

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

**Criminal**  
**Case No. 21/1434 SC/CRML**

**BETWEEN: Public Prosecutor**

**AND: Kalmasei Daniel**

**Coram: Judge Aru**

**Counsel: Ms. J. Tete for the Public Prosecutor  
Mrs. C. Gessa for the Defendant**

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## **SENTENCE**

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### **Introduction**

1. Mr Kalmasei Daniel was charged with 4 counts. Two counts of unlawful sexual intercourse (Counts 2 and 3), one count of acts of indecency with a young person (Count 1) and one count of domestic violence (Count 4). He pleaded guilty to Counts 3 and 4 after the prosecution rested its case. The trial then proceeded only in relation to Counts 1 and 2. Following the trial, the defendant was found guilty of Counts 1 and 2. He appears today for sentencing.

### **The facts**

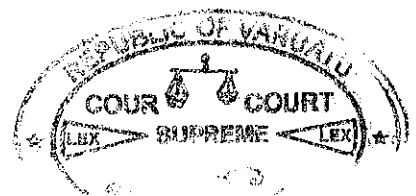
2. The facts as found at trial in relation to Counts 1 and 2 are as follows:-

#### **Count1**

3. Sometime in 2012, when the complainant was 10 years old, she was getting water from a water tank when the defendant called her to go and see him in the toilet. She went and the defendant called her to go inside. When she entered the toilet she saw the defendant standing up with his penis exposed. She wanted to run but the defendant grabbed her hand and placed it on his penis. He then began moving forward and backwards. He told the complainant to hold his penis tightly. After a while he ejaculated then he let her go.

#### **Count 2**

4. Sometime in 2013 when she was still 10 years old almost 11 years, the defendant entered the room where she was asleep with the other girls and called her. When the complainant woke up she saw the defendant standing by her



bedside. She wanted to scream but he blocked her mouth and laid on top of her and had sexual intercourse with her.

5. The facts of Counts 3 and 4 are set out in the prosecution brief of facts as follows:-

Count 3

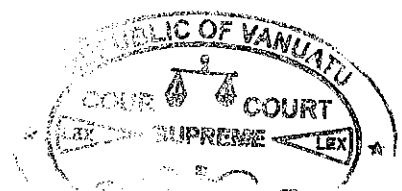
6. Sometime in 2013 the complainant was asleep in her room with the other girls. The defendant came and woke her up. He took her outside in the dark. He kissed her then exposed his penis and placed her hand on his penis. He then put his hand into the complainant's panty and inserted his finger into her vagina. After a while he told the victim to suck his penis. She refused and he pushed her head to his penis and inserted his penis into her mouth. The defendant began moving his penis until he ejaculated inside the complainant's mouth. Then he told her to stop.

Count 4

7. Sometime in 2014 when the complainant was 12 years old, she was told to take the defendant's food to his house. When she entered the house the defendant grabbed her and pulled her towards him and kissed on the lips. Then he let her go.

### Starting Point

8. The starting point of sentence is arrived at by considering the maximum sentence available for the offending and taking into account any aggravating or mitigating factors.
9. The lead offence in this case is unlawful sexual intercourse. There are two incidents of the offending, the last occurring in 2013. Since 2017 the law was changed so that the maximum penalty for this offending is now life imprisonment. When the offending occurred the maximum sentence available in 2013 was 14 years imprisonment.
10. There are a number of aggravating factors. There was a breach of trust as the complainant called the defendant daddy. He was a father figure to her and expected his care and protection. The offending was repeated and occurred at home where the complainant should be safe and protected. There is an age disparity of 49 years. In 2013 the defendant was 60 years old and the complainant was almost 11 years old. The psychological impact of the offending will remain as a scar throughout the complainant's life.
11. There are no mitigating factors.
12. The overall starting point of sentence is 8 years imprisonment to be concurrent.



## Personal factors

13. First the guilty plea. The defendant initially entered not guilty pleas to all the charges and the matter was listed for trial. After the prosecution closed its case the defendant sought to be re-arraigned on all 4 counts. The defendant then pleaded guilty to counts 3 and 4 but maintained a not guilty plea to counts 1 and 2. The guilty pleas were made very late in the proceedings after the complainant gave her evidence and the prosecution rested its case. The sentence will be reduced by 12 months.
14. I thank the Probation Officer for the Same Day Pre-Sentence Report which was filed as directed. It states that the defendant is now 68 years old and originates from Tongoa and resides at Mt Zion. He is a first time offender and a well-respected Senior member of his community.
15. He is an active member of his community both within the church as a Pastor and assisting the community with projects to earn income. His chiefs speak highly of him. Mr Daniel completed his education at class six. Before becoming a Pastor with the New Covenant Church he held different jobs in Vila as a panel beater with a number of garages then went on to be a public transport driver.
16. He has skills in business and marketing and uses these skills to assist mothers earn income to support their families. He is the bread winner in his family and also takes care of his congregation. The report says Mr Daniel is remorseful for his actions and blames his inability to control his sexual feelings towards the complainant.
17. He was remanded for some two weeks before being bailed. No custom reconciliation has been undertaken to date. The complainant informed the writer that she will not accept any custom reconciliation from the defendant in light of what he did to her.
18. The sentence is further reduced by 2 years taking into account the above factors.

## End sentence

19. The end sentence has to be a custodial one to mark the gravity of the offending. It is also to serve as punishment for the crime and be a deterrence to the defendant and the public at large against similar offending. In cases of sexual abuse I note what was expressed by the Court of Appeal in **Peter Talivo v PP** [1996] VUCA. The principle was re stated in **PP v Gideon** [2002] VUCA 7 that:-

*“it will only be in a most extreme of cases that suspension could ever be contemplated in case of sexual abuse ....Men must learn that they cannot obtain sexual gratification at the expense of the weak and vulnerable....Men who take advantage sexually of young people forfeit their right to remain in the community.”*



20. The end sentence on the lead offence is therefore 5 years imprisonment effective from today. For the act of indecency with a young person the defendant is sentenced to 3 years imprisonment and for domestic violence the defendant is sentenced to 2 years imprisonment both to be served concurrently.
21. The defendant has 14 days to appeal if he disagrees with the decision.

**DATED at Morua, Tongoa this 19<sup>th</sup> day of October 2021**

**BY THE COURT**

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**D. Ari**  
**Judge**

