

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 199 of 2023

STATE

V

- 1. MELETI BALEI**
- 2. QELENIKA KULA**

Counsel: Ms. Shreta Prakash for the State
Ms. Shaneez Shafique for the 1st Accused
Mr. Pritesh Chand for the 2nd Accused

Sentence Hearing: 12 August 2024

Sentence: 5 September 2024

SENTENCE

[1] Meleti Balei and Qelenika Kula, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged with the following offence:

FIRST COUNT

Statement of Offence

AGGRAVATED BURGLARY: Contrary to Section 313 (1) of the Crimes Act 2009.

Particulars of Offence

MELETI BALEI & QELENIKA KULA, between the 25th day of November 2023 and 26th day of November 2023, at Natolevu, Tavua, in the Western Division, entered into the house of **LUISA SAWEA**, as trespassers, with intent to commit theft.

- [2] The Disclosures relevant to the case were filed and served by the DPP on 19 March 2024, with Additional Disclosures filed and served on 19 April 2024. The Information was filed and served on 19 April 2024 and the matter was adjourned for plea.
- [3] On 9 May 2024, Meleti Balei and Qelenika Kula, you were ready to take your pleas. On that day you both pleaded guilty to the single count against you 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 guilty pleas.
- [4] On 23 May 2024, the State filed the Summary of Facts. On the same day, the Summary of Facts were read out and explained to you and you understood and agreed to the same. Accordingly, Court found your guilty pleas to be unequivocal. I found that the facts support all elements of the count of Aggravated Burglary in the Information, and found the said count proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own pleas and I convicted you of the charge.
- [5] Meleti Balei and Qelenika Kula, I now proceed to pass sentence on you.
- [6] The Summary of Facts filed by the State was as follows:
1. *The 1st accused in this matter is Meleti Balei (hereinafter referred to as 1st accused), who was 23 years old at the time of the offence.*
 2. *The 2nd accused in this matter is Qelenika Kula (hereinafter referred to as 2nd accused), who was 20 years old at the time of the offence.*
 3. *The complainant in this matter is Luisa Sawea (hereinafter referred to as complainant), who was 36 years old at the material time.*
 4. *The complainant resides at Natolevu Settlement, Vatukoula, Tavua and so do the accused persons.*
 5. *On 25th November 2023, at around 9.00 a.m., the complainant locked her house and went to town, she did some shopping and then stayed the night at her sister's place in Kadavu Settlement.*
 6. *At around 2.00 a.m., on 26th November 2023, Penisoni Vatutu who is the neighbour of the complainant, saw the two accused persons outside the complainant's house shouting and drunk.*
 7. *The two accused persons then broke the lock of the complainant's door and entered her house with intent to steal food items.*
 8. *At around 6.30 a.m., on 26th November 2023, the complainant returned home and saw that her house door was open and then she reported this matter to Police.*

9. *The two accused were heavily drunk at the material time.*
10. *Later, the two accused were arrested and during their caution interview the 1st accused, Meleti Balei, admitted entering the house and the 2nd accused, Qelenika Kula, stated he does not remember anything as he was really drunk.*
11. *Nothing was stolen in this matter.*
12. *Both accused were subsequently charged for one count of Aggravated Burglary contrary to Section 313 (1) of Crimes Act 2009 and they pleaded guilty to the offence.*

[7] Meleti Balei and Qelenika Kula, you have admitted to the above Summary of Facts and taken full responsibility for your actions.

[8] Section 4(1) of the Sentencing and Penalties Act No. 42 of 2009 (“Sentencing and Penalties Act”) stipulates the relevant factors that a Court should take into account during the sentencing process. The factors are as follows:

4. — (1) The only purposes for which sentencing may be imposed by a court are —

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes.

[9] Furthermore, Section 4(2) of the Sentencing and Penalties Act provides that in sentencing offenders a Court must have regard to the following factors—

(a) the maximum penalty prescribed for the offence;

(b) current sentencing practice and the terms of any applicable guideline judgment;

(c) the nature and gravity of the particular offence;

(d) the offender’s culpability and degree of responsibility for the offence;

(e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;

(f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

(g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;

(i) the offender's previous character;

(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and

(k) any matter stated in this Decree as being grounds for applying a particular sentencing option.

