

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 261 of 2023**

**STATE**

**v**

- 1. LUKE MALUMU**
- 2. AMINIASI VUICOLO**

**Counsel:** Ms. S. Bibi for the State  
Mr. J. Dinati for the 1<sup>st</sup> & 2<sup>nd</sup> Accused

**Date of Sentence:** 15<sup>th</sup> August 2024

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**SENTENCE**

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1. Luke Malumu (1<sup>st</sup> accused) and Aminiasi Vuicolo (2<sup>nd</sup> accused) are charged with the offences of *Aggravated Burglary* and *Theft* laid out as follows in the Information by the Director of Public Prosecutions dated 28 August 2023:

**COUNT ONE**

*Statement of Offence*

**AGGRAVATED BURGLARY:** Contrary to section 313(1)(a) of the Crimes Act 2009.

*Particulars of Offence*

**LUKE MALUMU** and **AMINIASI VUICOLO** in the company of each other, on the 30<sup>th</sup> day of July 2023, at Nausori, in the Eastern Division, entered into the building of **KASABIAS BUILDING** and **SOUTHERN CROSS TEXTILES (a business operating inside KASABIAS BUILDING)** as trespassers, with intent to commit theft therein.

### **COUNT TWO**

#### *Statement of Offence*

**THEFT**: Contrary to section 291(1) of the Crimes Act 2009.

#### *Particulars of Offence*

**LUKE MALUMU** and **AMINIASI VUICOLO** in the company of each other, on the same occasion as Count 1, dishonestly appropriated a carton of groceries, the property of **SOUTHERN CROSS TEXTILES**, with the intention of permanently depriving the said **SOUTHERN CROSS TEXTILES** of its property.

### **Brief facts**

2. On 30 July 2023 while working as security officer at Kasabia building in Nausori town, Ratu Emosi Vucago Kuruduadua (PW1) heard someone attempting to break a window from behind of Kasabia building to gain access into Southern Cross Textiles a business operating within Kasabia building. Upon checking PW1 saw two I-Taukei boys attempting to break the window and door with their hand to gain access into Southern Cross Textiles situated inside Kasabia building, and a small window broken. PW1 then asked the two I-Taukei boys as to what they were doing, and they responded that they were trying to break into the shop. PW1 then promptly proceeded to the Eastern Division Command Centre for purposes of lodging a formal complaint of the break-in by the two I-Taukei boys, and while on his way he saw an approaching police vehicle and walked to the police vehicle and informed the police occupants of that vehicle that two I-Taukei

boys were trying to break into Kasabia building where he works as security officer. The police officers then ran towards Kasabia building followed by PW1 and shone the torch light towards the two I-Taukei boys who then tried to hide but the police officers yelled for them to come down. The two I-Taukei boys then came down and were apprehended by the police officers and thereafter taken along with PW1 in the police vehicle to the Nausori police station for interrogation.

Luke Malumu (1<sup>st</sup> accused), in his caution interview statement, admitted that he and Aminiasi Vuicolo (2<sup>nd</sup> accused) had entered into Kasabia building and Southern Cross Textile a business operating within the said building, with intent to commit theft therein. [ Q&A 27, 36 – 40 onwards in the caution interview statement ]

Aminiasi Vuicolo (2<sup>nd</sup> accused) in his caution interview statement, admitted that he and Luke Malumu (1<sup>st</sup> accused) had entered into Kasabia building with the intention of committing theft therein, and had stolen a carton of groceries from Southern Cross Textiles. [ Q&A 17 – 32, 37 in the caution interview statement ]

3. On 20 February 2024 Luke Malumu (1<sup>st</sup> accused) and Aminiasi Vuicolo (2<sup>nd</sup> accused) pleaded guilty to Count 1 – Aggravated Burglary and Count 2 – Theft voluntarily and unequivocally duly confirmed by their counsel.
4. Due to the 2<sup>nd</sup> accused being on bench warrant and absence of defence counsel, the *Summary of facts* was eventually read out by the prosecutor on 9 May 2024, and both accused persons via their counsel admitted the prosecution's *Summary of facts*, and also their respective *Antecedent report* also submitted by the prosecutor.
5. Having admitted the prosecution's *Summary of facts* and *Antecedent reports*, this Court then formally convicted Luke Malumu (1<sup>st</sup> accused) and Aminiasi Vuicolo (2<sup>nd</sup> accused).
6. Plea in mitigation and sentencing hearing was held on 17 July 2024 and 31 July 2024,

and this is the Court’s finding on sentence.

**Count 1 - Aggravated Burglary**

7. The maximum sentence for the offence of *Aggravated Burglary* contrary to section 313(1)(a) of the Crimes Act 2009 is a custodial term of 17 years.

