

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

CF

**Criminal
Case No. 18/1351 SC/CRML**

PUBLIC PROSECUTOR

v.

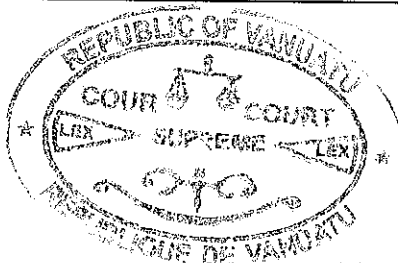
1. NAUKA KAPER
2. RUBEN NAPUAT
3. NAUSIEN KUNAR
4. MOSES KEREVU
5. JOHN ALIAM
6. JOSEPH WILLIE
7. JAYU SILAS
8. PETER REXON
9. JOHNSEN SAM
10. STEVEN MISIMAN
11. ANDREW JOHN IAKOTA
12. PAUL MISIMAN
13. SAM NAPAITAK
14. KAPUA IARAI
15. NALAPOK NIAWIA
16. NORMAN NALMEN
17. NANUA IAEUA
18. ENUO NAUTAN
19. KOMAN LOPASIM
20. ENUO DOCTA
21. SAM YASUA
22. SIMEON KURAS
23. KAWA CHARLEY
24. SANOK NALMIN
25. IAIEL NIAVIA
26. REMO KAUIA
27. WILLIAM IARU
28. JIMMY JOT (Chief)
29. WILLIE TOM NAIEU (Chief)
30. PETER HENAUNG
31. NALIHI MOSES

Before:
Counsel:

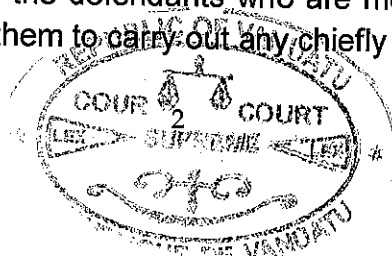
Justice D. V. Fatiaki
K. Massing for the State
H. Rantes for the Defendants
24th August 2018

Date of Delivery:

SENTENCE



1. On 20 August 2018 the 31 named defendants were arraigned on an Information that jointly charged them with offences of Criminal Trespass, Malicious Damage to Property, Threats to Kill, Unlawful Entering Dwelling House and Inciting and Soliciting Unlawful Entering Dwelling House. All defendants are jointly charged with Criminal Trespass and a selection only of named defendants are charged separately in respect of the remaining offences.
2. In particular, there are 5 charges of Unlawful Entering Dwelling House consistent with the 5 houses that were unlawfully entered during the incident and in respect of 3 of the houses there are charges of Malicious Damage caused to the windows of the house by some of the individuals charged with unlawfully entering the particular house.
3. The charge of Threats to Kill is laid against one defendant **Sanok Nalmin** who threatened to kill one of the complainants Abel Sam and his family members. The charge of Inciting and Soliciting is laid against 3 named chiefs – **laus Moses** (absent in Vila), **Willie Tom Naieu** and **Jimmy Jot** who are jointly charged with inciting the other 28 named defendants to unlawfully enter the complainants' dwelling houses at Louanpakel village, remove all the contents outside, and seal up the houses to prevent any possible re-entry by the evicted occupants.
4. At the arraignment each defendant pleaded guilty to the offence(s) with which he was charged individually. Upon each defendant admitting the facts outlined by the prosecutor, he was convicted as charged of the offence(s) to which he had earlier pleaded guilty.
5. Five (5) defendants who are named in the Information were not present during the arraignment and no plea has been taken from them. They are: **Nalawas Napuat**; **Karahai Billy**; **Litgen Kuras**; **Ken Kerevu** (sick with swollen leg) and **Chief laus Moses**. Bench warrants are issued for the arrest of the 4 absentee defendants for breach of condition (8) of their bail conditions which required each of them: "... (to) appear before the Supreme Court at Isangel on 20 August 2018 at 9am in the morning for plea".
6. After convictions were entered against the 31 defendants, brief pre-sentence reports were ordered as well as sentencing submissions from both counsels. I am grateful for the assistance provided at such short notice.
7. The facts of the case may be briefly summarised as follows: Sometime in November 2015 there was a nakamal meeting of chiefs which decided for reason(s) that remain unclear, that the 5 named complainants and their families were to be evicted from their houses at Louanpakel village, North Tanna. The decision was relayed to the defendants who are members of the chiefs tribes and owed allegiance to them to carry out any chiefly decisions.



