

ATTORNEY GENERAL'S OFFICE	
INITIALS: <u>JK</u>	DATE: <u>9/11/21</u>
<input checked="" type="checkbox"/> File	<input checked="" type="checkbox"/> Website
<input checked="" type="checkbox"/> Database	<input type="checkbox"/> Social Media
<input checked="" type="checkbox"/> Email internal	<input type="checkbox"/> _____

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

CR 133 of 2021

REX

-v-

VAILOA KAVALIKU

BEFORE HON. JUSTICE NIU

Counsel : Mr. J. Fifita for the Crown.
: The accused for himself.

Plea : Guilty on 25 August 2021.

Report : by Probation Officer, 'Ema To'ia, on 28 September 2021.

Submissions : by Crown on 27 October 2021.

Sentencing : 9 November 2021.

SENTENCING

Offence

- [1] You, Vailoa Kavaliku, have committed serious causing bodily harm at Kolofo'ou on 5 March 2021, contrary to S.107 (1) and (2) (c) of the Criminal Offences Act, by hitting Tu'amelie Mahe with a piece of timber on the head and causing injury to it. You admitted to the police that you did do that and you pleaded guilty to that charge in Court before me on 25 August 2021.
- [2] What happened was that the complainant, Tu'amelie Mahe, was close to you because he is related to your wife, and that you had repeatedly told him not to

come to the kava club when he was intoxicated with alcohol because he was noisy, abusive and disrespectful to the elders at the club.

- [3] On this occasion, he took a bag of fish from the refrigerator of the club without permission and sold it and bought alcohol which he consumed and when drunk, he came to the club and did as he had done before. That fish was intended for handicap children. You were embarrassed and you were very angry with him. You got up and hit him on the head with the timber and caused a cut to his scalp about 9 cm long.

No previous conviction

- [4] You have no previous conviction in all your 56 years of age.

Report

- [5] The probation officer has prepared a pre-sentence report on your circumstances. She says that you are married and that you have 3 children aged 21, 15 and 12, and that you are the town officer of Kolofo'ou and that you have a fortnightly salary of \$581.00. She says that you have held that position for 5 years now.
- [6] She says that she spoke with the complainant and he told her that he did not blame you for what you did to him because you had abused his relationship to you by repeatedly committing disorderly behavior in the area in which you are town officer, and especially by stealing the fish that was intended for the handicap children. He said that you have asked him for his forgiveness and that he had forgiven you. He said that his older brothers overseas had told him that he rightly deserved what he got, if not enough. He said that his injury has healed and that he has no problem with it at all. He even said that he has learnt from the lesson you taught him with the beating and has accordingly changed his behavior for the better.
- [7] The officer received and has attached 8 letters from persons who have spoken well of you, and she quoted statements from some of those letters as follows:

(a) Mr. Sefita Tangi, auditor general: "I hereby vouch for the integrity,

Straight forwardness and sincerity of Vailoa.

(b) Mr. 'Alotaisi Takau, District Officer: Vailoa is "a person who is reliable, trustworthy and hardworking, these qualities of a leader lead him to become the head of all 12 community police posts in Kolofo'ou."

(c) Hon. Samiu Vaipulu, Minister of Justice: "I have known Mr. Kavaliku for over 30 years and I witness his commitment and perseverance."

(d) Hon. Hu'akavameiliku, Minister of Education: Working together with the accused through Kolofo'ou development goals and plan, I know how much he loved the people of this community and how he wants to assist them in any way he can."

[8] She says that you are a first offender, you have pleaded guilty, you have cooperated with the police and you are remorseful for what you have done, and that you blame yourself for what happened because you ought to have exercised restraint and not lose your temper.

[9] She therefore recommends that you be given a full suspension of your sentence subject only to the condition that you do not commit an imprisonable sentence.

Crown submissions

[10] Mr. Fifita, counsel for the Crown agrees with that recommendation of the probation officer and refers to the case of *R v Toki* (CR106/2009) where the accused, a police officer, handcuffed the complainant and then punched, kicked and stomped on him. The Court emphasised the seriousness of use of a weapon, the handcuffs being the weapon in that case, and sentenced him to 2 years imprisonment.

- [11] He also referred to the case of ***R v Fifita*** (CR158/2019) where that accused stabbed the complainant 3 times with a knife. He was sentenced to 3 years imprisonment, but which was fully suspended because through no fault of the accused, the case was not brought to trial for 5 years, by which time he had 3 more children born to him and his partner.
- [12] He then referred to ***R v Tupou*** (CR50/2015) where the accused there struck the complainant with a steel pipe causing injuries to his head. The accused was sentenced to 18 months imprisonment but fully suspended on condition he served 40 hours community work and to complete an alcohol and drug awareness course.
- [13] He recommends that a starting point of 2 years be taken and that 12 months or 1 year be deducted on account of your guilty plea and your clean record, and the remaining 12 months of your sentence be fully suspended for 1 year, and that you serve 60 hours community service.
- [14] He says that there was “minimal provocation” on the part of the complainant to cause you to hit him as you did. However, he says that this is a case where a discharge without conviction would not be appropriate.

No submissions by you

- [15] You were to file your submissions in mitigation by 6 October 2021 but you have not done so up to now.

Consideration

- [16] I have considered the recommendation of the probation officer and of Crown Counsel and I have to say that I agree with the recommendation on which they both agree, namely, that you be sentenced to 1 year imprisonment and that it be fully suspended for 1 year. I, however, do not agree with the Crown submission that you serve 60 hours community work.
- [17] I fully accept the statements of the several reputable persons who have spoken on your behalf as to the great, consistent and tireless efforts you have devoted to the community of Kolofo’ou, and that you have performed those services

beyond your duties as town officer for 5 years now. You have earned the gratitude and support of the community by electing you twice as their town officer. You have earned the praise and respect of the responsible people in your area.

[18] I also consider that but for the theft by the complainant of the fish intended for the handicap children, and his disrespect and disregard of the rules of the kava club and of the specific instructions you had given him not to come to the club drunk, by coming to the club knowing that he was drunk, you would not have done what you did to him this night. As his older brothers have told him he deserved what he got, and that he should be thankful that you did not give him a worse beating, which they meant he deserved for what he had done.

[19] I therefore think that you should not be ordered to serve any community service. And I know that you will continue to serve your community as you have been doing like you have been doing in any event.

Sentence

[20] I therefore sentence you for the offence of serious causing bodily harm to Tu'amelie Mahe at Kolofo'ou on 5 March 2021 to 1 year imprisonment but which imprisonment shall be suspended for a period of 1 year from today. That suspension is conditional on you committing no offence punishable by imprisonment within the period of suspension.

Nuku'alofa: 9 November 2021.



The seal of the Supreme Court of Tonga is circular, featuring a central emblem with a crown and a cross, surrounded by a wreath. The words "SUPREME COURT TONGA" are inscribed around the perimeter, with a star at the bottom.

[Handwritten signature]
Niu J
J U D G E