

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

**Crim. Case No: HAC 286 of 2019**

**STATE**

vs.

**KIALA MARCELLINO PENAKOY HENRI LUSAKA**

**Counsel:** Ms. E. Rice with Ms. J. Fatiaki for the State  
Ms. L. Vaurasi for the Accused

**Date of Hearing:** 13<sup>th</sup> June to 18<sup>th</sup> July 2022

**Date of Closing Submission:** 25<sup>th</sup> July 2022

**Date of Written Submission:** 29 June 2022 and 4<sup>th</sup> August 2022

**Date of Judgment:** :08<sup>th</sup> August 2022

**Date of Sentence/Mitigation Submission:** 10<sup>th</sup> August, 2022

**Date of Sentence:** 12<sup>th</sup> August, 2022

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**SENTENCE**

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**Introduction**

1. Mr. Henry Lusaka, you were found guilty and convicted on the 8<sup>th</sup> of August 2022 for the murder of your wife Ms. Jenffer Anne Downes by this Court after a full hearing of the trial of which I presided. You appear to day to be sentenced for the said murder.
2. The offence of murder you stand convicted under section 237 of the Crimes Act carries a mandatory sentence of life imprisonment. However, this Court is conferred with a

discretion to determine and set a minimum term to be served before a pardon may be considered. The trial judge in the exercise of the said discretion is required to consider firstly, if a minimum term should be set and if so the length of the term. The statute prescribes no guidelines as to what matters should be considered in deciding whether to set a minimum term or the length of the term.

### The Offending

3. If I may recap your offending on the 23<sup>rd</sup> of July 2019 your wife Jennifer was found dead in her bedroom. As to what happened within your house that day was known only to you and if at all your 3 kids. However, the circumstances and the pathologist's evidence enable the prosecution to enlighten this court with certainty as to what happened during the last moments. According to the pathologist, Jennifer's death was due to the assailant coming in front of her and exerting pressure on her neck with bare hands maybe for a period between 3 to 8 minutes until her life was virtually squeezed out of her. It is a death due to asphyxia caused by manual strangulation. The circumstances proved that the assailant was you. The Pathologist explained that Jennifer had struggled and fought for her life. She had several bruises, internal hemorrhages and continuations which clearly proved that she struggled during the last moments when you held onto her neck, very likely pinning her down to the ground whilst looking straight in to her. This by all means is an extremely cruel death brought about by your own hands.
4. You embarked upon and pursued this violent and horrible act behind locked doors whilst your young kids were in the house. There is no doubt they certainly would have known, heard and understood what exactly was happening, at least the two elder children may have.
5. No doubt your suspicion and belief of her infidelity did cause agitation and turmoil in your mind which developed into psychosis due to your consumption of cannabis and alcohol. According to both the psychiatrists you have been suffering from this state of substance induced psychosis at the time you committed this gruesome and cruel act of murder. However, though you were so suffering from psychosis the evidence was more than

sufficient to convince this court that you knew and was aware as to the nature of the act that you committed. Your conduct and effort to conceal what actually happened, what you told Noel and utterances made when the police arrived at your door step bear testimony to this fact. Though you said, that you were unaware and confused this is entirely at odds with what you did and uttered immediately before and after the offending. You knew that killing Jennifer was morally wrong and your actions after killing her speak for themselves; you knew what you had done was wrong and did not want to be caught. That said so, your mental illness is relevant to the length of your minimum period of imprisonment and will be considered.

6. Your suspicion of your wife's infidelity certainly had sparked off great anger and agitation upon which you embarked upon a voyage of dispensing your anger, frustration and revengeful thoughts not only to the deceased but her father and family too. This is what the several messages, photos, screen shots and the utterances made to Mr. Downes told us. You did finally give effect to your revengeful thoughts by manually strangling your wife and you watched her asphyxiate and die. Then you placed coins on eyes of her lifeless body and sent a photograph or a screen shot to Mr. Downes with the message "*you lose motherfucker, I win*" and in a recorded message said "*this is what you made me do*".

