



HIGH COURT OF KIRIBATI

Criminal Case N° 7/2019

Criminal Case N° 30/2019

THE REPUBLIC

v

KABORA TIORO

*Tewia Tawiita for the Republic
Teetua Tewera for the prisoner*

Date of sentencing: 2 September 2019

SENTENCE

- [1] Kabora Tioro has pleaded guilty to 1 count of defilement of a girl under the age of 13 years, contrary to section 134(1) of the *Penal Code*,¹ and 1 count of engaging in unlawful sexual intercourse, contrary to section 129(1) of the *Penal Code*.
- [2] The complainant in this case is the prisoner's stepdaughter. She was born on 13 May 2007. Shortly after her birth she was adopted by the sister of her biological mother. When she was aged 2, her adoptive mother settled down with the prisoner. The complainant regarded the prisoner as her father.
- [3] In December 2017 she was 10 years of age and living with her adoptive mother and the prisoner at Ukiangang village on Butaritari. Late one evening, around 10:00pm, the prisoner asked the complainant to accompany him into the bush. Not far from the house the prisoner removed his clothes and then removed the complainant's clothes. He pushed her to the ground and got on top of her. He had sexual intercourse with her by inserting his penis into the complainant's vagina. She struggled with the prisoner, but he was too heavy. When she cried out the prisoner placed his hand over her mouth. He did not use a condom and ejaculated inside her vagina. The ordeal was extremely

¹ Despite the repeal and replacement of section 134 by section 4 of the *Penal Code (Amendment) and the Criminal Procedure Code (Amendment) Act 2017*, which commenced on 23 February 2018, this case has proceeded with respect to this charge under the *Penal Code* as it was in force on the date of the offence (as provided for under section 10(2) of the amending Act).

painful for the complainant. The prisoner told the complainant that he would kill her if she told anyone what he had done. Despite the threat, the incident was reported to police the next month. When the prisoner was interviewed by police in April 2018, he admitted to having had sexual intercourse with the complainant. After the offence came to light, the complainant went to live with her biological parents at the home of her maternal grandfather in Betio.

- [4] On 11 February 2019, the complainant, now aged 11, was at her grandfather's house. The prisoner and his wife were visiting from Butaritari. At about 10:00pm the prisoner went to the *bua* where the complainant was sleeping. He lifted her shirt and sucked on her breast. He then put his hand inside her underpants and inserted 1 finger into her vagina. After a brief period, he withdrew his finger and returned to where his wife was sleeping. The complainant then went to her biological mother and told her what had happened. When interviewed by police the following day, the prisoner said that he had been drunk and could not recall touching the complainant.
- [5] An information was filed on 26 March 2019 charging the prisoner with 2 counts of defilement. Count 1 referred to the offence described at [3] above, while count 2 alleged an earlier act of defilement in 2016. The prisoner had to be brought from Butaritari, and made his first appearance on 20 May. The prisoner failed to appear at a subsequent mention of his case and a warrant was issued for his arrest. It turned out that he had returned to Butaritari, in breach of his bail conditions. The warrant was executed on 23 July and the prisoner returned to South Tarawa under arrest. The following day, counsel for the prisoner advised the Court that his client would plead guilty to count 1 on the information but not guilty to count 2. The trial on the second count was fixed for 19 August.
- [6] On 30 July, the Attorney-General filed a second information, charging the prisoner with engaging in unlawful sexual intercourse, with a charge of sexual intercourse by a person in a position of trust as an alternative count. These charges relate to the offending described at [4] above.
- [7] On 19 August – what was to have been the first day of the trial on count 2 on the first information – counsel for the prosecution advised that she would not be proceeding on that count. Counsel for the prisoner also informed the Court that his client would be pleading guilty to count 1 on the 30 July information. As a consequence, the alternative count was withdrawn.
- [8] The prisoner is now 29 years of age. He was 27 in December 2017 and 28 in February 2019. He has 2 young children with the complainant's adoptive mother, but she left him after the commission of the second offence. He has no previous convictions and, until he was taken into custody, lived a subsistence lifestyle on Butaritari.

- [9] The prisoner's offending was extremely serious. The only matter put forward by counsel for the prisoner by way of an explanation for his client's conduct was that the prisoner was intoxicated on both occasions.
- [10] The maximum penalty for both offences is a sentence of imprisonment for life. In determining the appropriate sentence for the prisoner, I am mindful of the approach to sentencing recommended by the Court of Appeal.²
- [11] Given that there was an interval of more than a year between the 2 offences, I will consider both matters separately. I intend to impose sentences that are to run consecutively. I need to ensure though that this process does not result in an overall sentence that is crushing in its effect. It will be important to have regard to the totality principle.
- [12] With respect to the offence of defilement of a girl under the age of 13 years, the Court of Appeal has held that an appropriate starting point in a contested case is a sentence of 5 years' imprisonment.³
- [13] I consider the following matters to be the aggravating features of the 2017 offence:
- a. as the complainant's stepfather, the prisoner was in a position of trust, and his offending constitutes a grave breach of that trust;
 - b. the complainant was very young, and the difference in ages between the prisoner and the complainant was significant;
 - c. by threatening the complainant, the prisoner added terror to what must already have been a very traumatic experience for her;
 - d. the prisoner did not use a condom and ejaculated inside the complainant's vagina, thereby exposing her to the risk of both pregnancy and sexually-transmitted infection.