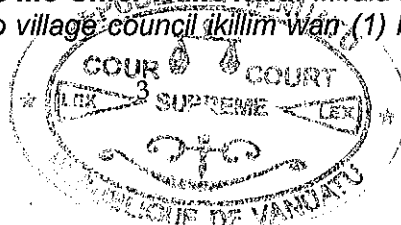
8. On 13 November 2015 the defendants armed with bush knives, axes, stones and sharpened pieces of wood, trespassed into the complainants' compound at Louanpakel village, forcibly entered the complainants' dwelling houses despite their protestations, and removed all their belongings and contents outside their houses. Thereafter the entrance doors of the houses were nailed shut from the inside to prevent the complainants and their families re-entering their houses.
9. The complainants' family members fled their houses in terror and hid in nearby bushlands for several days exposed to the weather and without proper living and sleeping facilities. The eviction lasted for several months until reciprocal custom reconciliation ceremonies were performed by the complainants to the chiefs and vica versa from the defendants to the complainants. A total of 4 pigs, 5 stems of kava, a local fowl, local food crops and several mats were exchanged during the 5 custom ceremonies. Thereafter the complainants were allowed back into their houses at Louanpakel village and peace was restored.
10. During police investigations all defendants were arrested and interviewed and most elected to speak in court ("... *blo toktok long court nomo*"). Those that did speak to the police all said that they were merely obeying their chiefs directives and commands eg. "... *mi folem toktok blo chief nomo*" and "... *mifala mekem wok blo chief*".
11. In this latter regard I have considered whether the defendants might have a defence of acting under "*superior orders*" in accordance with Section 22 of the Penal Code, but, after due consideration of the charges and the admitted facts including the complainant's protestations, there is not the slightest doubt in my mind that the defence is not available to the defendants because their chiefs' order to summarily evict the complainants from their homes was "... *manifestly unlawful*" in so far as such an order constituted an offence of inciting the commission of illegal acts contrary to Section 35 of the Penal Code which clearly states:

"It shall be unlawful to incite or solicit another person to commit any offence whether or not that offence is committed ..."

The particular offences incited by the chiefs unilateral eviction order necessarily included: Criminal Trespass, Unlawful Entering a Dwelling House and Malicious Damage to Property.

12. Chief Jimmy Jot speaking for his fellow chiefs, told the police officer under caution:

"... mi wantem talem stret se ol boys blo mifala imekem action ia long date 13th November 2015 long Louanpakel long ol family Henaung long name blo mitrifala ol chiefs igat, mi, Chief laus mo Chief Willie Naiu. Mifala ibin meeting long nakamal mo mi kilim three pigs (3) mo village council ikilim wan (1) bulluk mo mifala everyone



wetem olfala Henaung iagree blo olgeta family Henaung iaot long Louanpakel mo move igo long Enapil village blo project igo Louanpakel. Every minute blo ol meetings blo mifala bae mi attachem wetem ol statements blo mi. **Mi wantem talem nomo se ol boy oli mekem muv ia long order blo mitrifala ol chiefs.**
Hemia nomo true statement blo mi".

(my highlighting)

13. Of greater assistance to an understanding of the underlying issues in this case is the typewritten statement of the Crime Scene Officer PC Terry Sandy who attended the scene on 21 November 2015 a week after the incident and who writes:

*"The property was a project funded by Assembly of God religion and was established for quite some time in that area. It happened that the project was shifted into another inland area within Loanpakel. **These land and properties was release to family Henaung. Sam Henaung is the eldest son of family Henaung and he is in charge of all properties under Henaung Family.***

*A humanitarian agency was about to establish its base on Loanpakel. It was a charity organisation namely Salvation Army. Many meetings and awareness had held and arrangements had been made through leaders willing heart offers. **Sam Henaung allocated a dwelling at his compound. Unfortunately when the agency arrived, he refused. The situation went worse and it was leaded to his removal from his property by forty five people of Loanpakel and other villagers nearby. ...***

The compound consists of seven permanent houses in forms of German building. It had wire fencing from the cliff towards the bay. A gate was at the centre of the fencing which indicated the main entrance into the compound. Sam Henaung, Isaiah Henaung, Tom Jimmy, Yol Henaung and Able Henaung are currently occupying individual dwellings at that location when they were forced out of the property. Some of their properties still remained outside from each individual dwelling when I attended the scene".