8. The Fiji Court of Appeal in Kumar v State [2022] FJCA 164; AAU117.2019 (24 November 2022) at paragraphs 75 to 78, held:

*[75] As the first step, the court should determine harm caused or intended by reference to the level of harm in the offending to decide whether it falls into High, Medium or Low category. The factors indicating higher and lower culpability along with aggravating and mitigating factors could be used in the matter of deciding the sentencing range. This would allow sentencers wider discretion and greater freedom to arrive at an appropriate sentence that fits the offending and the offender.*

*Determining the offence category*

*The court should determine the offence category among 1 – 3 using inter alia the factors given in the table below:*

- *Category 1 – Greater harm (High)*
- *Category 2 – Between greater harm and lesser harm (Medium)*
- *Category 3 – Lesser harm (Low)*

<b><i>Factors indicating greater harm</i></b>
Theft of/damage to property causing a significant degree of loss to the victim (whether economic, commercial, sentimental or personal value)
Soiling, ransacking or vandalism of property
Restraint, detention or gratuitous degradation of the victim, which is greater than is

necessary to succeed in the burglary. Occupier or victim at home or on the premises (or returns home) while offender present
Significant physical or psychological injury or other significant trauma to the victim beyond the normal inevitable consequence burglary.
Violence used or threatened against victim, particularly the deadly nature of the weapon
Context of general public disorder
<i>Factors indicating lesser harm</i>
Nothing stolen or only property of very low value to the victim (whether economic, sentimental or personal). No physical or psychological injury or other significant trauma to the victim
Limited damage or disturbance to property. No violence used or threatened and a weapon is not produced

*[76] Once the level of harm has been identified, the court should use the corresponding starting point in the following table to reach a sentence within the appropriate sentencing range. The starting point will apply to all offenders whether they plead guilty or not guilty and irrespective of previous convictions. A case of particular gravity, reflected by multiple features of harm, could merit upward adjustment from the starting point before further adjustment for level of culpability and aggravating or mitigating features.*

LEVEL OF HARM (CATEGORY)	BURGLARY (OFFENDER ALONE AND WITHOUT A WEAPON)	AGGRAVATED BURGLARY (OFFENDER <u>EITHER</u> WITH ANOTHER <u>OR</u> WITH A WEAPON)	AGGRAVATED BURGLARY (OFFENDER WITH ANOTHER <u>AND</u> WITH A WEAPON)
<b>HIGH</b>	Starting Point: 5 years  Sentencing Range: 3 – 8 years	Starting Point: 7 years  Sentencing Range: 5 – 10 years	Starting Point: 9 years  Sentencing Range: 8 – 12 years
<b>MEDIUM</b>	Starting Point:	Starting Point:	Starting Point:

	3 years Sentencing Range: 1 – 5 years	5 years Sentencing Range: 3 – 8 years	7 years Sentencing Range: 5 – 10 years
<b>LOW</b>	Starting Point: 1 year Sentencing Range: 6 months – 3 years	Starting Point: 3 years Sentencing Range: 1 – 5 years	Starting Point: 5 years Sentencing Range: 3 – 8 years

[77] *The following table contains a non-exhaustive list of higher and lower culpability factors relating to the offending. Any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.*

<b><i>Factors indicating higher culpability</i></b>
Victim or premises deliberately targeted (for example, due to vulnerability or hostility based on disability, race, sexual orientation) or victim compelled to leave their home (in particular victims of domestic violence). Child or the elderly, the sick or disabled at home (or return home) when offence committed
A significant degree of planning, or organization or execution. Offence committed at night.
Prolonged nature of the burglary. Repeated incursions. Offender taking a leading role.
Equipped for burglary (for example, implements carried and/or use of vehicle)
<b><i>Factors indicating lower culpability</i></b>
Offence committed on impulse, with limited intrusion into property or little or no planning
Offender exploited by others or committed or participated in the offence reluctantly as a result of coercion or intimidation (not amounting to duress) or as a result of peer pressure
Mental disorder or learning disability, where linked to the commission of the offence

[78] *The following table contains a non-exhaustive list of aggravating and mitigating factors relating to the offender. Any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. In some cases, having considered*

*these factors, it may be appropriate to move outside the identified category range.*

