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**IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY**

CR 15 of 2021

REX

-V-

KISIONE TAUVAKA

BEFORE HON. JUSTICE NIU

**Counsel : Ms. 'E. Lui for the Crown.
Mr. V. Latu for the accused.**

Probation Officer : Kelela Fetu'u.

Plea : Guilty, on 18 February 2021.

Probation Report : on 18 March 2021.

Crown submissions : 26 March 2021

Accused submissions : 29 March 2021

Sentencing : 1 April 2021.

SENTENCING

Offences

- [1] Kisione Tauvaka, you have pleaded guilty to 3 counts of serious housebreaking and to 3 counts of theft each of which you committed upon each of those 3 housebreakings.
- [2] You were employed by the business Adiloa Store in Nuku'alofa. That business had a retail store at Kolofou where it sold all types of merchandise including, stoves, freezers, washing machines, bicycles, floor mats, sewing machines, microwave ovens, tents and house

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lights, amongst other things. In addition to its storage area at that store, it also had a warehouse at Kolomotu'a and another warehouse at Havelu where it stored its merchandise from which it replenished its store in Kolofo'ou. Both warehouses were kept locked and the key to the Havelu warehouse was kept at the Kolomotu'a warehouse.

- [3] In May 2020, whilst you were working at the Kolomotu'a warehouse, you took the key of the Havelu warehouse without permission and you went and opened the Havelu warehouse without permission and stole from it 2 stoves, 3 freezers and several floor mats and re-locked the warehouse and took them to your home at 'Utulau. You then returned the key of the Havelu warehouse to the Kolomotu'a warehouse without anyone at work knowing what you had done.
- [4] In June 2020, you did the same thing twice. The first was on 16 June 2020, when you stole washing machines, stoves, freezers and lights. The second was on 18 June 2020 when you took washing machines, stoves, bicycles, freezers and lights.
- [5] The total items and their values which you took on the 3 occasions were as follows:

	Items	Value
1.	01 x 5 burner oven stove	\$1,595
2.	05 x burner oven stoves	\$3,175
3.	06 x washing machines 15kg	\$3,180
4.	01 x washing machine 12kg	\$490
5.	01 standing fridge	\$1,300
6.	02 x chest freezers 130L	\$1,160
7.	02 x chest freezers 170L	\$1,380
8.	02 x chest freezers 270L	\$1,730
9.	03 x chest freezers 320L	\$2,895
10.	10 x 3 piece Chinese mats	\$765
11.	03 x mountain bikes	\$1,050
12.	01 Panasonic microwave oven	\$370

13. 01 Tent	\$290
14. 01 sewing machine	\$320
15. 25 x lights	\$497
16. 07 x 02 burner stoves	\$945
17. 08 x 2 burner stoves	\$992
TOTAL	\$22,934 "

[6] Whilst you were in the warehouse at Havelu loading up the items on to a white truck you were using on the third occasion of these offences, a passer-by happened to notice what you were doing and reported the matter to the store manager in Kolofo'ou. You were later identified by the passer-by as the one inside the Havelu warehouse at the time.

[7] You readily admitted what you had done and you went with the police and collected the items which you had taken but which were not all the items which the store manager said that you had taken. What were recovered were:

1. 5 freezers (but their values were not specified)
2. 3 oven stoves (" ")
3. 3 washing machines (" ")
4. 3 bicycles (" ")
5. 1 microwave oven (" ")
6. 5 2 burner stoves (" ")
7. 3 stoves (" ")
8. 1 sewing machine
9. 10 floor mats
10. 25 lights.

[8] You cooperated with the police and you have pleaded guilty to the 6 offences with which you were charged.

Probation Report

[9] The probation officer has prepared a report on you in which it appears that you might have cooperated with the police because you

were beaten up by some person, who were not the police, because you refused to tell the manager of the store where you had hidden the items which you had stolen, and that it would appear that you had to have medical attention in consequence of that beating.

[10] She says that you are remorseful for what you have done and that there is hope that you would be a good citizen in future, provided you keep away from persons who may have led you astray to commit these offences.

[11] She recommends that you be given a fully suspended imprisonment sentence and that you be placed on probation under the supervision of the Probation Officer and that you be required to undertake the life skills course of the Salvation Army.

[12] That appears to be based on what the Probation Officer may have found out about you, namely, that you may have a problem with alcohol. She says that you told her that you stole these properties so that you would sell them "to afford alcohol".

