IN THE COURT OF APPEAL OF KIRIBATI — CRIMINAL APPEAL NO. 2 OF 2024
CRIMINAL JURISDICTION
HELD AT BETIO
REPUBLIC OF KIRIBATI

BETWEEN

THE REPUBLIC — Appellant

AND

TUITEKE IOANE — Respondent

Before: Sir Salika, JA
Nelson, JA
Khan JA

Date of Hearing: 5 December 2024
Date of Judgement: 13 December 2024

Case to be referred as: *The Republic v Tuiteke Ioane*

APPEARANCES:

Counsel for the Appellant: Ms A. Temaia
Counsel for the Respondent: Ms A. Takabwebwe

JUDGEMENT OF THE COURT

Background

[1] In the High Court, the Respondent faces 4 counts of having sexual intercourse with a girl under 15 years of age contrary to s.135(1) of the Penal Code Cap 67. At the close of the prosecution case, the Respondent made a 'no case to answer' submission based on the lack of evidence as to the age of the alleged victim.

Relevant Law

[2] In its judgement dated 29 August 2024, the High Court correctly identified age as an element of the offence and observed no birth certificate or other evidence of age was tendered by the prosecution. The Commissioner who heard the matter accepted the 'no case' submission and applying s.195 of the Criminal Procedure Code dismissed the charges.

[3] In doing so, the learned Commissioner relied on the Court of Appeal decision in *The Republic v Narayan and Loo* [2012] KICA 9 where the court upheld the decision of the trial court applying s.195 and dismissing the charges on a no case to answer basis.

[4] Section 195 of the Criminal Procedure Code provides as follows:

"Acquittal of accused person where no case to answer
If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit the accused".

[5] Significantly, this is in Part VI of the Code which is headed 'Procedure in trials before the Magistrates Court.' An indication that it applies only to trials in the Magistrates Court. Parts VII and VIII deal with the practice and procedure for trials in the High Court.

[6] In this court, the Respondent challenged the authority of *Narayan* submitting that the correct approach was followed by the High Court in *The Republic v Temeria* [2018] KIHC 31 where Lambourne, J pointedly refused to follow *Narayan* saying:

> "Counsel for the accused then applied for a ruling that the accused had no case to answer. He made his application by reference to section 195 of the Criminal Procedure Code. I pointed out to counsel that section 195 is located in Part VI of the Code – Procedure in trials before Magistrates' Courts. The relevant provision of the Code for trials before the Hight Court is actually section 256(1) (in Part VIII, Procedure in trials before the High Court on information). It appears that the Court of Appeal fell into the same error in its leading decision on submissions of no case to answer, *Republic v Edward Narayan and anor*[1]. This is significant,

[1] Court of Appeal Criminal Appeal 2/2012, unreported, 15 August 2012.

because Sections 195 and 256(1) take markedly different approaches to the issue. Section 195 of the Code provides as follows:

> **195 Acquittal of accused person where no case to answer**
>
> If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit the accused.

Whereas section 256(1) provides:

> **Close of case for prosecution**
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> **256(1)** When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court if it considers that there is no evidence that the accused or any one of several accused committed the offence, shall, after hearing, if necessary, any argument which the public prosecutor or advocate for the prosecution or the advocate or the other person defending him may desire to submit, record a finding of not guilty.

> For a 'no case' submission to succeed in a trial before the High Court, the court must conclude that there is no evidence that the accused committed the offence. This would appear to set a higher bar than even the approach taken in the leading English case of *R v Galbraith*.[2] The Court of Appeal in *Edward Narayan* considered that *Galbraith* had no application in Kiribati, and that a court here is entitled to weigh not only the sufficiency of the evidence against an accused person at the end of the prosecution case, but also the reliability of that evidence.[3] With respect to the learned Judges of the Court of Appeal, given that they were clearly labouring under the misapprehension that section 195 was the relevant section, we consider that we are not bound by the Court's decision in *Edward Narayan*".