<b><i>Factors increasing seriousness</i></b>	<b><i>Factors reducing seriousness or reflecting personal mitigation</i></b>
<b><i>Statutory aggravating factors:</i></b>	Genuine remorse displayed, for example the offender has made voluntary reparation to the victim
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction	Subordinate role in a group or gang
	No previous convictions or no relevant/recent convictions.
Offence committed whilst on bail or parole.	Cooperation with the police or assistance to the prosecution
<b><i>Other aggravating factors include:</i></b>	Good character and/or exemplary conduct
Any steps taken to prevent the victim reporting the incident or obtaining assistance and/or from assisting or supporting the prosecution	Determination, and/or demonstration of steps taken to address addictions or offending behaviour
Established evidence of community impact	Serious medical conditions requiring urgent, intensive or long-term treatment
Commission of offence whilst under the influence of alcohol or drugs	Age and/or lack of maturity where it affects the culpability and responsibility of the offender
Failure to comply with current court orders	Lapse of time since the offence where this is not the fault of the offender
Offence committed whilst on licence	Mental disorder or learning disability, where not linked to the commission of the offence
Offences Taken Into Consideration (TICs)	Any other relevant personal considerations such as the offender being sole or primary care giver for dependent relatives or has a learning disability or mental disorder

	which reduces the culpability
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9. Based on the Fiji Court of Appeal sentencing guideline for the offence of *Aggravated Burglary* in Kumar v State [2022] FJCA 164; AAU117.2019 (24 November 2022) and the Prosecution's *Summary of facts*, the category of harm in this instant is low thus the corresponding sentencing range of 1 to 5 years imprisonment, and starting point of 3 years imprisonment.
  
10. With the starting point of 3 years imprisonment, 1 year 6 months is added for the aggravating circumstances of the offending, in particular, the unlawful trespass, and extent of damage done to the Kasabia building and Southern Cross Textiles business, financial expenses or otherwise incurred by the owners of the Kasabia building and Southern Cross Textiles to repair the damage done by the perpetrators and remedy any loss, the accused persons total disregard of the utility and value including lack of respect of the said properties, and prevalence of the offence of *Aggravated Burglary*. This also include, in as far as Luke Malumu (1<sup>st</sup> accused) is concerned, his prior convictions of *Burglary*, *Theft* and *Criminal trespass* based on his prior conviction record in the *Antecedent report*.
  
11. Having considered Defence Counsel's plea in mitigation, 1 year is deducted bearing in mind that both Accused persons are young in age, reached Form 6 level education, and were employed i.e. Luke Malumu (27 years; carpenter) and Aminiasi Vuicolo (20 years; delivery boy at Farm Fresh Produce), arriving thus far to the custodial term of 3 years 6 months. This also takes into consideration that Aminiasi Vuicolo (2<sup>nd</sup> accused) has no prior conviction.
  
12. With the custodial term of 3 years 6 months, I further make the following special deductions:
  - i) Early guilty plea - 1 year 2 months is deducted being the one third deduction for the early guilty plea. This approach is consistent with the Fiji Supreme Court decisions in



Qurai v State [2015] FJSC 15; CAV24.2014 (20 AUGUST 2015) per Justice Saleem Marsoof at para. [54], and Aitcheson v The State [2018] FJSC 29; CAV0012.2018 (2 November 2018), paras. 12-15.

- ii) Time spent in custody until guilty plea and pursuant to section 24 of the Sentencing and Penalties Act 2009, a deduction of (a) 7 months for Luke Malumu (1<sup>st</sup> accused), and (b) 5 months for Aminiasi Vuicolo (2<sup>nd</sup> accused). See Aitcheson v The State [2018] FJSC 29; CAV0012.2018 (2 November 2018), paras. 7-11.

13. Thus, the head sentence for Count 1: *Aggravated Burglary* is:

- (a) 1 year 9 months imprisonment for Luke Malumu (1<sup>st</sup> accused); and
- (b) 1 year 11 months imprisonment for Aminiasi Vuicolo (2<sup>nd</sup> accused).

### **Count 2 - Theft**

14. The maximum sentence for the offence of *Theft* contrary to section 291(1) of the Crimes Act 2009 is a custodial term of 10 years.

15. In terms of the sentencing tariff for *Theft*, Justice Vincent Perera (as he then was) held in Waqa v State [2015] FJHC 729; HAA017.2015 (5 October 2015) at paras. 10-14:

#### *Tariff for Theft under section 291 of the Crimes Decree*

*10. After considering a number of decisions of this court on tariff for the offence of Theft, I find that the court has opined the lower end to be 2 months imprisonment and the higher end to be 3 years imprisonment. (See Navitalai Seru v State [2002] FJHC 183; State v Saukilagi [2005] FJHC 13; Chand v State [2007] FJHC 65; Kaloumaira v State [2008] FJHC 63; Chand v State [2010] FJHC 291; Ratusili v State [2012] FJHC 1249; State v Koroinavusa [2013] FJHC 243; Lal v State [2013] FJHC 602; State v Batimudramudra [2015] FJHC 495).*

11. An imprisonment of 2 to 9 months has been the tariff recognised under the now repealed Penal Code for a first offender who commits the offence of *Theft*. Section 262 of the Penal Code specified three different penalties for the offence of *Theft* as follows:

a) *First offence of Theft (simple larceny) – 5 years*

b) *Simple larceny committed after having been previously convicted of a felony – 10 years*

c) *Simple larceny committed after having been previously convicted of a misdemeanor – 7 years*

12. However, it is pertinent to note that the *Crimes Decree 2009* does not specify different penalties for *Theft* based on previous convictions. The only penalty provided under section 291(1) of the *Crimes Decree* is an imprisonment for 10 years.