[10] Meleti Balei and Qelenika Kula, I have duly considered the above factors in determining the sentences to be imposed on you.

[11] In terms of Section 313 (1) of the Crimes Act, *"A person commits an indictable offence (of Aggravated Burglary) if he or she-*

(a) Commits a burglary in company with one or more other persons; or

(b)"

The offence of 'Burglary' is defined at Section 312 (1) of the Crimes Act as follows: *"A person commits an indictable offence (which is triable summarily) if he or she enters or remains in a building as a trespasser, with intent to commit theft of a particular item of property in the building"*.

The offence of Aggravated Burglary in terms of Section 313 (1) of the Crimes Act carries a maximum penalty of 17 years imprisonment.

[12] The tariff that this Court had been consistently following for the offence of Aggravated Burglary, was between 18 months to 3 years imprisonment. Even the Court of Appeal in ***Leqavuni v. State*** [2016] FJCA 31; AAU 106.2014 (26 February 2016), observed that the tariff for Aggravated Burglary was between 18 months to 3 years.

[13] However, in the decision of ***(Avishkar Rohinesh) Kumar & Another v State*** [2022] FJCA 164; AAU117.2019 (24 November 2022), the Fiji Court of Appeal formulated a new tariff for the offences of Burglary and Aggravated Burglary. Resident Justice of Appeal, His

Lordship Justice Chandana Prematilaka (with Justices Suhada Gamalath and Priyantha Nawana agreeing) 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 01-03 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)

Factors indicating greater harm
<i>Theft of/damage to property causing a significant degree of loss to the victim (whether economic, commercial, sentimental or personal value)</i>
<i>Soiling, ransacking or vandalism of property</i>
<i>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</i>
<i>Significant physical or psychological injury or other significant trauma to the victim beyond the normal inevitable consequence burglary.</i>
<i>Violence used or threatened against victim, particularly the deadly nature of the weapon</i>
<i>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</i>
<i>Limited damage or disturbance to property. No violence used or threatened and a weapon is not produced</i>

[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)
HIGH	Starting Point: 05 years Sentencing Range: 03–08 years	Starting Point: 07 years Sentencing Range: 05–10 years	Starting Point: 09 years Sentencing Range: 08–12 years
MEDIUM	Starting Point: 03 years Sentencing Range: 01–05 years	Starting Point: 05 years Sentencing Range: 03–08 years	Starting Point: 07 years Sentencing Range: 05–10 years
LOW	Starting Point: 01 year Sentencing Range: 06 months – 03 years	Starting Point: 03 years Sentencing Range: 01–05 years	Starting Point: 05 years Sentencing Range: 03–08 years

[14] Considering all the facts and circumstances of this case, as is depicted in the Summary of Facts, it is my opinion that the level of harm could be considered as low. Therefore, the appropriate tariff in this case should be in the range of 1 to 5 years imprisonment for the offence of Aggravated Burglary.

[15] In determining the starting point within a 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.”

[16] In ***Kumar & Another v State (supra)***, their Lordships held that once the level of harm has been identified, the Court should use the corresponding starting point in the given table to reach a sentence within the appropriate sentencing range (paragraph 76 of the Judgment). As could be observed, the starting points in the said table are all in the middle range of the sentencing tariff.

[17] However, I respectfully submit that this is not consistent with what has been stated in ***Laisiasa Koroivuki v State (supra)***, where it was held that as a matter of good practice, the starting point should be picked from the lower or middle range of the sentencing tariff.

[18] In the light of the above, Meleti Balei and Qelenika Kula, I commence your sentences at 18 months imprisonment for the count of Aggravated Burglary.

[19] Meleti Balei and Qelenika Kula, the aggravating factors in this case are as follows:

- (i) The frequent prevalence of these offences in our society today.
- (ii) The two of you trespassed into the residential premises of the complainant late in the night thereby paying complete disregard to her privacy and property rights.
- (iii) You were both were under the influence of alcohol and as such heavily intoxicated at the time you committed the offence.
- (iv) Meleti Balei, the complainant is said to be your biological sister. Qelenika Kula, the complainant is said to be your cousin sister. Therefore, there is a domestic relationship with the complainant.

