

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

**Crim. Case No: HAC 309 of 2022**

**STATE**

vs.

- 1. MOSESE TALEMAINAIVALU**
- 2. MIKEA TUBUNA NIURUA**

**Counsel:** Ms. M. Ramoala for the State  
Both Accused in Person

**Date of Sentence/Mitigation Submission:** 14<sup>th</sup> November, 2022

**Date of Sentence:** 24<sup>th</sup> November, 2022

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**SENTENCE**

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**Introduction**

1. As per the information filed by the Director of Public Prosecutions dated 28<sup>th</sup> of September 2022, both of you Mr. Mosese Talemainaivalu and Mr. Mikea Tubuna Niurua were charged jointly for committing the offence of Aggravated Robbery contrary to Section 311 (1) (a) of the Crimes Act, 2009 by stealing a REDMI mobile phone and \$900.00 cash from Lu Hong

Kai and immediately before stealing, used force on him whilst being in the company of each other.

2. Both of you the 1<sup>st</sup> and the 2<sup>nd</sup> Accused being aware of the legal effects, did plead guilty to the above count. This Court was satisfied that you fully comprehended the legal effects and that your pleas were voluntary and free from influence. You did so plead guilty at the first available opportunity.
  
3. Your charge reads thus;

### **COUNT ONE**

#### *Statement of Offence*

**AGGRAVATED ROBBERY:** contrary to Section 311 (1) (a) of the Crimes Act, 2009.

#### *Particulars of Offence*

**MOSESE TALEMAINAIVALU and MIKEA TUBUNA NIURUA**, on the 27<sup>th</sup> day of August, 2022 at Walu Bay, Suva in the Central Division, in the company of each other, stole a REDMI mobile phone and \$900.00 cash from **LU HONG KAI**, and immediately before stealing from **LU HONG KAI**, used force on him.

4. When the State presented the facts, you admitted the following summary of facts;

**Complainant (PW1): Lu Hong Kai, 55 years old, Boat Captain of Winfall 31 Fishing vessel, residing at Mua-i-Walu Jetty, Suva.**

**Accused (A1): Mosese Talemainaivalu, 29 years old [D.O.B: 09/11/1993], Fisherman of Sealand Processing, residing at Lot 4 Clifton Road, Valelevu.**

**Accused (A2): Mikea Tubuna, 36 years old [D.O.B: 07/06/1986], Student of Fiji National University's Fiji Maritime Academy, residing at Nauluvatu Settlement, Reservoir Road, Suva.**

*On Saturday 27<sup>th</sup> of August, 2022 at about 2.40pm, PW1 came from the Walu Bay jetty in a company vehicle and got off at the junction of Rona Street, Walu Bay,*

*Suva. PW1 was waiting there for his friends to come and pick him up. PW1 recalled having \$900.00 (FJD) and a REDMI brand mobile phone which was worth \$1,400.00 (in Chinese currency) on him that day.*

*Whilst waiting, he (PW1) was first approached by a bearded Fijian man namely, **Nemani Cakacaka (PW2, 46 years old, Maintenance Officer, residing at Suvavou village, Lami)**, who was wearing a hat and an earpiece that day. PW2 had asked PW1 for \$10.00 and PW1 gave him (PW2) \$30.00 before he (PW1) proceeded to walk to the footpath next to Nissan Motors store where some workers were fixing the road.*

*PW1 was then approached a second time by two iTaukei male youths. According to PW1, one of the men wore a grey cap hat and a blue vest and the other a black round neck with a blue cap hat. Upon reaching PW1, one of them grabbed PW1 and then they both reached inside PW1's pocket. PW1 stated that he struggled and asked them "what are you doing?" however the man wearing the black round neck threw a punch at PW1 causing him to fall down to the ground. When PW1 tried to get back up, the man wearing the blue vest punched PW1 and he (PW1) fell down again and the two men then took PW1's money and mobile phone.*

*Afterwards, PW1 got up and saw the two men walking back towards Rona Street and he (PW1) could feel his mouth bleeding and bruises on his left elbow. PW1 also could smell liquor from their breaths during the scuffle.*

