



HIGH COURT OF KIRIBATI

Criminal Case N° 4/2019

THE REPUBLIC

v

IBWEBWEKI TAKAM

*Tewia Tawiita for the Republic
Kiata Kabure-Andrewartha for the accused*

*Dates of hearing: 22-23 July, 25 July 2019
Date of judgment: 12 August 2019*

JUDGMENT

- [1] By information filed on 11 March 2019, Iwebweki Takam is charged with 1 count of unlawful sexual intercourse, contrary to section 129(1) of the *Penal Code*, and 1 count of assault with intent to engage in unlawful sexual intercourse, contrary to section 129(3) of the *Penal Code*.
- [2] At the start of the trial, counsel for the prosecution particularised the offending covered by count 1 as penetration of the complainant's vagina by the accused's finger.
- [3] Four witnesses were called for the prosecution. The first witness was the complainant, who is now 20 years of age. In 2018 she was 18 and a Form 6 student at Sacred Heart High School in Bikenibeu. Between 8:00 and 9:00am on Monday 15 October, she was waiting for a bus by the side of the road in Nanikaai village. She was wearing her school uniform. The accused, who was a computer teacher at Sacred Heart, rode past on his motorcycle. He stopped and asked the complainant if she wanted to come with him on his motorcycle. She accepted his offer and got onto the back of the accused's motorcycle. They rode off, heading towards Teoraereke.
- [4] At Teoraereke, the accused turned off the main road. He stopped, got off the motorcycle and told the complainant to wait for him. He had not said anything to the complainant about needing to stop anywhere. He walked away. A short time later the accused returned and asked the complainant if

she knew of somewhere he could buy alcohol. She told him of a place not far away, beside the road. That place did not have any alcohol available. The complainant said that she knew of a place in Temwaiku. They got back on the motorcycle and rode off. On the way, the accused asked the complainant if she had drunk alcohol before. She said that she had. He asked her if she would like to go drinking with him. He said that he would keep it a secret and not tell anyone. He said that a teacher was not supposed to drink with a student, and he would lose his job if anyone found out. The complainant agreed to go with him.

- [5] When they arrived in Bikenibeu, but before they reached the school, the accused turned off the main road, heading towards the Teachers College. They stopped not far from the house of the accused. He told the complainant to get changed. She had shorts on underneath her uniform, and had a T-shirt in her bag. She removed her uniform and put on the T-shirt. He went to his house and changed out of his work clothes into more casual attire. When the accused returned he was carrying an empty 2-litre plastic bottle. They got back on the motorcycle and headed towards Temwaiku, using the back road to avoid riding past the school. It was now after 9:00am.
- [6] They went to a sour toddy seller in Temwaiku and the accused bought 4 litres of sour toddy. He filled the bottle he had brought from home and obtained a second 2-litre bottle from the sour toddy seller. They then rode towards a 3-storey house in an isolated area at the end of Temwaiku. They found a place in the bush nearby and began drinking the sour toddy. They were drinking from a small cup that the sour toddy seller had given the accused.
- [7] The complainant consumed quite a lot of sour toddy. She got to the point where she started pouring the drink onto the ground when it was her turn. She was feeling sleepy. The accused was not drinking much; he said that he had been drinking the night before. He did not have as much to drink as the complainant. It was now about 10:00am.
- [8] The complainant moved away, out of the sun. She spread out her *lavalava* on the ground and lay down on it, intending to sleep. She was using her school bag as a pillow. The accused asked the complainant if he could kiss her. She told him that he could not. She did not want to kiss him because he was a smoker and had bad teeth.
- [9] While the complainant was lying on the ground, the accused got on top of her. He wanted her to take off her clothes. He punched her in the jaw and she screamed. The accused then covered her mouth with his hand. He told the complainant that she was weak, and if she wanted to live she had to do what he told her. The accused tried to remove the complainant's shorts. She was struggling, and struck his head with her hand. He began punching her thighs.

She felt numb and no longer able to resist. The accused lifted up the complainant's T-shirt and bra and began sucking her breast. He then started sucking on her neck, trying to give her a love bite.