For all of these matters I increase the prisoner's sentence by 2 years.

- [14] For the prisoner's previous good character and his early plea of guilty, I deduct 2 years, resulting in a sentence for the 2017 offence of imprisonment for 5 years.
- [15] Determining an appropriate starting point for the offence of engaging in unlawful sexual intercourse is a little more challenging. As I discussed earlier today in the matter of *Ibwebweki Takam*,⁴ the recent amendments to the *Penal Code* introduced a much broader definition of the expression 'sexual intercourse'. Prior to the amendments, non-consensual digital penetration of

² *Kaere Tekaei v Republic* [2016] KICA 11, at [10].

³ *Republic v Uriano Arawaia* [2013] KICA 11, at [18].

⁴ *Republic v Ibwebweki Takam*, High Court Criminal Case 4/2019, 2 September 2019.

a woman's vagina was treated as an indecent assault, with a maximum sentence of 5 years' imprisonment. Such conduct is now considered unlawful sexual intercourse, and carries a maximum penalty of imprisonment for life.

[16] I said the following in *Ibwebweki's* case earlier today:

In sentencing for the offence of engaging in unlawful sexual intercourse, it is essential to consider the objective seriousness of the offending. The form that the sexual intercourse took is just one of the matters to be taken into account in undertaking this task. It is relevant for the purposes of this case to have regard to the fact that the prisoner inserted a single finger into the vagina of the complainant, with penetration lasting only a relatively brief period. In all of the circumstances of this case, I consider an appropriate starting point to be a sentence of imprisonment for 3 years.⁵

Given the similar circumstances of this case I intend to take the same approach. My starting point will be a sentence of 3 years' imprisonment.

[17] I consider the following matters to be the aggravating features of the 2019 offence:

- a. despite no longer having day-to-day responsibility for the complainant, the prisoner was still in a position of trust with respect to her;
- b. the complainant was still very young;
- c. inflicting further harm on the complainant, after she had been forced to leave the only parents she had ever known, can only have magnified the traumatic impact of the prisoner's actions;
- d. the prisoner had been arrested with respect to the 2017 offence and was awaiting the filing of charges in the High Court, so he could not have been labouring under any illusions as to the wrongfulness of his conduct.

For these matters I increase the prisoner's sentence by 1 year.

[18] With respect to the 2019 offence, the prisoner can no longer be considered to be a person of previous good character. He is, however, entitled to a reduction in sentence to reflect his very early plea of guilty. For this I deduct 1 year and 2 months, resulting in a sentence of imprisonment for 2 years and 10 months.

[19] If the sentences for both offences are to run consecutively, that will result in an overall sentence of 7 years and 10 months. Taking the totality principle into consideration, such a sentence strays into 'crushing' territory. The Court of Appeal has said the following with respect to the totality principle:

This principle requires the sentencing judge to take into account, when there are convictions of 2 or more separate offences, not only the penalty for each offence separately, but also whether the total of the punishment being given

⁵ *ibid.* at [7].

is appropriate for the total offending. The final overall sentence is more significant than the individual parts of it.⁶

[20] Those remarks were made in the case of *Uriano Arawaia*. Uriano's offending was in many ways not dissimilar to that of the prisoner in this case. Uriano was his victim's step-grandfather. The Court of Appeal was of the view that, looked at in its totality, his offending justified a term of imprisonment for 5 to 6 years, after taking into account his plea of guilty. With that in mind, I consider that the prisoner's conduct warrants an overall sentence of imprisonment for 6 years and 6 months. This can be achieved by adjusting the sentence for each offence downwards by 8 months.

[21] The prisoner is convicted on his pleas of guilty. Taking all of the above matters into account, he is sentenced as follows:

- a. for the offence of defilement of a girl under the age of 13 years – to imprisonment for 4 years and 4 months;
- b. for the offence of engaging in unlawful sexual intercourse – to imprisonment for 2 years and 2 months.

The sentences are to be served consecutively, so that the prisoner is to be imprisoned for a total of 6 years and 6 months. Under section 28(2) of the *Penal Code*, I order that this sentence is to run from 24 July 2019, being the day on which he was first remanded into custody on these charges.

[22] I wish to make a final comment, for the benefit of the Parole Board. Although the prisoner will become eligible for release on parole after having served half of his sentence, it is my strong recommendation to the Parole Board that the prisoner not be released from prison on parole unless the Board is satisfied that appropriate measures are in place to protect any young women and girls who will be living at the place at which the prisoner intends to reside on his release.


Lambourne J
 Judge of the High Court



⁶ *Republic v Uriano Arawaia* [2013] KICA 11, at [16].