And in expressing his insightful belief Constable Sandy writes:

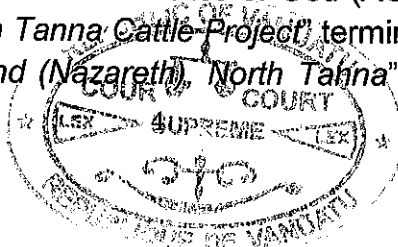
*"... **information's collected (with) regard to the entire matter determined the situation to be a result of land dispute.** The chiefs used the humanitarian aid project to overdraw (sic) Mr Sam Henaung and relatives out of their property.*

However it was a conflict matter that chiefs fail to consider laws and humanitarian affairs. They gave instructions and removed five victims from their dwellings whereas a court of law or customary land tribunal should decide and produce a fair judgment to satisfy all parties.

As a responsible leader, a chief must maintain his neutrality, integrity and find solutions to any situation which is approaching but not to be implicated in any wrongful activities"

(my highlighting)

14. Included in the PI papers is an undated letter from the General Superintendent of the General Council of the Assemblies of God (AOG) Church addressed to the "Custom Owner North Tanna Cattle Project" terminating the Agreement For Lease of "Louanpakel land (Nazareth), North Tanna" between AOG, Vanuatu



and the Kastom owners and returning the land to them. The 4 named lessors of Enabil Village including Chief Sam Henaung and Sam Nauka Henaung the principal complainant in this case.

15. By letter dated 23 September 2010 lawyers acting for the custom owners of the land on which the cancelled cattle project was operated, wrote to a **Pastor Ham Tuprik** of AOG, Tanna advising him to "*refrain from coming to the said land again and you must advise your family members to vacate our clients' property as soon as possible*". His relationship (if any) to the complainants in this case is unclear.

16. In sentencing the defendants, I have decided on the basis of the admitted facts and charges and commensurate with each defendant's actions, responsibility and culpability, to group the defendants into three (3) convenient sentencing categories namely: (1) Chiefs; (2) Proactive Participants; and (3) Passive Followers.

17. **Category (1)**: includes – **Chief Willie Tom Naieu** and **Chief Jimmy Jot**. **Category (2)**: is comprised of: 19 named defendants as follows:

- Peter Raxon
- Nauka Kaper
- Nausien Kunar
- John Aliam
- Sam Napaitak
- Moses Kerevu
- Joseph Willie
- Ruben Napuat (juvenile)
- Steven Misiman
- Andrew John lakota
- William Iaru
- Peter Henaung
- Kawa Charley
- Andrew John
- Johnson Sam
- Simeon Kuras
- Nalihi Moses

all of whom entered a dwelling house and emptied its contents outside. In this category I also include Sanok Nalmin who verbally threatened to kill Abel Sam and his family and, Jayu Silas who nailed shut the entrance doors of the complainants' houses from the inside, after the contents were removed outside. He also broke open windows in order to exit the locked houses.

18. Finally, **Category (3)**: comprises all remaining 10 defendants who were willingly present at the scene to show their support without doing anything in particular. These defendants are:



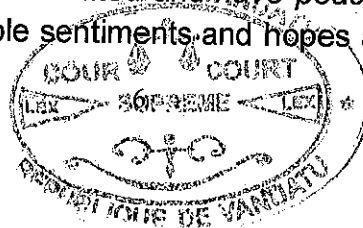
- Remo Kauia
 - Sam Yasua
 - Nanua laeua
-
- Nalapok Niawia
 - Enuo Docta
 - Koman Lopasim
 - Norman Nalmen
 - Paul Misiman
 - Enuo Nautan
 - Iaiel Niavia

19. I have received same-day pre-sentence reports on all the defendants and I gratefully extract the following common features:

- All defendants are simple villagers and subsistence farmers with little or no formal education;
- Most defendants are married with dependent children;
- All defendants are first offenders and all pleaded guilty at the earliest opportunity;
- All defendants are remorseful and each defendant claims he participated in the activities "*... on his chief's orders*"; and
- All defendants say they have performed a custom ceremony to the complainants and they are now reconciled and living together peacefully. The complainants and their family members have resumed living in their houses at Louanpakel village.

