



HIGH COURT OF KIRIBATI

Criminal Case N° 31/2019

THE REPUBLIC

v

TIIROKO ARAWATAU

*Tewia Tawiita for the Republic
Raweita Beniata for the accused*

*Dates of hearing: 10-11 February 2020
Date of judgment: 17 February 2020*

JUDGMENT

- [1] Tiiroko Arawatau is charged with having caused the death of Tabwai Tekaaï by driving without due care and attention.¹ The offence is alleged to have been committed on 10 July 2018, at Tabonibara village on North Tarawa. He has pleaded not guilty.²
- [2] At the start of the trial, counsel for the accused advised that he consented to the admission into evidence of the record of his client's interview with police, as well as a report prepared by a Medical Assistant setting out his findings following an examination of the body of the deceased child.³ I will summarise these documents later in the judgment.
- [3] Taukai Bwakatii was the first of 4 witnesses called by the prosecution. He is a 60-year-old resident of Tearinibeia on North Tarawa. In mid-2018 he was working on a part-time basis as a driver for a business known as Tokaraetina.

¹ *Traffic Act 2017*, section 35(1).

² The accused pleaded guilty to a second count on the information, namely that, at the time, he was driving without a driver's licence (contrary to section 20(1) of the *Traffic Act 2017*). This matter has been adjourned for sentence to the end of the trial on count 1.

³ *Criminal Procedure Code (Cap.17)*, section 126A.

Before lunch on 10 July 2018, he left Abaokoro on North Tarawa on a 2-tonne truck belonging to Tokaraetina with 3 other employees – the accused, Tiare and Teambo. Taukai drove to an islet called Iku, not far from Tabonibara village. There the truck was loaded with several *uri* logs,⁴ which they were to take back to Abaokoro. Before they left Taukai went to the beach to defecate. He heard the truck's engine start up. When he returned, the accused was sitting in the driver's seat of the truck. He told the accused to get out of the truck. The accused refused, and said that he wanted to drive. He said that he knew how to drive and had driven before. Taukai acceded to the accused's request. They then drove off, with the accused behind the wheel. Taukai was in the passenger seat and Tiare and Teambo were in the tray of the truck. The return journey to Abaokoro was expected to take about 30 minutes. It was just after midday. The weather was fine.

- [4] The road from Iku to Tabonibara is overgrown and in very poor condition, not much more than a track, with many potholes and fallen logs. After a little while, Taukai suggested to the accused that he should resume driving. He testified that he was not sure that he could trust the accused. The accused again assured Taukai that he could drive, so they continued on, with the accused as driver.
- [5] At Tabonibara they turned on to the main road, heading north to Abaokoro. The road was better, but only wide enough for 1 vehicle. As they drove through Tabonibara, Taukai could see a child alone in the middle of the road, about 20 metres ahead, walking away from them. The truck was moving quite slowly. The accused sounded the horn, but the child did not move out of the way. When the truck was about 3 metres from the child, Taukai said to the accused, "There's a child in front of you." The truck then struck the child, at which point the accused applied the brakes. The child fell under the truck. The accused got out of the truck and Taukai slid over to the driver's seat. He saw the accused holding the child in his arms. Others gathered at the scene.
- [6] Under cross-examination, Taukai said that there had been nothing about the standard of the accused's driving that concerned him, prior to the collision with the child. He conceded that there had been a number of children playing and walking on the road at the time he had first seen the child, but they had moved off the road when the accused sounded the truck's horn, leaving only

⁴ *Guettarda speciosa*.

the child with whom the truck collided. Taukai estimated that the road was only about 3 metres wide at that point. He said that, after the collision, the truck was stopped in the middle of the road. He rejected the suggestion that it was on the right side of the road. Taukai admitted that he could not be sure whether the accused had applied the brakes of the truck before or after the collision. Immediately before the collision, the truck was in first gear and had been travelling at about 5 or 10 kilometres per hour.

- [7] Taukai wanted to take the child to the hospital on the truck, but the mother of the child arrived and it was decided that she should take the child with her on a motorcycle. In response to a question from defence counsel as to what more the accused could have done to avoid the collision, Taukai said that he could have stopped the truck, or at least swerved to try to avoid the child.
- [8] In answer to questions from the Court, Taukai said that the child was hit by the front of the truck, but he could not be sure exactly where on the truck the point of impact was. He saw no damage to the truck from the collision. He had not seen the child make any sudden movements prior to the collision.
- [9] Defence counsel suggested to Taukai that the accused had tried to avoid the child, but the child had moved into the path of the truck, to which Taukai said that he had no response.
- [10] The second prosecution witness was Karubea Eria, the stepmother of the deceased child. At the time of the incident, Tabwai was 10 years old. She was deaf and could not speak, and had only recently learned to walk unaided. The family communicated with Tabwai using sign language. At the time of the incident Karubea was at home, preparing items for the school's cultural day. Someone came to tell her that something had happened, a collision between a vehicle and a person. She went to the scene and was told that it was Tabwai who had been struck. She was out of her mind with grief. Karubea was given Tabwai to hold, and she could see blood coming from Tabwai's nose and mouth. She took Tabwai on a motorcycle to the clinic, but there was nothing that could be done to save her.
- [11] Under cross-examination, Karubea agreed that there were times when Tabwai lost her balance and fell while walking, but said that she was usually fine to walk on her own. When Tabwai walked on the road she would normally

be accompanied by another child, to warn her of any approaching traffic, but on the day of the collision she had been walking by herself.