[13] She says that you are 20 years old and unmarried and that you were living with your mother and father, at 'Ulutalu, but I believe that your father has just passed away in March this year, after having been incapacitated by a stroke since 2013. She says that after you attained form 5 at Tupou High School, you had to leave school to work to keep the rest of your 5 younger siblings at school. And in 2019 you began working for Adiloa Store. She says that you are now the sole breadwinner for your family. After you were dismissed from that store for your present offences, you have now been employed by and are working for a bakery at 'Utulau.

The Crown submissions

[14] The Crown has submitted that there are aggravating factors against you:

- (a) You were trusted by your employer to look after its properties so that they did not get stolen but you went and stole those properties instead.
- (b) you did that on 3 separate days.
- (c) the total value of those properties is substantial, it being \$22,934.

[15] It also says that there are mitigating factors in your favour:

- (a) you are a first offender.
- (b) you have pleaded guilty.
- (c) a substantial amount of the properties have been recovered.
- (d) you have shown remorse and have cooperated with the police.

[16] It has referred to the case of ***R v Ealelei*** (CR162/2018) who was a repeat offender who broke into a dwelling house and stole Tongan koloa and other properties altogether worth \$34,269.00. He pleaded guilty. He was sentenced to 4 years imprisonment for the serious housebreaking and 2½ years imprisonment for the theft, both to be served concurrently.

[17] It also referred to the case of ***R v Maile*** (CR133/2019) who was a first offender who broke into a dwelling house and stole Tongan koloa and other properties worth \$14,900. He pleaded not guilty but was convicted after trial. He did not cooperate and did not apologise and showed no remorse for what he had done. He was sentenced to 3 years 3 months imprisonment for the serious housebreaking and to 2½ years imprisonment for the theft, both to be served concurrently.

[18] It then submitted and recommended that the sentence to be imposed on you be 2½ years imprisonment for the serious housebreaking but that the last 1½ years be suspended for 2 years. As for the theft offence, it recommends that you be sentenced to 2 years imprisonment, but to be concurrent with the sentence for the housebreaking.

Defence submissions

- [19] Counsel for the accused, Mr. Latu, has submitted that you be given a wholly suspended sentence, such as the probation officer has also recommended. He bases that on the fact that you are only 20 years old and this is your first offence and because you have pleaded guilty and that although the value of the properties you stole exceeded \$20,000, all, if not most of them, were recovered and returned to the complainant business store.

Consideration

- [20] In considering those submissions of both counsel and of the probation officer, I have to accept that you have committed a very serious crime, three times, within 1 month. You broke into your employer's warehouse, although you used the key, because you did not have any permission to go in and take the properties you took. That is serious housebreaking and it is punishable with imprisonment for up to 10 years. If you did not know that, you knew it was wrong to do it. That was why you stole the key to that warehouse from the Kolomotu'a warehouse and you put it back there afterwards so that no one would know that you were the one who went and stole the items from the Havelu Warehouse.
- [21] You thought you were smart and that nobody would find out. You were wrong and you were not smart because somebody did see you at the Havelu warehouse and informed the manager. When you committed these breaks in and thefts, did your father or your mother teach you to do so? Of course not. On the contrary, they both taught you not to do it. Then why did you do it?
- [22] The reason you did it was because you thought you would not be found out. That was where you went wrong. What you should have thought about was whether it was right or wrong to break into someone else's house and steal. If you had thought of that, like you should have, you would have known the right answer right away and you would not have done what you did.

[23] The Courts have been mindful of the temptations of money and property to young people and their foolish notion that no one would see them take, for example, another kid's lunch from his lunch box, or a small toy from the shelf of a big store, or to break into a dwelling house and steal Tongan koloa or liquor or money or laptop from it because the house is unattended, or the people in the house are fast asleep in the middle of the night.

[24] The Courts have shown leniency to young first offenders in respect of property offences which they commit because of that, and the reason for that is because if such young first offenders are sent to prison, they would have no fear any more of going to prison. There would be no deterrent for them not to commit another offence and they would commit them again and again, and again and so on for the rest of their lives. The following cases show that.

[25] In *Sailosi v R* [1991] Tonga LR 51, a 16 year old boy broke into and stole property from a house. He should not have been, but he was, sentenced in the Magistrate's Court to 6 months imprisonment. He appealed to the Supreme Court and it should have been upheld it but it was dismissed. He served his prison sentence. In 1989, having served his sentence, he broke into and stole from the same house again and in November 1989, he was given a 12 months suspended sentence. While that suspension was in force, he broke into and stole from the same house again. He was sentenced in the Supreme Court to 6 months imprisonment which was to be followed by the 12 months suspended imprisonment sentence, making a total of 18 months imprisonment commencing on 21 January 1991. The boy appealed to the Court of Appeal.