[7] There are two matters that need to be noted: First and foremost, judges of the High Court have no, repeat, 'No' discretion to refuse to follow a decision of the Court of Appeal which under the laws of

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[2] [1981] 2 All ER 1060
[3] *Edward Narayan* at [7]

the Republic of Kiribati is the highest court in the land. They may in a respectful manner disagree with the views of the higher court, but at days end they are bound by and must follow the decision of the superior court. This is an important aspect of the common-law doctrine of *stare decisis* and is a fundamental cornerstone of the legal system that applies in the Republic of Kiribati. To allow lower courts to depart as they see fit from rulings of higher courts would be to invite chaos, unpredictability and disorder. Lambourne, J was clearly in error in this regard in *Temeria*. Although he then went on in paragraph 20 of his judgment to correctly apply the relevant test:

> "[20] The meaning of section 256(1) is clear – a submission of 'no case' can only succeed if there is no evidence at all that the accused committed the offence. This determination should be made by taking the evidence from the prosecution witnesses 'at its highest' and putting to one side any concerns I may have regarding the veracity of any or all of the witnesses."

[8] As this important principle was at stake and because appellant's counsel advised from the Bar that the High Court trial transcript was not completed and made available in a timely fashion, and there being no obvious prejudice to the Respondent, we granted leave for the Appellant to file its Notice of Appeal out of time. We also considered that the delay of three days in filing the Appeal was minimal

[9] The second matter of note is it is our respectful view that the power of the High Court to make rulings on a 'no case' submission rests not on s.256(1) but is derived from the inherent common-law jurisdiction of the High Court as a superior court of record and from s. 239 of the Criminal Procedure Code which provides:

> **"239. Practice of High Court in its criminal jurisdiction**
> Subject to the provisions of this Code and of any rules of court the practice of the High Court in its criminal jurisdiction shall be assimilated so far as circumstances admit to the practice of Her Majesty's High Court of Justice in its criminal jurisdiction and of Courts of Oyer and Terminer and General Gaol Delivery in England."

[10] The approach to be followed is well stated in the leading authority referred to by counsel of *R v Galbraith* [1981] 1 WLR 1039 at 1042:

> "How then should the judge approach a submission of "no case"?

(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury or where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[11] As there are no jury trials in this jurisdiction, for "jury" we must obviously substitute "judge" or "court". As explained by Speight, J in *Auckland City Council v Jenkins* [1981] 2 NZLR 363 in dealing with a no case submission in a traffic prosecution:

"A tribunal deciding whether or not there is a case to answer must decide whether a finding of guilt *could* be made by a reasonable jury or a reasonable judicial officer sitting alone on the evidence thus far presented. He is ruling in fact whether it is "prima facie" – a well understood phrase. A ruling that there is a prima facie case does not mean that of necessity if there is no evidence by way of rebuttal that a conviction must follow. It is merely that a conviction can properly follow and not be upset as being one which could not be made by a fact-finding tribunal acting reasonably."

[12] As to the meaning and effect of s.256(1), it would appear that in Kiribati, there is the further option available of a 'not guilty' finding if the circumstances outlined in s.256(1) are found to prevail.

The evidence

[13] The central question in this matter is whether applying the 'no case' test as aforesaid, the learned Commissioner reached the correct conclusion? In our respectful opinion, he did not.

[14] A close examination of the evidence reveals the following:

(i) In answer to questions in cross-examination, the alleged victim stated more than once that she was at the material time "attending JSS form 2,": see page 25 trial transcript. It is common ground that this is a reference to Form 2 of a Junior Secondary School.

(ii) This was also the evidence of the prosecution witness Takoaki Rurunga whose daughter was the victim's best friend. At page 33 of the trial transcript:

"A: Yes at first she told everything to my daughter because my daughter was her best friend in school. They were attending the JSS at that time, they were in form 2 at that time."

(iii) The same witness in her evidence several times referred to the alleged victim as a "child": see her answer to the first question she was asked page 32 of the transcript; see also page 34, 4th paragraph; page 35, 2nd paragraph; and page 36, 10th paragraph.

(iv) The prosecution witness Ekeuea Timau also referred in his evidence to the need to help "children who are in school and get in this kind of situation"; refer paragraph 39 of the transcript.

[15] We agree with the learned Commissioner that this is not strong evidence of actual age but it is nevertheless evidence that at the relevant time the alleged victim was a young female attending Junior Secondary School. It may be "weak evidence" as he says, but it is evidence nevertheless and all he is required to decide at this stage is whether there is prima-facie evidence that taken at its highest could reasonably form the basis of a conviction. The Commissioner recognizes this himself by describing it in his judgment as "evidence" albeit "weak evidence."

Conclusion

[16] The appeal must be allowed, the decision of the Commissioner is overturned and the matter is to be remitted back to the High Court for a re-trial.

[17] The Respondent is to be taken into custody forthwith to appear before the High Court at the earliest available date for trial.

DATED this 13 day of December 2024

Sir Salika, JA

Nelson, JA

Khan, JA