

IN THE HIGH COURT OF KIRIBATI )  
CRIMINAL JURISDICTION )  
HELD AT BETIO )  
REPUBLIC OF KIRIBATI )

HIGH COURT CRIMINAL CASE No. 12 OF 2004

THE REPUBLIC  
VS  
ABERA BARENABA

FOR THE REPUBLIC:  
FOR THE ACCUSED:

MS PAULINE BEIATAU  
MS BOTIKA MAITINNARA

DATE OF HEARING:

20, 21, 24 & 25 MAY 2004

### SENTENCE

Abera Barenaba: you have not been found guilty of the charge of causing grievous harm with intent contrary to section 218(2) of the Penal Code (Cap 67) which you were charged with originally. And instead I have convicted you with a lesser offence of unlawful wounding. The Court is empowered to do this under section 157(2) of the Criminal Procedure Code (Cap 17) to convict you with a lesser offence if the facts are proved which reduce it (the original charge) to a lesser uncharged offence. That section 157(2) provides as follows:

"S.157(2) When a person is charged with an offence and the facts are proved which reduce it to a lesser offence he may be convicted of the lesser offence although he was not charged with it".

You certainly have not been charged with unlawful wounding under section 223 of the Penal Code (Cap. 67) under which section I have convicted you. However on the evidence as adduced during the trial by the prosecution witnesses and the defence witness especially Miomio's evidence (DW2) I have found that the prosecution had proved beyond reasonable doubt that you had unlawfully wounded the victim - Tokiteba Ribaii. And therefore even though you had not been charged with unlawful wounding under

section 223 of the Penal Code (Cap 67) pursuant to section 157(2) of the *Criminal Procedure Code* (Cap 17) the Court has power to convict you with unlawful wounding which I did so in the Judgment I delivered on 31<sup>st</sup> May 2004.

The sentence which I will now consider imposing on you shall relate only to your conviction for unlawful wounding under section 223 of the Penal Code, which attracts a maximum penalty of five years' imprisonment.

The facts of this case are contained in my Judgment dated 31<sup>st</sup> May 2004 and I shan't repeat them here.

I am told by your counsel Ms Botika Maitinnara that you are 35 years of age, married with seven children out of whom four are still with you and your wife, but financially you and your wife who is working in the Australian High Commission still support all your seven children in terms of school fees and other necessities of life. Your children's age ranges from 22 to eight years of age some of whom are still attending school and a girl aged 21 is working as a court clerk in Betio. Your eldest son however is not working.

You are unemployed but you go out fishing regularly in order to earn some money and also to feed members of your family.

I am also told that you are not only a father to your family but you also are a keeper of the family home if you are not out at sea fishing in terms of house keeping and meal preparation for your children before they go to school and also for your wife before she goes to work every day.

I am also told that you are remorseful for what you had done to the victim and in order to express that feeling of remorse on your part more meaningfully, you have seen fit to persuade your wife and your mother to apologize to the victim's uncle on your behalf for the unfortunate incident in question between you and the victim. I understand too that Ribaii, father of the victim, had paid you a friendly visit to your house with a view to reconciling you and members of your family and with the victim and members of his family and you are now on good terms and in peace with one another and the victim has forgiven you.

I am also told that since the incident in question took place two and half years ago you and the victim had never ever even seen each other again until a few days ago when you all came to this court for attending the hearing in this case. You and the victim shook hand and you obviously had forgiven each other. I also understand that you are the only man in your family and I appreciate very much the hardship your family would suffer if you were incarcerated.

Counsel for the prosecution Ms Ruria Iteraera told me that you had never been in trouble with the law nor with the police before in your life and so up to now you have led a blameless life.

The prosecution suggests that a custodial sentence is warranted under the circumstances as the offence is a serious one especially as a weapon had been used by the accused to inflict the wounds on the stomach of victim which caused the victim's intestines to come out protruding and the stomach to bleed profusely.

Though I agree with the prosecution that the wound is very severe the circumstances under which you had inflicted the wounds on the victim were entirely caused by the victim's aggressive behaviour and also by him having first started the fight by punching you first without any provocation whatsoever on your part or any argument between you and the victim. When you staggered back after the first blow the victim then quickly followed you with another strong punch which you stopped by pushing him back with your two hands. When you pushed the victim back you simultaneously held your toddy knife in your right hand and you must have injured the victim with it (the knife) then when you pushed him back with your two hands.

Further the lighting situation was bad as it was then very dark where you and the victim were fighting and so neither you nor the victim could see nor anticipate whether you are armed or not or vice versa.

It is significant to note that you had stabbed the victim only once yet you had ample opportunity to inflict more injuries on the victim had you wanted but you did not.

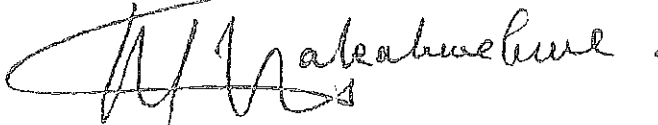
Both counsel for the prosecution and the defence had referred me to some High Court decisions on unlawful wounding and the penalties imposed. While these cases are good guidelines each case must be decided on its own peculiar facts. In one of the cases where the defendant had pleaded guilty to the charge of unlawful wounding the High Court sentenced the defendant to imprisonment for a term of 18 months but that term of imprisonment was suspended for two years (see R v Kakiata Ioane HCCrC 67/97 per Hon R Lussick CJ). In Teraoi Kaoti v R Criminal Appeal No. 1 of 2002 R Millhouse CJ stated that "the maximum penalty for unlawful wounding is five years.

His Honour also stated that the term of two years (imposed by the Single Magistrate) in the circumstances of this case is too severe but the appellant must serve some term. The appeal allowed and for the term of two years' imprisonment is substituted a term of nine months.

Taking all the above matters into account including the fact that it took 2½ years before the prosecution authority proceeds with the prosecution of your case and hence great anxiety and distress on your part, I consider that the appropriate penalty under the circumstances is a custodial sentence. I therefore sentence you to imprisonment for a term of six months. However in my view justice will be served if that sentence is suspended for 18 months, and I hereby order that the term of six months' imprisonment be suspended for a period of 18 months as from today's date.

This means that you shall not have to go to gaol to serve your present penalty of six months' imprisonment if within the next 18 months you behave yourself and do not commit any other offence. However if within the same 18 months' period you commit another offence which is punishable with imprisonment and the appropriate court so convicts and imprisons you, you shall then have to go to gaol to serve this term of six months' imprisonment and also the new term of imprisonment, whatever it is, for the new offence for which you have been convicted and imprisonment.

Dated the 2<sup>nd</sup> day of June 2004



THE HON MR JUSTICE MICHAEL N TAKABWEBWE  
Judge