- [10] The accused managed to remove the complainant's shorts. He put his right hand under the waistband of her underpants and inserted his index finger into her vagina. He said to the complainant, "Why would you refuse? You're not a virgin." The complainant felt pain and a stinging sensation in her vagina. His fingernail was sharp and it scratched her.
- [11] The accused then pulled down his shorts and attempted to insert his penis into the complainant's vagina by pulling the crotch of her underpants to the side. She felt the accused's penis enter her vagina a short distance. It was painful, so she told the accused that she needed to pee. She told him that they should find somewhere more comfortable to have sex. This was a ruse on her part.
- [12] The accused stood up. The complainant also stood up and was brushing the sand from her body. She said again that she needed to pee. The accused was sitting down. The complainant then ran away towards the road. On the road she saw a young man with a bicycle and called out to him for help. She did not know him. She was crying. He asked the complainant who had done this to her and she told him that it was her teacher.
- [13] The young man was returning home after cutting toddy, and he told her not to be afraid because he had a toddy knife. He told the complainant to come with him to his house. They were walking along the road when the accused came on his motorcycle. He said to the complainant, "Why did you run away from me? Did I do something bad to you?" She responded, "Eat my shit. You're a bald man." The young man told the accused that the complainant did not want to listen to him. The accused said, "No. She has to come with me, because I'm the one who took her from her house."
- [14] The accused asked the complainant where her school bag was. He left on his motorcycle, returning to the scene of the attack. The complainant assumed that he was going to get her bag. The complainant and the young man kept walking in the direction of his house. Soon after, the accused returned. He had with him the complainant's shorts, but he did not have the school bag. The accused told the young man that the complainant should get onto the motorcycle. She told the accused that she did not want to, and he rode away.
- [15] When they arrived at the house of the young man, his parents were there. It was noon, or maybe later when the police came to get the complainant. She was in the bathroom at the time because her vagina was painful and stinging.

- [16] Under cross-examination, the complainant conceded that she was still a little drunk when she had given her statement to the police. She saw from the clock at the police station that it was after 1:00pm. She agreed that her statement did not include all of the details of the attack. She was unsettled and a little confused. The complainant accepted that her statement did not include details of the attempt by the accused to give her a love bite. Nor did it say anything about the accused inserting his penis into her vagina.
- [17] The complainant said that she had not been afraid when she learned that the accused wanted to buy sour toddy. She was quite happy to go and drink with him. It was perhaps 10:00am when they started drinking. At the beginning the complainant was serving herself, but later she felt that the accused was pressuring her to drink. They had a bottle of sour toddy each, but shared the cup. By the end there was only a small amount left in her 2-litre bottle.
- [18] The complainant agreed that she had told the accused that he should drink faster. He responded that he had to drive. Then he said he was going to sleep for a while. When he was lying down, he asked the complainant if she knew how to ride a motorcycle.
- [19] The complainant rejected the suggestion that she had kissed the accused. She said that, when he had tried to kiss her the first time, she had refused. He then forced her to kiss him. He pulled her hair and got on top of her. He pinned her arms to her side and sucked on her neck. She was struggling. She managed to free a hand and hit him in the head. She denied that she had consented to the accused sucking her breast.
- [20] The complainant said that she had told the accused twice that she needed to pee. She had not needed to pee any earlier, despite drinking almost 2 litres of sour toddy.
- [21] The complainant rejected the suggestion that the accused had only put his finger on her clitoris, and had not inserted it into her vagina. She did not accept the proposition that the accused had stopped as soon as she told him that she needed to pee. She said that he only stopped when she suggested that they should find a more comfortable place.
- [22] It was put to the complainant that the accused had cuddled her before kissing her. She said that he did not cuddle her and he forced her to kiss him. She did not kiss him back. The complainant said that her neck was red and scratched after the accused had tried to give her a love bite. He had been quite forceful.
- [23] The complainant denied the suggestion that she had enjoyed it when the accused had sucked her breasts. She had told the accused to stop when he

inserted his finger into her vagina, and hit him, but he did not stop. The complainant slapped the accused in the head and tried to push him away. When she had suggested they find a better place, the accused rolled off and lay down next to her. He complained that she was being difficult. That was when she ran away. When she met the young man on the road she was wearing her *lavalava* and a yellow T-shirt.