- [12] The third prosecution witness was Terara Katieua, a 53-year-old resident of Tabonibara. Some time before midday, Terara was at home, preparing a garland for the cultural day at his child's school. He heard a bang and, when he looked up, he could see a truck on the road nearby with a child underneath. He went to the truck and saw Taukai in the driver's seat. The accused was nearby, holding Tabwai in his arms.
- [13] In answer to questions from the Court, Terara said that the truck was on the left side of the road, facing north. As far as he could tell, there was enough room at that point for another vehicle to pass by. He could see no damage to the truck.
- [14] The final witness for the prosecution was Nabuti Tokamaitarawa, aged 40. He is the chief mechanic for the Eutan Tarawa Council. On 17 July 2018 he examined the truck belonging to Tokaraetina that had been involved in the collision. He checked the brakes and found that they were working properly. The indicators were working, but the brake lights were faulty. There was no mirror on the left-hand side of the truck. He saw no impact damage.
- [15] I return now to the documents tendered by consent at the beginning of the trial, the record of the police interview with the accused (exhibit 1) and the report from the Medical Assistant (exhibit 2).
- [16] The accused was interviewed by Detective Constable Tokaraoi Titera on 12 July 2018. He told her that he had driven a motor vehicle before, but had never held a driver's licence. The day of the incident was the eighth time he had driven a vehicle. He said that he felt confident that he could drive without panicking. The accused told police that he had applied the brakes of the truck at the time of the collision, but the truck had not stopped immediately. He said that he had seen Tabwai on the side of the road, before she moved quickly and unexpectedly in front of the truck.
- [17] The report from Medical Assistant Tekarika Tekibwebwe records that he examined Tabwai at 10:50am on 10 July 2018. Her age is given as 9 years. On examination, Tabwai's nasal and oral cavities were full of blood. Her body was covered with sand. She was not breathing and had no pulse. There was a large

depression to the right side of her head, with minor injuries to her face and chest.

- [18] With the close of the prosecution case, I found that the accused had a case to answer. His rights were explained to him.⁵ Counsel for the accused advised that his client would be giving evidence, but no defence witnesses would be called.
- [19] The accused is 45 years of age, from Marenanuka village on North Tarawa. In July 2018 he worked for Tokaraetina in Abaokoro as a carpenter. On the morning of 10 July, he went with 3 other employees to collect logs from Iku, to be used for a building project in Abaokoro. On Iku, once the truck was loaded, Taukai went to the beach. The accused got into the driver's seat of the truck and started the engine. When Taukai returned, the accused told him that he was going to drive the truck. Taukai agreed. The truck was fully loaded, and the logs were large and heavy, each log being roughly 3 metres in length.
- [20] The accused admitted that he had never held a driver's licence. He had driven for the first time in either 2015 or 2016 and was not an experienced driver. This was perhaps the eighth time he had driven. The accused had driven that particular truck before, as well as another similar one owned by Tokaraetina. As someone who was learning how to drive, he was keen to drive that day as an opportunity to improve his driving. The accused did not know that it was necessary to obtain a learner's permit in order to learn to drive – he wanted to learn first before going to the Council to get his driver's licence.
- [21] As he drove through the Catholic area of Tabonibara, the accused saw children playing on the road ahead. The truck was in second gear and moving quite slowly. He sounded his horn and the children scattered, except for 1. Taukai warned him to look out for the child. The accused swerved to the right side of the road to avoid her, but the child unexpectedly stumbled into the path of the truck. The accused lost sight of her, so he applied the brakes, bringing the truck to a stop, although not immediately, due to the fact that the truck was heavily loaded. The accused got out and saw the child underneath the truck, between the front and rear wheels. He picked her up. She was breathing, but with difficulty. The accused went to Taukai and told

⁵ In accordance with section 256(2) of the *Criminal Procedure Code* (Cap.17).

him that they needed to go to the clinic. A woman came and said to the accused, "What did you do to my child?" The accused responded, "This is an emergency. We need to take her to the clinic." The woman took the child away on a motorcycle.

[22] The accused then got back onto the truck and they drove off. Taukai was driving. The accused asked Taukai to drop him at his house in Marenanuka. There he spoke with police and asked to be taken to the police station in Abaokoro. From Abaokoro he was taken to South Tarawa, where he learned that the child had died.