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*On that day (27/08/22), an independent witness namely, **Karalo Tanagaga (PW3, 32 years old, China Railway employee, residing at Stage 1 Cunningham)** was at his work site which is located at the junction of Foster Road and Sonoma Road in Walu Bay. PW3 saw PW1 fall onto the netting that separates the footpath from the work site area and two I-Taukei men who were trying to take out something from PW1's pocket of his trousers. Additionally, PW3 confirmed that the man wearing a black jackshirt was the one who pulled out a clear plastic containing cash from the Chinese national's pocket (PW1). When asked by PW3 as to why they were trying to steal from the Chinese man they told PW3 that PW1 had not given their wages from 3 weeks ago.*

*Another witness namely, **Ratu Iliesa Rokubu (PW4, 26 years old, China Railway employee, residing at Lami village)**, saw the man wearing a black check-shirt punch PW1 that caused him to fall to the ground. PW4 confirmed that the man was accompanied by another who wore a blue muscle vest and who was touching PW1's pocket. PW4 also confirmed that it was the man wearing the black check-shirt that took a white clear plastic containing cash. PW4 further mentioned in his statement that during the incident, he heard them say in the I-Taukei language, "ivei na keirau sau" meaning "where is our pay" before punching PW1 on the ground and walking back towards Rona Street. When PW4 had gone to assist the*

*Chinese man (PW1), he mentioned that PW1 stated that he does not know the two I-Taukei men.*

*After the incident occurred, two witnesses who saw PW1 and the two I-Taukei men on 27/08/22, had positively identified the two I-Taukei men. Savenaca Ledua (PW5, 47 years old, Grid Security employee, residing at Kalekana Settlement, Lami) who was on duty at about or after 3pm, saw PW1 get off from a carrier at the junction of Rona Street and Foster Road. He (PW5) then saw two I-Taukei youths one wearing a blue muscle vest with a white cap, three-quarter pants and flip-flops whom he (PW5) identified as Mikea or 'Miks', who is A2. The other wearing a black jack shirt with a hood whom PW5 had identified as Mosese or 'Mojee', who is A1. He further stated that that he saw them walking back towards Rona Street and then turned left to Sonoma Street and mentioned that he noticed them walking so quickly and separated when they reached a nearby rubbish bin opposite Banking Company.*

*The second witness who was able to identify the two I-Taukei men was PW2 (Nemani Cakacaka). He stated that after receiving \$30.00 from PW1, he walked back to where his group was drinking at the mango tree which was beside the main gate to the Ministry of Infrastructure depo. On his way back, he net two of his friends namely, Mikea and Mojee who were walking towards Carpenters Motors building which is located at the junction of Rona Street and Foster Road. According to PW2, PW1 was injured when he came by to where PW2 was drinking and when PW2 asked him (PW1) what had happened PW1 mentioned that he was robbed by 2 men. Later, PW2 was shown a footage of the incident that went viral on social media and he confirmed that the one wearing a blue cap and black check-shirt was Mojee of Kalekana, Lami (A1) and that the one who was wearing a white cap with a blue muscle vest was Mikea (A2).*

*A closed-circuit television (CCTV) footage was extracted by PC 5857 Sefanaia Lesivou (PW6) from Carpenters Motors at Rona Street on 30/08/22 as well as a footage from Facebook showing the incident that happened between 1421 hours (2.21pm) to 1430 hours (2.30pm). They were then uploaded onto the discs (DVD-ROM [Digital Versatile Disc – Read only Memory]) by PW6*

*PW1 was medically examined on 27.08.22 at the Samabula Health Centre by Doctor Rodrishwar Prasad. The following injuries were noted at D(12) of PW1's Medical Report:*

- (a) Submandibular swelling on right jaw.*
- (b) Submucosal laceration noted inside cheek.*
- (c) Some tenderness to back*
- (d) Abrasions noted on left elbow*

*The professional opinion of Doctor Prasad noted at D(14) as well as the summary of the medical report noted at D(16) stated that the injuries were non serious ones which were obtained via blunt force trauma within 1 hours.*

*A1 was interviewed under caution on 29<sup>th</sup> of October, 2022 By DC 4743 Lovate whereby partial admissions were given to the allegation.*