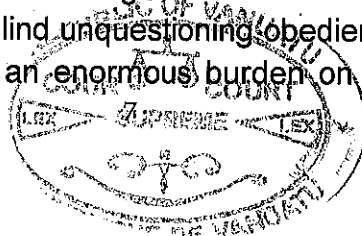
20. The two (2) defendant chiefs confirm the performance of several custom reconciliation ceremonies to the complainants in December 2017 and June and July 2018. Both chiefs are highly regarded within the North Tanna communities and each possesses "*... a lot of traditional knowledge*". However, they both profess to having little knowledge of Vanuatu laws and both claim to be unaware that their decisions and orders involved the performance of illegal/criminal offences. Both say that "*... the main contributing factor to the offences was the land dispute between (unidentified) parties*". Both claim that the (unexplained) land dispute was resolved by the Tanna Chiefs Council but the complainants reneged on the agreement to share the (unidentified) properties on the disputed land.

21. Both chiefs expressed to the probation officer their desire and "*... ambition in life is for his community to be united and have peace and live a good life*". If I may say so such honourable sentiments and hopes are what is expected of all



chiefs in Vanuatu but the way to achieve it is by the exercise of wise counsel, lawful advice, and persuasion. A united and peaceful community cannot be achieved by taking the law into your own hands and inciting violent and unlawful behaviour from your tribesmen and members of the community.

22. Your power and influence as chiefs of your people and communities must be exercised with restraint to do good and to prevent wrong-doing and lawlessness which is the very opposite of the peaceful community that you hope for your people. Remember also that the law exists for all and there are lawful processes and procedures for the resolution of all problems in Vanuatu society including for land disputes.
23. I accept and respect the role of traditional kastom chiefs in resolving disputes and in maintaining peace in rural village communities but, equally, the written laws of Vanuatu which includes the Penal Code, exists to guide and help all people to live peacefully and free. It protects both the victim and the offender equally and provides an avenue for calmly addressing grievances and resolving disputes after hearing all sides.
24. Given the prevalence and frequency of this type of group-offending being instigated and incited by customary chiefs, the time is fast-approaching when deterrent immediate custodial sentence will be imposed on the chiefs who must bear the greater responsibility for such offences.
25. In considering the appropriate sentence for each category of offender, I am guided by the maximum sentences provided in the Penal Code. For Criminal Trespass the law provides a maximum penalty of imprisonment for 1 year. For the offence of Threats to Kill a maximum penalty of 15 years imprisonment and for Unlawful Entering a Dwelling House imprisonment for 20 years where the home is used for human habitation as in this case. Malicious Damage to Property carries a maximum penalty of imprisonment for 1 year or a fine of VT5,000 or both and Inciting and Soliciting the commission of an offence is punishable according to the offence incited which in the present case is the unlawful entering into the dwelling houses of the 5 complainants and removing all the contents therefrom.
26. There is not the slightest doubt in my mind that the involvement of the three (3) chiefs was pivotal in the commission of the offences and indeed, I am convinced that none of the offences would have occurred had it not been for their instigation and incitement.
27. It should not be necessary for the court to say that traditional chiefs wield extraordinary powers and influence in a traditional and rural village setting and, as with all power, it is capable of being directed towards doing good or towards evil and wrong-doing. The blind unquestioning obedience of tribal members to a chiefly edict/deed places an enormous burden on chiefs to ensure that the



decisions and orders they issue to their followers is reasonable and lawful at all times and does not provoke a breach the laws of the land which applies to all inhabitants of Vanuatu from Torba to Tafea. The law also exists for the guidance and protection of all members of society and applies equally to all including traditional kastom chiefs and their people.

28. As was said by the Chief Justice in Public Prosecutor v Bruno Neprei and 52 others [2011] VUSC 8 which may be conveniently described as the "*Digicel Tower case*":

"In sentencing each and all of you, the Court must inform you that Vanuatu as an independent and sovereign nation has laws for everyone including each and all of you. As citizens of Vanuatu, each and all of you including your chiefs, are subject to the laws of Vanuatu. Each and all of you must understand that you cannot take the law into your own hands to do justice to yourselves out of frustrations, reactions, misunderstanding and lack and/or poor communications.

