

IN THE MAGISTRATE'S COURT AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. 354 of 2008

DPP

v

KITIONE LAGIVALA

Counsel : **Mrs Vavadakua. A** for the prosecution
Mr Koroitini. J for the accused

Judgment : **5 October 2018**

JUDGMENT

1. The accused, *Kitione Lagivala* was charged for three counts of *rape* under *section 149 and 150 of the Penal Code*.
2. The particulars of the offence for each count are as follows;-

Count One

"Kitione Lagivala on the 31st day of October 2005 at Cabeu settlement, Naravuka, Seaqaqa in the Northern Division, had unlawful carnal knowledge of a woman namely Mere Vereivalu without her consent."

Count Two

"Kitione Lagivala on the 1st day of November 2005, at Cabeau settlement, Naravuka, Seaqaqa in the Northern Division, had unlawful carnal knowledge of a woman namely Mere Vereivalu without her consent."

Count Three

"Kitione Lagivala on the 2nd day of November 2005, at Cabeau settlement, Naravuka, Seaqaqa in the Northern Division had unlawful carnal knowledge of a woman namely Mere Vereivalu without her consent."

3. On 18 January 2012, the counsel who appeared for the accused informed the court that the accused pleaded not guilty to the charges.
4. The case proceeded to trial on 30 September and 1 October 2013, before another Magistrate where the Prosecution called five witnesses. The trial continued on 19 August 2014, before the same Magistrate, where the prosecution called her last witness and closed the prosecution case.
5. The requirements of *section 139* of the *Criminal Procedure Act* was put to the accused. On 18 December 2017, the counsel who appeared for the accused, informed the court that they will continue with the trial and they are ready to proceed with the defence case. The accused is the only witness for the defence case.
6. *Section 149* of the *Penal Code* state;-
"Any person who has unlawful carnal knowledge of a woman or girl, without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape."
7. The elements of the offence that must be proven beyond reasonable doubt by the prosecution are;-
 - a. *the accused,*

- b. *without consent,*
- c. *had unlawful carnal knowledge,*
- d. *with the victim.*

Prosecution Evidence

8. The victim in her evidence stated that in 2005, she was 17 years old and was a form 4 student at Seaqaqa Central College. At that time she was living with the accused at Cabeu Settlement at Seaqaqa. On 30 October 2005, at night, only her and the accused was at home. After dinner, she was studying in the sitting room using the only lantern light in the house, while the accused was lying down in the sitting room. When she finished her study after 10pm, she went to her bedroom with her face towards the window and there were some light coming from the sitting room. He was in bed trying to sleep when the accused came and forced her to have sex with him. The accused took her clothes off while she was in bed. The accused took off his clothes. She tried to push the accused but the accused came on top of her. She told the accused that he cannot do that as they are related, but the accused told her that they should have sex. The accused inserted his penis into her vagina and moved back and forth. They had sexual intercourse in the room without her consent. The accused told her not to tell anybody, otherwise, he will do something to her. After their sexual intercourse, the accused went to his room, she got dress and went off to sleep. That was after 12am as she heard the time over the radio from the sitting room.

9. On 1 November 2005, at 3am the accused came to her and forced her to have sex with him. The accused got hold of her, took off her clothes and took his clothes off and came on top of her. She tried to push him but the accused came over her. She told the accused that it is not right for them to have sex, the accused told her that she should not tell anyone as he will do something to her. The accused inserted his penis into her vagina and moved back and forth. She did not consented to the sexual intercourse. After that, the accused went to the sitting room and she got dressed and went to sleep.

10. On 2 November 2005, it was only her and the accused at their home. She was sleeping in her bedroom. At about 2am the accused came and forced her to have sex with him. He get hold of her, removed her clothes, she was afraid. She tried to push him but the accused came on top of her and inserted his penis into her vagina, moving back and forth. She did not consent to it. After that the accused told her not to tell anyone.
11. At 3pm on 2 November 2005, the victim stated that her step father came and took her to Nairailagi village for birthday party. When they reached home at Narailagi village, she related the story to her mother and stepfather. Her parents told her not to report to the police and for them to reconcile. In 2006, she went to Seaqaqa town where she met Sukabula the younger brother of her stepfather. Sukabula told her to report the matter to the police. She went and lodge the report at the Seaqaqa Police Station. She was taken for medical examination at the Seaqaqa Health Centre where she was examined by Dr Pablo. She identified the accused in court.
12. In cross-examination, the victim maintained her story that the accused had sexual intercourse with her on those dates she stated in her evidence in chief.
13. Poseci Vosaicake is the second witness for prosecution case. He is the step-father of the victim. On 2 November 2005, at about 3pm he was at the accused house. He went there to ask the victim on why she is not going to school and to take her to a birthday party. When he reached the accused house, only the accused and the victim were in the house. He took the victim and they went to Narailagi village. At their house, the victim informed him and his wife (victim's mother) that she does not want to go back to Cabeau. She was lying down crying when she informed them that the accused had forced her to have sex with her three times. They stop the victim from going back to the accused house. On 27 September 2006, around 6.30am, the accused called him on the phone and told him not do lots of things or he will chase him out from the village. At 6.30pm, the accused came to see him, his wife, the victim, and the village headman if they can sign a paper to say that Sukabula had forcefully took the victim to the police station. He told the accused that he

cannot sign the paper as he already given his statement to the police. He did not report to the police because he thought of their relationship with the accused.