*At Q&A 22, A1 admitted to approaching PW1 and then punching him (PW1) on the ribs and mouth after which he (PW1) fell and then A1 had walked away. This took place on Saturday, 27/08/22 at around 2pm after A1 knocked off from work (Q&A 18).*

*At Q&A 20, A1 also admits that he was with A2 on this day (Saturday, 27/08/22 at around 2pm) and that A2 was also punching PW1 (Q&A 25, 35).*

*Further in Q&A 29, 40, 43, 44, 45, 49, 59, 61, A1 maintained that he only assaulted PW1 out of revenge and did not take PW1's property. However, at Q&A 50, A1 later admitted that he and A2 were asking PW1 about their wages.*

*At Q&A 26, A1 further admitted that he wore a black check shirt and that A2 was wearing a blue basketball vest with a round neck inside. A1 admitted that he was the man wearing a black check shirt with a blue cap in the CCTV footage obtained from Carpenters Motors that was shown to him during the caution interview (Q&A 53).*

*A2 was interviewed under caution on 29<sup>th</sup> of October, 2022 by DC 3592 Joseph whereby full admissions were given to the allegation.*

*At Q&A 32 and 35, A2 admitted to following PW1 from Rona Street and robbing PW1 at the junction of Rona Street and Foster Road on 27/08/22. A2 also admitted that he and A1 robbed PW1 on the same day (27/08/22) at the front of Carpenters Motors building (Q&A 47).*

*He then confirmed that A1 was with him that day (at Q&A 39) and that he (A1) was wearing a black check shirt (Q&A 41). He also admitted that he was wearing a blue muscle vest and white cap (Q&A 48) and that he was wearing the same when he was assaulting PW1 at the front of the Carpenters Motors building on 27/08/22 (Q&A 55).*

*A2 further admitted at (Q&A 57) that he robbed PW1 with another on 27/08/22 at the junction of Rona Street and Foster Road.*

*On 8<sup>th</sup> November, 2022, A1 and A2 pleaded guilty as charged of their own free will in open court.*

5. That both of you Accused were charged and both of you pleaded guilty to the count of Aggravated Robbery contrary to section 311 (1) (a) of the Crimes Act, 2009.

6. Upon duly considering the summary of facts read by the State Counsel which was understood and admitted by both of you and also upon perusing the caution interviews this court is satisfied that both of you did enter unequivocal pleas of guilt on your own freewill.
7. This Court is also satisfied that both of you Accused persons did fully understand the nature of the charge and the consequences of so pleading guilty. The summary of facts read and admitted covers and satisfies all the elements of the offences of Aggravated Robbery which both of you admitted as having committed.
8. In view of the aforesaid, this Court finds the both the 1<sup>st</sup> Accused and the 1<sup>st</sup> Accused separately and individually guilty of and convicts both the Accused in respect of the said count as charged separately.
9. Both of you and the State Counsel filed written submissions on mitigation and sentencing and were heard too.
10. The tariff as determined by State v Tawake [2022] FJSC 22.; CAV0025.2019 (28<sup>th</sup> April 2022) for the offence of Aggravated Burglary of street mugging nature of offences is laid down in a form of a schedule based on the level of harm to pick the starting point in the spectrum. As there is force used causing a swelling on the jaw, laceration in the mouth and abrasion to elbow and tenderness the level of harm is low level and the starting point of 3 years with a range of 1-5 the range is picked as the offence was committed in the company of each other. This offence carries a maximum sentence of 20 years imprisonment.
11. If I may consider the culpability and the harm factors of your offending, both of you approached the victim, one of you grabbed him and then both reached inside his pocket. When he was resisting threw a punch causing him to fall down to the ground. Then one of you punched and he fell down again and then you took his money and mobile phone and left. This was in broad daylight and is a serious offence against property of the complainant as well as the society. You have, put him into fear of immediate serious harm which

certainly would have caused anxiety and trauma to any victim in similar circumstances. This certainly would have been a horrific experience for the victim to be so manhandled by the two of you in this manner and the emotional trauma caused will not be forgotten in a hurry.