[20] Meleti Balei and Qelenika Kula, in mitigation you have submitted as follows:

- (i) That you are both first offenders and that you have no previous convictions to date. The State too confirms that there are no previous convictions recorded against you.
- (ii) That you fully co-operated 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. You have promised not to re-offend and that you are willing to rehabilitate yourselves.
- (iv) That you entered a guilty plea at the first given opportunity during these proceedings.

[21] Considering the aforementioned aggravating factors, Meleti Balei and Qelenika Kula, I increase your sentences by a further 4 years. Now your sentences for the count would be 5 years and 6 months imprisonment.

[22] Meleti Balei and Qelenika Kula, I accept that you are both first offenders and that you have fully co-operated with the Police in this matter. I also accept your remorse as genuine and the fact that you have promised not to re-offend and that you are willing to rehabilitate yourselves. Accordingly, considering these mitigating factors, I deduct 2 years and 6 months from your sentences. Now your sentences for the count would be 3 years imprisonment.

[23] Meleti Balei and Qelenika Kula, I accept that you entered a guilty at the first available opportunity during these proceedings (on the first day for plea after the Information was filed in Court). In doing so, you saved precious time and resources of this Court. For your early guilty plea I grant you a further discount of 12 months.

[24] In the circumstances, Meleti Balei and Qelenika Kula, I sentence each of you to 2 years imprisonment for the count of Aggravated Burglary contrary to Section 313 (1) (a) of the Crimes Act.

[25] The next issue for consideration is whether your sentences should be suspended.

[26] 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.

[27] Meleti Balei, you are now 24 years of age [Your date of birth being 8 July 2000]. You are said to be single and residing at Natolevu Settlement, Tavua. You are said to be a farmer by occupation, earning approximately \$100.00 per week. You are said to be financially supporting your 57 year old mother.

[28] You have taken full responsibility for your actions. You have submitted that at the time of the offending, you were hungry and looking for food, which was the reason for trespassing into the complainant's property.

[29] Qelenika Kula, you are 21 years of age [Your date of birth being 2 June 2003]. You are said to be single and residing at Natolevu Settlement, Tavua, with your elderly parents. You are said to be a farmer by occupation, earning approximately \$80.00 per week. You are said to be the sole breadwinner of your family.

[30] You have taken full responsibility for your actions. You have acknowledged that there was a lapse of sound judgment on your part and have recognized that your conduct was unjustified and improper.

[31] In *Singh & Others v. State* [2000] FJHC 115; HAA 79J of 2000S (26 October 2000); Her Ladyship Madam Justice Shameem held:

"...However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse. If these factors are present then the offender is usually given a non-custodial sentence."

[32] In *Nariva v. The State* [2006] FJHC 6; HAA 148J.2005S (9 February 2006); Her Ladyship Madam Justice Shameem held:

"The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment."

[33] Meleti Balei and Qelenika Kula, you are both relatively young offenders. You have been of previous good character. You both have fully co-operated with the Police in this matter and you have accepted responsibility for your conduct. You have submitted that you are truly remorseful of your actions and promised not to re-offend and stated that you are willing to reform and rehabilitate yourselves. You both entered a guilty plea at the first available opportunity during these proceedings. You both have been in remand custody in this case from the time of your arrest, which was on 28 November 2023, until the time you were granted bail, which was on 4 April 2024. That is a period of over 4 months.

[34] For the aforesaid reasons, it is my opinion that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your sentences.

[35] However, in order to deter you and other persons from committing offences of the same or similar nature, and also to protect the community we live in, I suspend your sentence for a period of 5 years.

[36] In the result, Meleti Balei and Qelenika Kula, your final sentence of 2 years imprisonment, is suspended for a period of 5 years. You are advised of the effect of breaching a suspended sentence.

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



AT LAUTOKA

Dated this 5th Day of September 2024


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

Solicitors for the State:

Office of the Director of Public Prosecutions, Lautoka.

Solicitors for the 1st and 2nd Accused: Office of the Legal Aid Commission, Lautoka.