- [24] In re-examination, the complainant maintained that at no time had she consented to the accused inserting his finger into her vagina.
- [25] The second prosecution witness was Mweretaka Bwateriki. He is 23 years of age. On 15 October 2018 he had been cutting toddy in Bonriki and was returning to his home in Temwaiku, where he lived with his parents. It was late morning. He was riding a bicycle. Not far from the 3-storey house he was stopped by a woman who asked for his help. Her hair was a mess. She was wearing a yellow T-shirt and a *lavalava*. Her clothing was covered in mud and out of place. He could see that her bra was pushed up. He saw scratches on her neck and a red mark on her face, near the right cheekbone. She looked frightened and nervous. He had never seen the woman before.
- [26] Mweretaka told the woman that she should come back with him to his house. She wanted him to retrieve her bag, which had been left at the place she was attacked. He told her that they should go to the house first. As they were walking along the road, a man on a motorcycle arrived. The woman hid behind Mweretaka and said, "That's the guy." The man told the woman to get on the motorcycle and he would take her to Ambo. Mweretaka told the man that the woman was coming with him to the house. The woman said that she did not want to go with the man. The man said to the woman, "Isn't this your stuff?" He was holding a pair of shorts. The woman said, "They're mine." She took the shorts and put them on.
- [27] The man rode away on his motorcycle, before coming back. He then rode away again, before returning a third time. On the last occasion he asked the woman if she wanted to come with him. She told him that she wanted to go with Mweretaka to his house.
- [28] Mweretaka identified the accused as the man on the motorcycle. He had not seen the accused before. Mweretaka then took the woman to his house. She was hungry and asked him for food. He left her with other members of the house and went to buy some food from the store. Another member of the family called the police.
- [29] In cross-examination, Mweretaka agreed that the woman had been drunk when he met her on the road. He could not say how drunk she was, but she was not really drunk. He described her as being capable. Mweretaka denied

telling the complainant that he had a toddy knife that he could use on the accused. He said that he had not been carrying a knife that day.

- [30] In the course of Mweretaka's evidence, a medical report prepared by Doctor Tanebu Tong was admitted into evidence by consent. According to the report, on examination several scratches were seen on the complainant's *labia minora*. The complainant also had 4 marks on her throat – 3 on the right side and 1 on the left. The report does not say whether those marks were bruises, scratches or something else. Unfortunately Doctor Tanebu was not available to testify as she was out of the country.
- [31] The third prosecution witness was Senior Constable James Oten from the Bonriki police station. Sometime after lunch he was patrolling in the car when he received a call from Police Headquarters. As a result of the call he went to Temwaiku, where he saw the complainant. She appeared frightened and was crying. Her hair was a mess. She was taken to the Bonriki police station, where the matter was handed over to one of the detectives.
- [32] In cross-examination, James said that the complainant was not drunk when he saw her, but he could smell alcohol on her breath.
- [33] The final witness was Miriam Eterom. She is 52 years old and is the mother of Mweretaka. On 15 October 2018 she was at home in Temwaiku when Mweretaka returned from cutting toddy. She was surprised to see that he was accompanied by the complainant. The complainant was crying. Her clothing was dirty and her hair was a mess. She looked as if she had been attacked. Miriam saw a scratch on the complainant's throat. She smelt of alcohol. Miriam called the police, who arrived a short time later. They took the complainant away.
- [34] Under cross-examination, Miriam agreed that the complainant's clothing had been wet when she arrived at the house. She said that it was not like the complainant had been swimming; she thought that maybe the complainant had been on wet ground.
- [35] That brought the prosecution case to a close.
- [36] I formally found that the accused had a case to answer on both counts and informed him of his rights, as required by section 256(2) of the *Criminal Procedure Code*. Defence counsel advised that her client would be giving evidence, and no other witnesses would be called.
- [37] The accused is now 27 years of age. He is married with 4 children. On the morning of 15 October last year, the accused had taken his wife on his motorcycle to Bairiki and was returning to Sacred Heart High School in

Bikenibeu, where he taught computer studies to Form 7. At Nanikaai he saw the complainant in a Sacred Heart uniform on the side of the road, waiting for a bus. The accused thought that it was too late for the complainant to catch a bus and still get to school on time. He stopped next to her and told her to get on the motorcycle. She agreed and got on. They rode off, heading towards Bikenibeu. In Teoraereke, not far from the Fair Price petrol station, he apologised to the complainant and told her that he needed to get something from a store at the rear of the petrol station. She agreed and he turned off the main road. At the store he parked and told the complainant to wait while he went inside. The accused wanted to buy sour toddy, as he was hungover from a drinking session the previous night and had a headache. He thought that maybe some sour toddy would help ease the headache.