12. Both of you were charged on the basis of 'joint enterprise' based on the legal principle of '*common intention to prosecute an unlawful purpose in conjunction with one another*' as embodied in Section 46 of the Crimes Act of 2009 in view of which '*each of them is deemed to have committed the offence.*'
13. In selecting a starting point of your sentence, this Courts is required to have regard to the objective seriousness of the offence. The maximum penalty prescribed for aggravated robbery is 20 years imprisonment. As for the tariff, State v Tawake [2022] FJSC 22.; CAV0025.2019 has determined that sentences for Aggravated robbery of street mugging type in these circumstances range between 1 to 5 years imprisonment with a starting point of 3 years based on the level of harm and force used or threatened. Thus I will pick 3 years as the starting point.
14. First, I will consider the aggravating factors. I observe the following aggravating circumstances of your offending common to both of you:
  - a. The complainant was a vulnerable person who was 55 years mugged by the two of you, taking advantage of the said vulnerability,
  - b. carried out with or some planning though it was a spontaneous reaction to a previous enmity,
  - c. injuries were caused to the victim which required hospital treatment,
  - d. the items stolen were substantial not recovered.
15. I am inclined to add one (1) year to the starting point for the above-mentioned aggravating factors bringing the interim sentence to 4 years' imprisonment

16. I will consider the following circumstances as mitigating factors on behalf of both of you;
- a) are truly remorseful and seeks forgiveness,
  - b) co-operated with the police,
  - c) the 1<sup>st</sup> Accused Mosese Talemainavalu is 29 years of age,
  - d) the 2<sup>nd</sup> Accused Mikia Tubuna is 36 years of age,
  - e) pleaded guilty at the outset on the first opportunity,
  - f) As per the Antecedent Report of the 1<sup>st</sup> Accused Mosese Talemainavalu, it is noted that there are two previous convictions in 2014 which and as per the Antecedent Report of the 2<sup>nd</sup> Accused Mikia Tubuna, it is noted that there are three previous convictions in 2020 and 2021. Therefore, this Court is unable to consider both of you as a person of previous good character.
  - g) You are both employed and said to be breadwinners of your families and the 2<sup>nd</sup> Accused is also following a course ta the FNU.
17. I think it to be just to deduct 1 year and 4 months for the early guilty plea which is almost 1/3 of the sentence and another 1 year for the other mitigating factors and the sentences will be 1 year and 8 months imprisonment.

#### Suspending the Punishment

18. Your submitted that this Court consider acting under section 26(2) of the Sentencing and Penalties Act. As per Section 26(2) of the Sentencing and Penalties Act, the discretion to suspend a sentence should only be exercised by a High Court where the custodial sentence does not exceed 3 years and as opined in the Sentence Ruling in State v Aiding Zhang [2017] HAC 061 if there be circumstance which are exceptional.
19. In **DPP v Jolame Pita** (1974) 20 FLR 5 at p.7:, Grant Acting CJ (as he was then) explained what special circumstances that warrant and justify the suspension of a sentence thus;



*"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."*

20. Thus, I see no *special circumstances to justify a suspension, such as an offender of comparatively good character, and this not an isolated offence of moderately serious nature, but it involves violence too. You are not of extreme youth or age either.* You have been had been previously employed by the victim and considering the bold and nonchalant nature of attacking the victim in public with impunity in this manner to my mind this is not a fit matter to consider suspending the sentences.

#### Head Sentence

21. Accordingly, I sentence both of you separately to a period of one (1) year and eight (8) months imprisonment for the count of Aggravated Robbery as charged and convicted. However, you are not entitled to parole for 12 months pursuant to Section 18 (1) of the Sentencing and Penalties Act.

#### Actual Period of the Sentence

22. Both of you were in arrested on 28<sup>th</sup> August 2022 and have been in remand up to date. You have been in custody for a period of nearly 2 months and 26 days almost 3 months. In terms of the provisions of Section 24 of the Sentencing and Penalties Act I hold that the said period of 3 months be considered as imprisonment that you have already served.

23. Accordingly, the actual period of sentence of each of you is one (1) year and five (5) months imprisonment with a non-parole period of nine (09) months
24. You have thirty (30) days to appeal to the Fiji Court of Appeal if you so desire.



**At Suva**

24<sup>th</sup> November, 2022.

**Solicitors**

Office of the Director of Public Prosecutions for the State.  
Both the Accused In Person