and made the complaint.
11. The next witness for the Prosecution (**PW3**) was **WDC Sereima**. She claimed to be the investigating officer in this matter, where she received a report on 14/02/2022 from Katherina at the Nasinu police station. She informed that the victim was a child, and she recorded the statement of the victim. The birth certificate of the victim was tendered as **PEX2**. She confirmed that the victim was born on 24/12/2012.

Evaluation of the Prosecution Case

12. For the Prosecution case, the main witness that testified to establish the case was the Prosecutrix (**PW1**) **KA**. In testifying in Court, she narrated the occurrence of events in this matter to the best of her ability at her own pace. She was prompt in her responses and did not try to evade from questions. Further, since she claimed of 5 separate occurrences of the Accused caressing her private parts on different dates, she attempted to recall these occurrences to the best of her recollection during her testimony in Court. This Court observed the demeanor and deportment of this witness in Court and was impressed with her testimony and this Court has no reason to disbelieve the narrated trajectory of events by her.
13. In relation to this incident of Rape the Accused is charged with in the information, though the victim had not immediately complained of the incident to anyone, she had later informed of the incident to her aunt and then to the police. In dealing with the impact of the absence of a prompt complaint by the victim of the incident the Accused is charged with, this Court intends to take guidance from the pronouncement made by **Justice**

Thomas in the **Court of Appeal of Wellington, New Zealand** in the case of **R v H [1997]**¹, where he stated, as below:

“In the present context, the word "complaint" is itself archaic. Victims of rape seldom "complain" in the sense that that word is generally understood. Their "complaint" is almost invariably in the nature of a disclosure, a shared confidence, a "confession", a revelation, or the like. The recent complaint rule is applied regularly in the criminal Courts. Yet the rule is indefensible, the relic of the medieval requirement of the "hue and cry". The expectations of medieval England as to the reactions of an innocent victim of a sexual attack are no longer relevant. The assumption that there is a common inclination to talk about the incident to anyone must be expressly abandoned as it is without any evidential foundation.”

14. As mentioned above, Defense managed to mark one omission in the evidence of **(PW1) KA**. In considering the nature of this omission, this Court is convinced that this is a minor discrepancy which does not shatter the evidence of this victim in any manner. Therefore, Court recognized that the omission does not belittle the credibility of this witness. In following the **Court of Appeal of Fiji** decision of *Otetu Sivoinatoto v The State [2018]* and the **Indian Supreme Court** decision in *Appabhai v State of Gujarat*² in relation to the impact of contradictions and omissions of the testimony of a witness, this Court disregard this omission as it does not disturb the credibility of the witness.
15. By the evidence of PW2, the aunt of the victim, Prosecution informed this Court how the victim refused to go home due to harassments of the Accused and how the victim divulged the sexual assaults of the Accused. Further, she testified how the mother of the victim was reluctant to report the allegations of the victim to the police, where she decided to go ahead and report to the police. In relation to the evidence of this witness, this Court recognized that she has had a very cordial relationship with the mother of the victim and her family, where she had visited their home regularly. However, in receiving the complaint of the victim, she had stood up to the protection of the victim against a reluctant mother. In noticing this action, this Court has no reason to doubt the inclination of an aunt to protect a niece in our closely knit inclusive society, where family values are paramount.

Defense Case

16. In testifying in Court, the Accused, **ESEKAIA NAWELE**, informed that he is married to Siteri with 3 children and other children of Siteri's previous marriage also lived with them in government barracks. He verified that the house they live in belonged to his wife's family and he started living there in 2014. He claimed that he is a welder and a taxi driver by profession. He also affirmed that in 2021 the victim was schooling in Nasinu Sangam School in class 4. In relation to the allegation made by the victim, he confirmed that he was interviewed by the Nasinu police station in relation to harassing the victim, which he denied. He affirmed the falsehood in relation to the victim's allegation of 3rd time of abuse. In relation to this allegation, Accused claimed that his wife never goes to charge

¹ [1997] 1 NZLR 673

² AIR 1988, S.C.694

the phone not to be in the house. It was the position of the Accused that the victim has complained in this nature because of outside influence. He alluded that when he joined Sitheri's family, they didn't have basics, like water or a washroom, which he managed to provide with his finances. The Accused reiterated that his wife's relatives like Lina, Elenoa, May and Katherina were jealous of these improvements made to the house by him and sometimes asked them to leave the house, especially to get rid of him.