[26] In giving its decision, the Court of Appeal stated in page 52:

“Once again, we advert to the comments made by us in the Siliako Appeal as to a lack of suitable alternative sentences for first offenders in respect of property crimes. It does seem to us that the initial sentence imposed upon Sailosi was

inappropriate. However, there is nothing that this Court can do about that at this point in time. What we are concerned to ensure is that this particular offender does not continue with a life of crime and that he can see that the Courts can extend leniency and sympathy if the appropriate circumstances exist. We think that in this particular case the Court should take a limited risk which we emphasize is a limited risk given the reports of the school authorities and also the attitude of the psychiatrist which has now been clarified by evidence given in this Court. In this respect of course we have a distinct advantage over the learned Judge in the lower Court. The appropriate sentence in our view at this point in time is not to simply convict and discharge as his Counsel suggested but to impose a sentence of probation. The appellant's counsel felt that to have something like this hanging over his head might result in a further repeat performance of the crimes already committed, but we must say this Mr Sailosi, that sooner or later you are going to have to be able to withstand the ridicule and teasing of your peers, and if you cannot stand up to that sort of behaviour and act as a man should act, then we see little hope that you would be able to withstand other pressures which could lead you towards the prison gates yet again. Probation will be imposed for a period of 12 months and you must know of course that if you breach probation at all then you will be brought before the Court and sentenced on these two matters and the sentence will in all probability be a severe one. This is your last chance Mr Sailosi, please make the most of it."

- [27] In ***Mafi & Latu v R*** [1991] Tonga LR 53, Mafi was sentenced to 2½ years imprisonment on a house breaking charge and 2 years imprisonment on the theft charge, the terms to be served concurrently. Latu was sentenced to 18 months imprisonment on the house breaking charge and 1 years imprisonment on the theft charge and those terms were also to be served concurrently. Mafi had a long

criminal history. He is to some extent the victim of the system, in that he was sentenced to one month's imprisonment at the age of 13 for theft of a chicken, a penalty that was totally inappropriate given the lack of seriousness of the crime and the age of the child concerned. The Court of Appeal had no doubt that that particular sentence was a major factor in the life of crime which Mafi had proceeded to since that time. He then had numerous convictions for house breaking and theft in his criminal record. Latu was a first offender and the learned sentencing Judge held, quite rightly in the view of the Court of Appeal, that Mafi was the ringleader and that Latu simply went along with him. Latu was a first offender, at least in the field of crimes against property although he had served a prison sentence on another matter which had no relevance to the matters before the Court of Appeal.

The Court of Appeal decided that Latu be given a second chance and as far as his appeal was concerned, his sentence was quashed and replaced with a sentence of 12 months imprisonment, suspended as to 9 months for a period of 2 years, because he had already served 3 months of his sentence so that he was released immediately.

Mafi's case was quite different. He was not quite a hardened criminal but he was a determined repeat offender. There was no merit in his appeal against sentence and it was dismissed.

[28] In ***Lausi'i & Tauki'uvea v R*** [1991] Tonga LR 55, both appellants had stolen paint from their employer, Lausi'i stealing \$45.20 worth of paint and Tauki'uvea stealing over \$400 worth of paint. Lausi'i was appealing against his sentence of 6 months imprisonment and Tauki'uvea was appealing his sentence of 2 years imprisonment. Both appellants were first offenders.

[29] The Court of Appeal stated on p.56:

"In our view it is inappropriate for first offenders in regard to property offences to be sentenced to imprisonment unless the offences are of a particularly serious nature. That is not the

position here certainly as far as Lausi'i is concerned. We look more seriously at the offending committed by Tauki'uvea, committed as it was over a period of time and also given the value of the paint stolen."

[30] The Court of Appeal quashed the prison sentence of Lausi'i and imposed a \$250 fine to be paid in 3 months or 3 months imprisonment in default on him instead. In respect of Tauki'uvea, because he had already served 4 months of his 2 year sentence, his 2 year sentence was reduced to 12 months effective from the date of his imprisonment so that he had served 4 months of it and the remaining 8 months be suspended for 2 years.

Imprisonment

[31] I have to consider your offences like the Court of Appeal considered Tauki'uvea's offences, not only because you committed them over a period of a month but also because of the substantial value of the properties which you stole. And whereas Lausi'i was sentenced to pay a fine only over 3 months, Tauki'uvea was sentenced to 12 months imprisonment but which was suspended for 2 years.