14. In cross-examination, he stated that he cannot recall the date he took the victim from the accused house.
15. Sukabula Tikoyawa is the third witness for the prosecution case. He stated that in 2006, he was living at Vunigoligoli settlement at Batiri. On 26 September 2006, he went to Seaqaqa town for shopping. He met the victim and he asked the victim is it true that the accused raped her. The victim cried and admitted that the accused raped her. He asked the victim if she wanted to report the matter to the police which the victim said yes. He took the victim to the Seaqaqa Police Station to report the matter.
16. PC 2023 Isoa is the fourth witness for the prosecution. He is the interviewing officer in this case. He interviewed the accused on 28 September 2006 at the Seaqaqa Police Station. He tendered the caution interview, Fijian version as *prosecution exhibit 1A* and the translated version as *prosecution exhibit 1B*. There was no admission in the caution interview.
17. DC 3038 Nacanieli is the fifth witness for the prosecution. He is the investigating officer and the charging officer in this case. On 27 June 2008, he was instructed to charge the accused which he did. He tendered the itaukei charge statement as *prosecution exhibit 2A* and the translated version as *prosecution exhibit 2B*. In cross-examination, he agreed that Karalaini told her that she always spent the night with the victim and the accused at their home at Cabeau between October to November 2005.
18. Dr Pablo is the sixth and final witness for the prosecution. He recalled seeing a patient with the name of the victim in 2006, where he signed and issued a medical report. The patient was 17 years old at that time and was brought by the police and accompanied by the patient's father. The patient told him that she was forcefully sexual intercourse by one man when she was sleeping at

Nasoso, Naravula in November 2008. She seems to be shy to tell her story as they have to wait for few minutes before she speaks. The victim's medical report was tendered as *prosecution exhibit 3*. The patient did not tell him the name of the man who had sex with her. In her report, he stated that she had multiple sexual intercourse.

Evidence for the defence

19. The accused stated in his evidence that on 31 October 2005, Karalaini, the victim and Ana were at his home. When he reached home in the evening the girls were having dinner. The victim is his niece and was staying with them for them to look after her education. His relationship with the victim was good. He denied the allegation on 31 October 2005 as the victim, Kara, and Ana were slept inside the house and he slept in the room. The kerosene lantern light was on the door of his room which was opened.
20. On 1 November 2005, when he came home in the evening, the victim, Kara, and Ana were cooking the food. They had dinner and he went to sleep. He denied the allegation against him on that day.
21. On 2 November 2005, when he return in the evening, the victim, Kara and Ana were at home and the dinner was ready. After dinner he went to his room while the rest were still having their dinner. He stated that the victim, Ana, and Kara usually slept in the sitting room. At that time, his wife was in Batiri and she left on 14 September. Kara normally cooks for the cane cutting gangs about 2km away from their house. In the morning she always walked with the victim and victim will catch the bus to school. He stated that the reason for this allegation was because of the argument between him and the victim's step father and his brother Sukabula. The victim was with them from September 2005 to 23 October 2005 when she went back to Narailagi.
22. In cross-examination, he stated that he is the head of the family and he has complete control over everyone in the family. He stated that the victim is sleeping in the sitting room with Kara as Kara usually assist her in her study. He also agreed that the victim was sleeping in her bedroom.

Analysis and Determination

23. The evidence of the victim has established all the elements of the offence in this case. In light of the accused denial, the issue before this court is on credibility. This is a sexual offence and there is no need for corroboration.
24. The victim has stated in her evidence that on the night of 30 October, 1 and 2 November 2005, the accused raped her in her bedroom by inserting his penis into her vagina without her consent. The evidence of the victim was not discredited during cross-examination and she maintain her evidence that she was raped by the accused and it was only her and the accused were at the accused house on those nights.
25. The accused denied all the allegation and stated that on those nights his daughter in law Kara and Ana were with the victim on all those nights and they were sleeping together in the sitting room. The accused contradicted himself during cross-examination when he also agreed that the victim was sleeping in the bedroom. The accused further contradicting himself when he stated that the victim left his house on 23 October 2005, and he also confirmed that the victim was at his house on those nights of the incident that is on 30 October, 1 and 2 November 2005. This contradiction affects his credibility as a witness and the truth of his evidence.
26. In assessing the credibility of the victim and the accused in this case, I find that the accused is not a credible witness as discussed in paragraph 25 above. I therefore, find that the victim is a credible witness and was telling the truth. I accept her evidence as it was not discredited during cross-examination.
27. In examining the evidence of the prosecution and the defence as discussed above, I accept the victim's evidence that she was raped by the accused on the night of 30 October 2005, and on the night of 1 and 2 November 2005, in the bedroom, at the accused house, where the accused inserted his penis into her vagina without her consent. I accept the victim's evidence that it was only the victim and the accused who were present at the accused house on those

nights of the incident as Kara was cooking food for her husband's gang at Ilai's place which is a distance of 2km away from the accused house. I do not see any connection or links on the victim's complaint to the accused case that this case is a result of their bad relationship between the accused and the victim's step father and his brother.

28. As a trier of facts, I find that the Prosecution has established all the elements of the offence beyond reasonable doubts on all the counts.
29. In my judgment, I find the accused guilty as charged for the three counts of rape. Accordingly, the accused is convicted as charged for the three counts of rape.

28 days to appeal



A handwritten signature in blue ink, appearing to read "C. M. Tuberi". The signature is stylized and fluid.

C. M. Tuberi
RESIDENT MAGISTRATE