17. In cross-examination, the Accused admitted that they would go to the other houses of the siblings of his wife for functions. However, he was firm with the position that he had altercations with the family of his wife due to their desire to chase them out of the house. He claimed that his family made police complaints about these ill-treatments of his wife's family. He affirmed that these complaints were made to the Nasinu police station and that these squabbles have happened on many occasions and even police have come to settle matters between them. However, when this Court inquired from the Accused of complaint numbers and dates, he informed Court that his wife attended to such matters with the police, since it was against her family.
18. The second witness for the Defense (**DW2**) was the wife of the Accused, **Siteri Malumuvatu**. She testified that in 2021 she was residing with her family in Narere in the house that belonged to her mother. She also mentioned that in 2021 her daughter Katherina lived with her and went to school. She complained that in relation to the 3rd alleged incident by her daughter, she never complained to her. She further mentioned that she doesn't go to other people's houses for any purpose. Referring to her relationship with the Accused, she affirmed that their relationship was very good in 2021, though her relationship with her other siblings was not very healthy because of their interests in the house she was living in. For this end, she mentioned that her siblings had been trying to chase her and her family from the family house. She affirmed that she thinks there is a link between the allegations raised by the victim and the animosity of her family. She alluded that she came to know about these allegations when the victim wanted to go to her sister Catherine's place and did not return. She further informed this Court that she didn't believe in the allegations of her daughter, and she feels that her eldest sibling Lina is responsible for crafting them. She claimed that when she went to her sister Catherine's place the next day, she learned that her daughter had said things to her sisters complaining against the Accused. She reiterated that she did not believe these allegations, and she told her sisters to go ahead and report, if they want, but she wouldn't.. She informed this Court that when she met her daughter by the roadside near her sibling's place, victim asked her for forgiveness for her false complaint.
19. In cross-examination, she alluded that she had been with the Accused for 13 years and he repaired the house and continue to pay all the bills. She clarified that she always sends her child to charge her phone, since they didn't have electricity. She admitted that the Accused physically reprimanded her kids, but she had no problem with that to complain to anyone. She further admitted that they will attend family gatherings at her sister Catherine's house, and they had a good relationship with Catherine, but with Lisa and Elenoa relationship was not good because of their interest in her house. However, she confidently confirmed that they did not have any serious altercations with any relatives and no police reports were lodged. She affirmed to Court that the Accused is everything to her family.

20. The last witness for the Defense (**DW3**) was **Josaia Balekoro**, the son of the wife of the Accused from her previous marriage. Testifying in Court, he stated that In 2021 he was schooling and lived in Narere with his mother, Accused and 4 siblings. He affirmed that during this period he had a good relationship with his mom and the Accused. In cross-examination, he claimed that sometimes his mother (DW2) goes alone shopping and she would go to charge her phone at neighbors leaving the children at home. He further affirmed that his family had a cordial relationship with all the aunts.

Evaluation of Defense Evidence

21. The challenge made by the Defense case through the evidence of three witnesses attempted to discredit the Prosecution case on two grounds, as below.

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- a) That the wife of the Accused stays home at all times and she does not go to the houses of neighbors to charge her phone as claimed by the victim, to allowed the Accused to commit the offence charged,
- b) The allegation against the Accused is a fabrication due to the animosity the family members maintained due to jealousy.

22. However, in analyzing the evidence of the Defense witnesses, this Court observed blatant contradictions and inconsistencies in the three Defense witnesses that made this Court speculative in accepting their evidence as truthful.

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23. In this regard, as per the first ground of challenged, though the Accused and his wife (**DEW2**) testified in Court of sending the phone to charge through their children to the neighbors', the very eldest child whom they would have used for such chores (DW3) informed this Court that his mother (DW2) usually goes to charge her phone to neighbors', as claimed by the victim. In fact, the evidence of DW3 further corroborated the testimony of the victim of her mother not being at home when the incident charged took place.

24. With regard to the second ground of challenge, though the Accused claimed that there were regular altercations with the siblings of his wife **Siteri (DW2)**, which even resulted in his wife making complaints to the Nasinu police station, in the testimony of **Siteri** she informed that arguments arising from jealousy of the family were not very serious and they never made any police reports in relation to them. In further nullifying the venom of this ground of challenge, **DW3 Josaia** informed this Court that they had very cordial relationships with his aunts, where they visited them for family functions. In considering this status quo, this Court is convinced that the Accused had lied in Court of the victim been influenced by her aunts to make a false complaint against him.

25. Therefore, in considering the above analyzed case for the Defense, this Court rejects the evidence of the Accused and his wife and the Defense case in toto.

Finding of Court

26. In analyzing the facts and circumstances revealed in this matter, this Court has to highlight the important role parents should play in protecting their children from sexual abuses, even from their own family members, since any failure could expose the vulnerable children to undue social and psychological pressure and influences that could cause a detrimental impact to their lives. This case demonstrated how a child's very own step father could be the predator, where the victim was compelled to find solace in her aunt due to the apathetic attitude of her mother who was willing to compromise anything to protect her partner, even her own children by insulting the most revered position of motherhood in our society.
27. In considering the elements that need to be proved by the Prosecution for a conviction, the first element is the identity of the Accused. In this matter the Accused is the stepfather of the victim whom she knew well and who lived with the victim during the time in issue.
28. With regard to the second element, **KA** has testified in this Court that the Accused caressed the place she urinates with his 3 fingers and put his fingers inside her pipi on that fateful day. This evidence has sufficiently established the second element, where her testimony was not challenged by the Defense to cause any dents in the Prosecution case.
29. In this matter the Accused is charged for penetrating the vulva of a girl under 13-years of age, where her age was corroborated by her birth certificate marked **PEX2** by the Prosecution. Therefore, by the operation of **Sub-section (3) of Section 207 of the Crimes Act of 2009**, the consent of the victim will not play any part in the adjudication of the culpability of the Accused. Considering these circumstances, this Court is convinced that the Prosecution has established the required elements to find the Accused guilty of the charged offence beyond reasonable doubt.
30. In the light, this Court finds the Accused **ESEKAIA NAWELE** guilty of rape under **Section 207 (1) and (2) (b) and (3) of the Crimes Act 2009**, as charged by the information.
31. You have 30 days to appeal to the Court of Appeal.



A handwritten signature in blue ink, appearing to read "Thushara Kumarage", written over a horizontal line.

Hon. Justice Dr. Thushara Kumarage

At Suva

This 1st day of December 2023

cc: *Office of Director of Public Prosecutions*
Office of MIQ Lawyers