#### Victim Impact Statement

7. I have a victim impact statement from Mr. Christopher Downes the father, which the learned State Counsel read in court during the sentence hearing which I will consider. According to which Mr. Downes says that "*to lose a daughter is to have a piece of your soul reaped away and it is never quite the same.*" This clearly demonstrate the grief and trauma suffered due to the loss of his daughter. This is common to the rest of the family and the fact that the accused showed no remorse or regret has further compounded their grief.
8. Then he narrates the impact on the children of Ms. Jennifer, who upon the death of Jennifer are now orphans. The three children are said to be still scared and have nightmares and apparently express their fear of the father coming to Australia and harming them. The elder

two children are said to be under the care of a family member who is 72 years and the youngest had been diagnosed with severe autism and is cared for by a family member who is 71 years. The children are now in Australia. It is clear that the parents and siblings of Jennifer as well as the three children have suffered untold pain and mental trauma and the trauma so suffered will certainly remain for a very long time.

9. As a matter of practice, Courts have considered aggravating and mitigating factors in the exercise of the said discretion to determine the minimum term. These factors *inter alia* may include, the personal circumstances of the convict and his previous history, remorse if shown, the brutality of the killing and the impact on the family of the victim. However, Court is required to give reasons if a minimum term is set otherwise, vide-**Balekivuya v State** [2016] FJCA 16; AAU0081.2011 (26 February 2016).

#### 10. Aggravating Factors

1. Jennifer was killed in an extremely brutal and cruel manner whilst in her own home.
2. The Accused as the husband was in a position of trust which he had violated.
3. This is another instance of Domestic Violence where the victim Jennifer had paid the supreme price with her life due to a suspicion of infidelity of the Accused.
4. The overall evidence did show the Accused have been acting in an aggressive and cruel manner even on previous occasions.
5. The children under the age of 6 were present in the house when the offending took place.
6. The murder takes place within the home of the deceased which should have been a place of safety.
7. After the killing the Accused had placed coins on her eyes and sent a photo to her father.

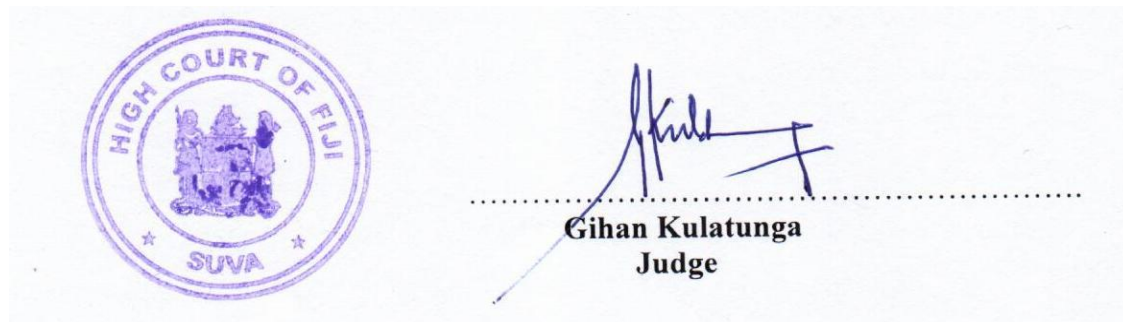
#### 11. Mitigating Factors

1. He has no previous convictions or other offending matters in Fiji.
2. He is 42 years of age and a father of 3 children.

3. He had been suffering from psychosis during the time of offending. It appears that the prolonged period of separation from his wife due to the nature of her employment may have also contributed.
  4. The Accused married and living with the deceased for almost 8 years as at the date of the murder.
  5. He was looking after the children during the absence of mother and there is no evidence that he was cruel to the children.
12. Considering and having regard to all the aggravating and mitigating factors, to my mind a 20-year minimum period will suffice to acknowledge the role played by your mental health in the offending as well as its brutal and cruel nature.

**Sentence**

13. In the said circumstances I sentence you Mr. Henry Lusaka to a mandatory life imprisonment for the count of murder which you stand convicted and in the exercise of my discretion under Section 237 of the Crimes Act set a minimum term of 20 years to be served before a pardon may be considered.
14. Accordingly, you are sentenced to mandatory life imprisonment with a minimum term of 20 years to be served before pardon may be considered.
15. You have 30 days to appeal to the Court of Appeal if you so desire.



**At Suva**

12<sup>th</sup> August, 2022.

**Solicitors**

Office of the Director of Public Prosecutions for the State.  
Shekinah Law for the Accused.