- [38] The accused was unable to buy sour toddy at that place, so he returned to his motorcycle. The complainant asked him what he was hoping to buy. He told her that he wanted to buy sour toddy. The complainant told the accused that he should go to Temwaiku, because there were plenty of places there where he could buy sour toddy.
- [39] The accused then went to his house in Bikenibeu, close to the Teachers College. He wanted to get a container for his sour toddy. On the way there he had a discussion with the complainant about drinking alcohol, and she had agreed to drink with him. At Bikenibeu, the accused changed out of his work clothes, while the complainant waited for him at the motorcycle. When he returned, the accused asked the complainant how she knew about the sour toddy seller in Temwaiku. She told him that she had bought sour toddy from there before. He asked the complainant if she was sure that she wanted to come drinking with him. She said that she was.
- [40] At Temwaiku, the accused bought 4 litres of sour toddy, in 2 bottles. He then stopped at a second store and bought cigarettes and sweets. He asked the complainant where she wanted to go to drink the sour toddy, but she told him to choose. The accused wanted somewhere secluded, as he did not want anyone to see his motorcycle. He suggested a place close to the 3-storey house and the complainant agreed. She told him that she had been drinking there before. They arrived and sat down. The accused gave one of the bottles of sour toddy to the complainant and told her to serve the drink.
- [41] As they drank, the accused and the complainant chatted. They were facing each other. On 2 or 3 occasions the complainant went off to pee. The complainant told the accused about a time when she had been drinking with friends, after which she thought she might be pregnant. She believed that the pregnancy had ended in a miscarriage.

- [42] The accused was attracted to the complainant, but he tried to restrain himself. He was not very drunk. Before they had finished the first bottle of sour toddy, the complainant said that she had had enough. She lay on the ground not far from the accused and said that it was time to sleep. He did not want to sleep, as he wanted to continue drinking. The complainant again said that it was time to sleep. The accused then leaned down and kissed the complainant. She kissed him back. He told her to spread out her *lavalava* so that he could lie next to her. He lay down and cuddled the complainant. They kissed some more. After a while he moved down and started sucking her neck. He gave the complainant 4 love bites, 3 on the right side and 1 on the left. She was a willing participant. He thought that she was enjoying it. She did not struggle or resist him.
- [43] The accused sucked on the complainant's breasts. He put his hand inside her shorts and inserted his finger into her vagina. He wanted to arouse her. She did not object, nor did she push his hand away. The accused then crouched above the complainant and pulled down his shorts. The complainant's shorts had already been removed. He told her to take off her underpants. She refused. She told the accused that she did not want to have sex with him because he was too old for her. He started kissing the complainant again, in the hope that he could get her to change her mind. Something had changed though. She no longer responded when he tried to kiss her. She kept her mouth closed. The accused was still trying to find a way to get her to agree to have sex with him.
- [44] The complainant then suggested that they go for a swim in the pond, as they were very dirty. He agreed and stood up. He started walking towards the pond. He turned around and saw that the complainant was running away. She was still close enough that he could have caught her had he tried, but he was angry, so he let her go. The accused felt that the complainant was trying to set him up. He thought that she wanted him to chase after her. If anyone saw that they might think that he was trying to attack her.
- [45] The accused waited, and tried to calm down. He thought that the complainant would catch a bus home. After about 30 to 45 minutes he got on his motorcycle and rode away. Some 100 to 200 metres down the road, he saw the complainant with another man. He stopped next to them and asked her to get on the motorcycle. She did not respond, but asked, "Where is my school bag?" The accused scolded her for running away and leaving her school bag behind. He told her to wait while he returned to where they had been drinking. At the spot he could not find the bag. He did find her shorts though. He went back to the complainant and the other man and told her that he could not find her school bag. He gave her the shorts. He asked her if she was going to come with him. She refused. The accused asked the complainant if she was hungry.

She said that she was and told the accused to go and buy her some food. He said that he only had \$1 left, but he would buy her some ice blocks. He went to a nearby store and bought some ice blocks, which he took back to the complainant and the other man. The accused told the complainant to come with him. She again refused and said that she was going to the other man's house. The accused left.

- [46] Under cross-examination, the accused admitted that he had seen the complainant before at school, but had not had much to do with her. He had not spoken to her before that day. He said that his original plan had been to buy some sour toddy that he would drink later during a break at school. That plan changed after the complainant gave him the idea of going somewhere to drink. During their conversation on the motorcycle, the complainant told the accused that she was only going to school to collect her flash drive, after which she had planned to go drinking in Betio.
- [47] When asked if he thought it proper for a teacher to take a student out drinking, the accused responded that he was a human being. He said that he thought that it was not wrong as long as they were away from the school compound. He explained that, in his view, his obligation to look after his students only existed in the classroom. The accused said that he thought that it was not wrong to have sexual intercourse with the complainant, even though she was a student, as long as she was not wearing her school uniform.
- [48] When asked why he had chosen such a secluded location, the accused said that it was only because he did not want anyone to know that he was not at work.
- [49] The accused explained that, although he did not have very much to drink, he felt that it affected him more than normal, perhaps because of how much he had drunk the night before. The complainant had told him that she was very drunk, and did not want any more to drink. The accused did not want the drink he had bought to be wasted, but he also knew that he should not drink any more because he had to drive. He tried to get the complainant to drink more.
- [50] The accused rejected the suggestion that he had forced himself on the complainant. He did not assault her, and she consented to what he was doing. The accused pulled the complainant's shorts down, but could not remove them because they were too tight. The complainant removed them herself.
- [51] In answer to a question from the Court, the accused said that he did not have any formal teaching qualifications. He had completed Form 7, and had done some first year subjects for a Bachelor of Science in 2011. He was not a registered teacher.