13. In view of the fact that the *Crimes Decree* has increased the maximum penalty for *Theft* from 5 years as stipulated in the Penal Code to 10 years, it is logical that the tariff for *Theft* should also be increased. Further, it is no longer the law in Fiji to recognise a different sentence or a tariff for *Theft* for offenders with previous convictions.

14. Considering all the above factors and the decisions of this court, I am inclined to hold the view that the tariff for *Theft* is 4 months to 3 years imprisonment.

16. The sentencing range for *Theft* is 4 months to 3 years imprisonment, and for this instant I take the starting point of 12 months or 1 year.

17. 1 year 6 months is added to the 1 year for the aggravating circumstances of the *Theft* bearing in mind the stolen properties and loss to the owners of Kasabia building and Southern Cross Textiles complainant, extent of damage done, the accused persons total disregard of the utility and value of the said properties, including the prevalence of the offence of *Theft*.

18. For the mitigating circumstances, I deduct 1 year leaving the balance of 1 year 6 months.

19. Due to the early guilty plea I further deduct 6 months being the one third, and further deduction of (a) 7 months for Luke Malumu (1<sup>st</sup> accused), and (b) 5 months for Aminiasi Vuicolo (2<sup>nd</sup> accused) for their time spent in custody, resulting in the respective head

sentence of (i) 5 months imprisonment for Luke Malumu (1<sup>st</sup> accused), and (ii) 7 months imprisonment for Aminiasi Vuicolo (2<sup>nd</sup> accused), for the offence of *Theft*.

20. Considering the totality principle of sentencing and relevant provisions in the Sentencing and Penalties Act 2009, the custodial terms of:

(a) Luke Malumu (1<sup>st</sup> accused) – 1 year 9 months for Count 1: *Aggravated Burglary* and 5 months for Count 2: *Theft* are hereby made concurrent resulting in the aggregate custodial term of 1 year 9 months.

(b) Aminiasi Vuicolo (2<sup>nd</sup> accused) - 1 year 11 months for Count 1: *Aggravated Burglary* and 7 months for Count 2: *Theft* are hereby made concurrent resulting in the aggregate custodial term of 1 year 11 months.

21. On the issue of whether to suspend the custodial terms, I consider the two accused persons as being young in age, reached Form 6 level in terms of education and were working earning legitimate income, and weighing these considerations with the nature and degree of offending I find that it is appropriate to suspend the respective custodial terms to the effect that:

(a) Luke Malumu's (1<sup>st</sup> accused) sentence of 1 year 9 months imprisonment is to be suspended for 3 years; and

(b) Aminiasi Vuicolo's (2<sup>nd</sup> accused) sentence of 1 year 11 months imprisonment is to be suspended for 3 years.

22. Based on the above reasons, I therefore order the following sentences:

i) Luke Malumu (1<sup>st</sup> accused) is sentenced to 1 year 9 months imprisonment but suspended for 3 years.

ii) Aminiasi Vuicolo (2<sup>nd</sup> accused) is sentenced to 1 year 11 months imprisonment but suspended for 3 years.

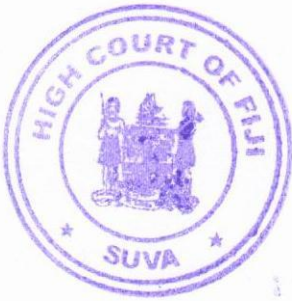
23. Furthermore, Luke Malumu and Aminiasi Vuicolo are hereby cautioned that if they are later found guilty of a criminal offence within the 3 years suspension period, the sentencing court is entitled to activate their respective custodial terms noted in paragraph 22 herein.

24. 30 days to appeal to the Fiji Court of Appeal.

**Orders of the Court**

i) **Luke Malumu (1<sup>st</sup> accused)** is sentenced to 1 year 9 months imprisonment but suspended for 3 years.

ii) **Aminiasi Vuicolo (2<sup>nd</sup> accused)** is sentenced to 1 year 11 months imprisonment but suspended for 3 years.



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**Hon. Mr. Justice Pita Bulamainivalu**  
**PUISNE JUDGE**

**At Suva**

15<sup>th</sup> August 2024

**Solicitors**

Office of the Director of Public Prosecutions for the State.

Dinati Lawyers for both the Accused