Your custom motives or custom rationals may be the basis of your actions. However, your custom and traditional practices are not excuses for each and all of you to commit criminal offences as you did

Custom chiefs and leaders shall refrain from soliciting and inciting their people to commit criminal offences out of frustrations and reactions using their custom and traditional practices as justifications for the breaking of the criminal laws of the Republic of Vanuatu".

29. More recently, in Public Prosecutor v Philip [2013] VUSC 24 which might be conveniently referred to as the "*Burning of Blackman Town case*" the Chief Justice said:

"... Retaliation or revenge is against the law as it is motivated by your personal vendatta and ... you end up breaking the law by committing offences yourselves. You must stop offending individually and/or grouped together as you did In this case, the victims of your crimes are innocent persons.

This is not the first time that the Courts have to deal with this type of offending on the Island of Tanna. Below are some of the examples of such type of cases dealt with by the Supreme Court at Isangel Tanna

- ***PP v. Jimmy Niklam & others***, Criminal Case No.04 of 2004;
- ***PP v. Bruno Neprei & others***, Criminal Case No.113 of 2010;
- ***PP v. Iavilu Tess & others***, Criminal Case No. 105 of 2011.

The common trend that is emerged from the analysis of these cases reflects common custom practices used - in that:

- Chiefs called and held meetings in nakamal;
- Persons assembled together in the nakamal;
- Persons so assembled in nakamal are not necessarily from the same nakamal. They may be from various nakamals, villages or areas. They were called to join through the custom process of "custom roads" or "custom linkages".
- Chiefs informed persons so assembled in the nakamal of the purpose of the meetings.
- The above cases show that the purposes of the meetings were to commit crimes;



- Chiefs solicited and incited the persons so assembled to carry out criminal activities jointly and together.
- Persons so assembled planned and carried out the joint criminal activities as ordered and directed in the nakamal.

The above common custom practices described are used against the law. They could not be part of accepted custom practices. They are abuses of custom practices in the manner they were used to commit criminal activities.

And later he said of the relationship between custom and statute law:

"All persons living in Vanuatu including Tanna Island, are protected by the laws of Vanuatu and the properties of all persons in Vanuatu including Tanna Island, are also protected by the laws of Vanuatu. Your customs and /or practices are also subject to the laws of Vanuatu. This means that if your customs or practices are against the law, you cannot apply them anymore. If your customs or practices are not against the law but you use them to achieve an unlawful purpose such as committing criminal offences, then, you have abused your customs or practices. Such abuses of customs or practices are condemned as they are not acceptable customs or practices. They are against the law".

(my highlighting)

30. Even more recently in Public Prosecutor v Natuman and 6 others [2014] VUSC 114 which involved the burning of 5 houses, the sentencing judge said:

"I understand that underlying this incident is a form of land dispute. If that is correct it would not be the first time in Vanuatu where a dispute has spilled over into violence against property or people and I am sure it will not be the last. That is no excuse though and the Court must treat as an aggravating factor the point that you decided to take the law into your own hands to teach the victim a lesson as you thought he should be taught because of the dispute.

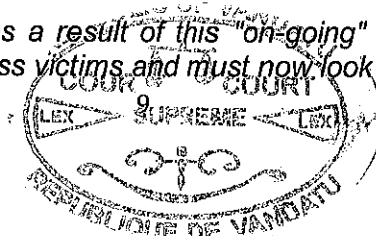
If you have a dispute with somebody then the way to resolve it is peacefully, by talking or negotiating and not by violence. You also must follow custom and am sure that custom would not endorse the burning of valuable property. It is a matter for you to look to your chiefs and others in authority in your community if you have a dispute or a problem; you do not go and take the law into your own hands as you did here".

(my highlighting)

31. In similar vein in Public Prosecutor v Loupas [2012] VUSC 25 which concerned a retaliatory attack at North Gate Christian Centre School compound in which 3 sleeping houses, a kindergarten classroom and kitchen along with all contents were completely burnt, this court said (at paras. 20 to 24):

"Land disputes are also equally capable of being resolved by lawful processes available in land tribunals and the court and although these processes may not function as quickly as desired, nevertheless, these are the processes that the government in its wisdom has seen fit to establish for dealing with land disputes and the parties are urged to utilise them rather than the illegal "self-help" that has marked the past actions of both sides to the underlying land dispute in this case.