[32] But in Tauki'uvea's case, his offences were only theft, which was and is, punishable with up to 7 years imprisonment. In your case, you committed serious housebreaking as well, which is punishable with up to 10 years imprisonment, a much more serious offence than theft.

Starting point and factors and sentence.

[33] I accept the Crown submission that the starting point for serious house breaking is from 3 to 5 years imprisonment. And because you committed these 3 serious house breaking as an employee of the complainant, and over a period of a month, which was in breach of the trust which the employer had placed in you, I consider that the appropriate starting point for you be 5 years imprisonment. From that, I would deduct 1 year 6 months for the mitigating factors in your favour, such as the Crown has submitted, leaving a final sentence for you of 3 years 6 months. As for the theft offences, I

accept the Crown's submission that 2 years imprisonment be appropriate.

Suspension

[34] I now have to consider the question of suspension of all or part of that sentence. Both the probation officer and your counsel have submitted that all of that sentence be suspended. The Crown on the other hand submits that only the final 18 months of your sentence be suspended, so that you serve 2 years of your sentence.

[35] Now having considered those submissions, I have to consider, and to accept, the universal truth which the Court of Appeal had stated and followed in the **Mafi & Latu Case** to which I have referred when it stated:

"Mafi had a long criminal history. He is to some extent the victim of the system, in that he was sentenced to one months imprisonment at the age of 13 for theft of a chicken, a penalty it would seem to us was totally inappropriate given the lack of seriousness of the crime and the age of the child concerned. We have no doubt that particular sentence is a major factor in the life of crime which Mafi has proceeded to since that time. He now has numerous convictions for house breaking and theft in his criminal record."

and in the **Sailosi Case** to which I have referred when it stated (as quoted in paragraph 26 above):

"What we are concerned to ensure is that this particular offender does not continue with a life of crime and that he can see that the Courts can extend leniency and sympathy if the appropriate circumstances exist."

(underline added)

[36] The appropriate circumstances were set out by the Court of Appeal in the case of **Mo'unga v R** [1998] Tonga LR 154 at page 157. It listed a number of situations (which it stated was not exhaustive) **in each**

of which the suspension of an imprisonment sentence would be appropriate. The first of those situations is where the offender is young and has a previous good record. In your case, you are young and you are a first offender and you therefore have a previous good record.

[37] The second of those situations is where the offender is likely to take the opportunity offered by the suspended sentence to rehabilitate himself. In your case you have taken up and have maintained another employment in a bakery at 'Utulau up to now and have remained otherwise trouble free. That indicates to me that you are likely to take the opportunity of suspension to rehabilitate yourself.

[38] The third of the situations is where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation, presence of provocation, or coercion by a co-offender. Obviously, that situation does not apply to you because you clearly had premeditation not only once but 3 times and there was no provocation or coercion.

[39] The fourth situation is where there has been cooperation with the authorities. That situation also applies to you because you cooperated by returning all the properties to the owner and furthermore, you have pleaded guilty and have thereby saved the police and your employer costs and time of attendance had there been a trial.

[40] I therefore find that you are eligible for a suspended sentence under 3 of the 4 situations listed by the Court of Appeal and I must therefore find that your imprisonment be suspended. I however consider that the suspension be for the longest period which the law has provided, namely 3 years, in view of the seriousness of the housebreaking and thefts you have committed. And more importantly, it would keep you trouble free for much longer. You would be 23 years of age by then and be more mature and all the more responsible.

Supervision

[41] I have to accept the view of the probation officer that you may have an alcohol problem and that you may have "negative peers" (that is friends) who may tempt and lead you astray, again, and her view that you attend the life skills course, including alcohol and drug abuse, and that you be placed on probation so that you are supervised to help you.

Sentence

[42] Accordingly, I sentence you as follows:

- (a) On each of counts 1, 2 and 3, namely, serious house breaking, you are sentenced to 3 years 6 months imprisonment, all of which are to be concurrent.
- (b) On each of counts, 4, 5 and 6, namely, thefts, you are sentenced to 2 years imprisonment, all of which are to be concurrent.
- (c) All sentences in orders (a) and (b) above are to be concurrent and are suspended for a period of 3 years from today and subject to the following conditions:
 - (i) you are not to commit an offence punishable with imprisonment within the said period of suspension of 3 years;
 - (ii) you are placed on probation and you are to comply with all directions given to you by a probation officer; and
 - (iii) you are to attend and complete the life skills and drug and alcohol awareness courses of the Salvation Army.



Niu J

JUDGE

NUKU'ALOFA: 1 April 2021.