- [52] That brought the defence case to a close.
- [53] 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 offences charged.
- [54] In order to convict the accused of the offence of unlawful sexual intercourse, I must be satisfied to the required standard of each of the following elements:
- a. the accused engaged in sexual intercourse with the complainant;
 - b. the sexual intercourse was unlawful.
- [55] In order to convict the accused of the offence of assault with intent to engage in unlawful sexual intercourse, I must be satisfied to the required standard of each of the following elements:
- a. the accused assaulted the complainant;
 - b. at the time of the assault the accused intended to engage in unlawful sexual intercourse with the complainant.
- [56] Sexual intercourse is defined under section 127A as being one of a number of acts involving penetration of, or contact with, the genitals or anus of another. For the purposes of this case, sexual intercourse includes the penetration, to any extent, of any part of a person's genitals by any part of the body of another person.
- [57] Sexual intercourse is unlawful if done without the consent, or an honest and reasonable belief in the consent, of the other person involved in the activity, other than for a genuine medical or law enforcement purpose. For the purposes of Part 16 of the *Penal Code*, a person consents to an activity only if the person freely and voluntarily agrees to the activity (section 128(1)).
- [58] An assault is an application of force to the person of another, either directly or indirectly, without the consent of that person.
- [59] The accused admits that he penetrated the vagina of the complainant with his finger. He denies that this act was done without the complainant's consent. He further denies assaulting the complainant with intent to have sexual intercourse with her without her consent. Counsel for the accused concedes that there is no question that the accused might have had an honest and reasonable, yet mistaken, belief that the complainant consented.

- [60] The complainant's assertion that the accused also inserted his penis into her vagina is not the subject of any charge. It is not taken into account in considering whether count 1 is made out.
- [61] Assessment of the evidence is not a competition between the complainant and the accused, nor is it a balancing act, but it is necessary for me to make a finding as to the complainant's credibility. The prosecution case rises or falls on my view of her evidence. While it is no longer a requirement that I warn myself of the dangers of convicting on a complainant's uncorroborated testimony,¹ it is still the case that I must consider her evidence very carefully. However, if I find her to be a credible witness, then it is open to me to convict the accused on her testimony.
- [62] In this case the complainant's testimony does not stand alone. There is evidence from Mweretaka, Miriam and Senior Constable John that is capable, if accepted, of supporting her version of events.
- [63] I observed the complainant closely as she testified, and I found her to be an impressive and credible witness. She remained consistent in her account of the various incidents and was not shaken under cross-examination. I also found the testimony of Mweretaka, Miriam and Senior Constable John to be credible. The complainant's demeanour and dishevelled appearance in the period immediately following her time with the accused is entirely consistent with that of a person who had been subjected to a sexual assault of the kind described by the complainant. The same can be said of the complainant's injuries as observed by Doctor Tanebu the day after the alleged attack.
- [64] While the accused need not satisfy me of anything, I do not accept the evidence he gave to the Court. Where his account differs from that of the complainant, I accept the complainant's evidence and reject that of the accused.
- [65] With respect to count 1, I am satisfied beyond reasonable doubt that the accused inserted his finger into the complainant's vagina and thereby had sexual intercourse with her. I am further satisfied that the complainant did not consent to the actions of the accused. Even if counsel for the accused had not conceded the issue, I would have been satisfied beyond reasonable doubt that the accused did not mistakenly believe that the complainant consented to his actions. Had he been so mistaken, there is no way that it was reasonable for him to hold such a belief.
- [66] With respect to count 2, I am satisfied beyond reasonable doubt that the accused assaulted the complainant by punching her in the face, holding his

¹ Section 11, *Evidence Act 2003*.

hand across her mouth and repeatedly punching her thighs. The complainant did not consent to these assaults. The accused committed these acts with intent to have sexual intercourse with the complainant without her consent.

[67] Having carefully considered the evidence before me, I am satisfied of the guilt of the accused on each of counts 1 and 2. I find the accused guilty on each count and he is convicted accordingly.

[68] I will hear counsel as to sentence.


Lambourne J
Judge of the High Court