[23] Under cross-examination, the accused said that he had last driven about a month before the day in question. He insisted that he had swerved the truck to try to avoid the girl. He agreed that he was the cousin of the girl's father and knew the family quite well, but not the children. He maintained that he had not recognised the girl prior to the collision and did not know that she had any disabilities.

[24] In answer to questions from the Court, the accused said that he had told Taukai that he had wanted to drive the truck so that he could learn. He agreed with Taukai's assessment that, where the collision occurred, the road was only wide enough for 1 vehicle to pass. It would not have been possible to swerve off the road to avoid a collision with Nei Tabwai.

[25] That brought the defence case to a close.

[26] In considering the evidence in this case, I remind myself that it is not for the accused to prove his innocence. His evidence is to be assessed like the evidence of any other witness. Even if I reject his evidence, I still need to be satisfied beyond reasonable doubt of the prosecution case before the accused can be convicted. The burden rests with the prosecution to prove, beyond reasonable doubt, each and every element of the offence charged.

[27] Section 35(1) of the *Traffic Act* provides as follows:

A person must not cause the death of another person by driving a motor vehicle on a road or elsewhere without due care and attention, or without reasonable consideration for other persons using the road or place.⁶

⁶ The *Traffic Act* 2017 entered into force on 5 June 2018, repealing the *Traffic Act* 2002. Save for a minor increase in penalty, section 35(1) reproduces section 33(1) of the *Traffic Act* 2002.

[28] In cases such as this I have found considerable assistance from the remarks of White J of the South Australian Supreme Court in *Police v Melisi*, in which he said, “The legal principles applicable to alleged contraventions of the obligation to drive with due care are well established.”⁷ He continued:

The issue is to be determined objectively. The obligation to drive with due care is the duty to exercise the standard of care which one would expect of a reasonably prudent driver in the like or similar circumstances... The reasonably prudent driver is expected to drive with a defensive outlook, *ie*, a lookout “that not only sees immediate, or immediately developing, danger, but looks well ahead and searches for potential danger”.⁸

[29] The fact that the accused was an inexperienced driver is not relevant to an assessment of whether his driving fell below the standard expected of the reasonably prudent driver. As Lord Hewart LCJ, giving the judgment of the Court in the English case of *McCrone v Riding*, said:

That standard is an objective standard, impersonal and universal, fixed in relation to the safety of other users of the highway. It is in no way related to the degree of proficiency or degree of experience attained by the individual driver.⁹

[30] There is no dispute that the truck being driven by the accused collided with Nei Tabwai and caused her death. The only issue is whether the accused can be said to have been driving without due care and attention at the time.

[31] Counsel for the prosecution submits that, in all the circumstances of this case, a reasonably prudent driver would have stopped the truck in time to avoid colliding with Nei Tabwai. On the other hand, defence counsel submits that there was nothing the accused could have done. The collision occurred because Tabwai stumbled into the path of the truck – it was an unavoidable accident.


[32] Assessment of the evidence is not a competition between the prosecution and defence witnesses. Having observed them closely as they testified, I found them all to be generally credible. However, I do not accept what the accused told the police about Tabwai being on the side of the road prior to the collision. On that point I prefer the evidence of Taukai. I am satisfied that she was in the middle of the road at all material times.

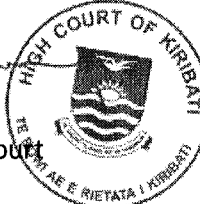
⁷ [2010] SASC 21, at [17].

⁸ *ibid.*, citations omitted.

⁹ [1938] 1 All ER 157, at 158.

- [33] As such, particularly given the narrowness of the road at that point, the only reasonable action that the accused could have taken was to stop well before reaching Tabwai's position, and only proceed once the road was clear. There was not enough room to safely swerve around the child. While Tabwai remained on the road there was a clear danger that she could be struck by the truck. The accused needed to take into account the possibility that, as with any child, she might make a sudden movement, stumble, or react in an unexpected way to the close proximity of the truck. Given that the truck was fully laden, and despite its slow speed, it was always going to take some distance to come to a complete stop. Preventive measures would therefore have been required earlier than might otherwise be the case. It is possible that the accused, as an inexperienced driver, did not appreciate the distance required to bring the truck to a stop. However, as I pointed out earlier, the standard to which the accused must be held is that of the reasonably prudent and competent driver. His lack of experience does not assist him.
- [34] It follows then that I am satisfied, beyond reasonable doubt, that the accused was driving without due care and attention, and that his driving caused the death of Tabwai Tekaa. I find the accused guilty of the offence of careless driving causing death, and he is convicted accordingly.
- [35] I will hear counsel as to sentence.


Lambourne J
Judge of the High Court



The seal of the High Court of Kiribati is circular. It features a central emblem with a sun, waves, and a bird. The text "HIGH COURT OF KIRIBATI" is written around the top inner edge, and "TE KIRIBATI E RIETATA I KIRIBATI" is written around the bottom inner edge.