



HIGH COURT OF KIRIBATI

Criminal Case N° 26/2019

THE REPUBLIC

v

BOBOIA KIOFUNG

*Tewia Tawiita for the Republic
Banuera Berina for the prisoner*

Date of sentencing: 25 February 2020

SENTENCE

- [1] Boboia Kiofung has been convicted after a trial of engaging in unlawful sexual intercourse.¹ The facts of the case are set out in my judgment, which was delivered on 10 February 2020.
- [2] The prisoner is 38 years of age. He was married, but his wife has recently left him. They have 5 children, aged between 2 and 7 years, who are being cared for by the prisoner's mother. Prior to going into custody the prisoner led a subsistence lifestyle. While he has previous convictions, they are of little consequence.
- [3] In determining the appropriate sentence, I am mindful of the approach to sentencing recommended by the Court of Appeal.²
- [4] Under the *Penal Code*, the expression 'sexual intercourse' now covers a wide range of conduct. It no longer refers only to penetration of a woman's vagina by a man's penis. Penile penetration, anal penetration, digital penetration, penetration of the genitals or anus by an object, and oral sex are all now

¹ *Penal Code* (Cap.67), section 129(1); punishable by a maximum sentence of imprisonment for life.

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


categorised as sexual intercourse. Both males and females can be victims or offenders.


- [5] Had this offence been committed prior to 23 February 2018, when the sexual offence provisions of the *Penal Code* were substantially amended, the prisoner would have been charged with rape. The Court of Appeal has held that an appropriate starting point in a contested case involving a single count of rape is imprisonment for 5 years.³ It is likely that, as a consequence of the amendment of the *Penal Code* and the introduction of new offences, the time is right to revisit the starting point for sexual offences attracting a maximum penalty of imprisonment for life. However, the Court cannot undertake such a task unilaterally. It will be for prosecuting counsel to make that submission, supported by authority, with an opportunity for defence counsel to oppose. Until then, 5 years will be taken as the starting point for an offence involving penile penetration.
- [6] I consider the following matters to be aggravating factors:
- a. as a result of her intoxicated state, the complainant was either asleep or unconscious, and therefore particularly vulnerable;
 - b. the prisoner did not use a condom, thereby exposing the complainant to the risk of both pregnancy and sexually-transmitted infection.
- [7] Of greatest concern to me was the incredible disrespect the prisoner showed to the complainant. He committed this offence in public, in full view of a crowd of people. He deliberately displayed the complainant's genitalia for the camera – twice. He allowed the sexual intercourse and subsequent acts to be filmed, increasing exponentially the number of people who would see the complainant's degradation once the file was inevitably shared on social media. The prisoner's actions significantly increased the humiliation and shame experienced by the complainant.
- [8] For all of these matters I increase the prisoner's sentence by 3 years.
- [9] There is little to be said in mitigation, save that the prisoner has no previous convictions of any consequence. I am prepared to regard him as a person of previous good character, for which I will reduce his sentence by 3 months. I accept that the prisoner's offending was opportunistic, with no pre-planning.

³ *Attorney-General v Tanre Tengke; Teitiniman Kaurake v Republic* [2004] KICA 10, at [13].

I also accept that the prisoner's intoxication was a significant factor in his offending, although that cannot excuse his conduct.

- [10] The prisoner has demonstrated no remorse for his actions. He went to trial, as is his right, but, by doing so, he has foregone the reduction in sentence that he would have received had he pleaded guilty.
- [11] Taking all of the above matters into account, the prisoner is sentenced to be imprisoned for a period of 7 years and 9 months. I order that the prisoner's sentence is to run from 10 February 2020, being the day on which he was taken into custody on this charge.⁴


Lambourne J
Judge of the High Court



The seal of the High Court of Kiribati is circular, featuring a central shield with a bird and a ship. The text 'HIGH COURT OF KIRIBATI' is written around the top inner edge, and 'TE MOU NE E RIETATA I HORRENTI' is written around the bottom inner edge.

⁴ Under section 28(2) of the *Penal Code*.