A school has been closed as a result of this "on-going" dispute and many innocent students have become hapless victims and must now look elsewhere for schools. That



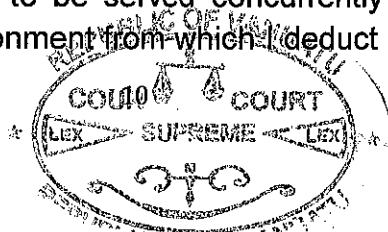
can never be in anyone's interests not even the defendants who between them have a large number of school-age children.

~~The burning of homes and their contents on both sides has not resolved the land dispute nor has it speeded up the land tribunals processes. All it has done is to fan retaliatory attacks where there are no winners only losers.~~

The defendants are all mature men in their late 20s, 30s, 40s and even one aged 57 years. All are responsible for families of their own and all should be expected to lead by good example and sound wisdom. **By your collective actions you send a dangerous message to your children, that it is alright to take the law into your own hands in an act of revenge without resort to the police or the courts".**

(my highlighting)

32. Mindful of the foregoing and the maximum penalties and the respective roles of the defendants in the commission of the offences charged, I impose a sentence of 9 months imprisonment on Chief Willie Tom Naieu and Chief Jimmy Jot consistent with sentences imposed in earlier similar cases I suspend your sentences for 3 years.
33. Chief Jimmy Jot and Chief Willie Tom Naieu, you must consider yourselves fortunate that you are not going to prison today but I must warn you that if you are convicted of another offence within the next 3 years then you will be immediately arrested and sent to prison to serve this sentence of 9 months imprisonment.
34. I am giving you this chance to continue living with and leading your people in the hope and confidence that you will exercise your chiefly power to lead them in the right way to achieve the peaceful community that you aspire to for them.
35. To you **Category (2)** offenders, let me ask before I sentence you – *how would you feel if a large crowd of armed and angry men did to you and your families what you did to the complainants' homes at Louanpakel village? Did you have any thought for the welfare of your wife and children whose lives you put at risk because you could be sent to prison in Santo or Efate for what you did? Who would feed and support your family in your absence and how did your actions benefit them?*
36. On the nineteen (19) **Category (2)** offenders who unlawfully entered the 5 dwelling houses of the complainants, I impose a starting sentence of 6 years imprisonment. For Unlawful Trespass I impose a sentence of 9 months imprisonment. For the offence of Malicious Damage to Property I impose a sentence of 9 months imprisonment for the defendants charged with the offence and for Threats to Kill a sentence of 5 years imprisonment is imposed on the solitary offender Sanok Nalmin.
37. All sentences are ordered to be served concurrently making a total starting sentence of 6 years imprisonment from which I deduct 18 months for mitigating

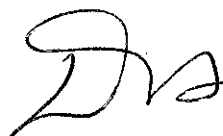
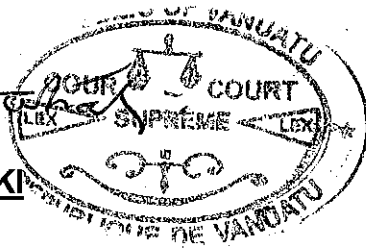


factors including the defendants' genuine remorse, past unblemished records, participation in a custom reconciliation ceremony and the delay of almost 3 years in finalising the case. This leaves a second stage sentence of $(72 - 18) = 54$ months imprisonment which is further reduced by one third to give an end sentence of $(54 - 18) = 36$ months imprisonment suspended for 3 years. This sentence means that these offenders will not go to prison today, but, if any of the **Category (2)** defendants is convicted of another offence within the next 3 years then he will be arrested and sent to prison to serve this sentence of 3 years imprisonment.

38. In addition, I impose on each of the **Category (2)** defendants, a sentence of Supervision for 2 years on condition that each defendant stays away from the 5 complainants in this case and their respective houses at Louanpapel village. Each defendant is also sentenced to 150 hours of Community Service under the supervision of the probation officer.
39. For each of the 10 **Category (3)** offenders who is charged with Criminal Trespass only, I impose a sentence of 9 months imprisonment suspended for 12 months. In addition, in respect of each defendant I impose a sentence of 100 hours of Community Work under the supervision of the probation officer.
40. Each defendant is informed that he has a right to appeal his sentence within 14 days if he does not agree with it.

DATED at Isangel, Tanna, this 24th day of August, 2018.

BY THE COURT



D. V. FATIAKI
Judge.