



IN THE HIGH COURT OF KIRIBATI 2012

CIVIL CASE NO. 85 OF 2011

	[TEROUTA BAAKOA	APPLICANT
	[
BETWEEN	[AND	
	[
	[ATTORNEY GENERAL IRO THE	
	[REPUBLIC OF KIRIBATI	RESPONDENT

Before: Hon Chief Justice Sir John Muria

8 August 2012

Mr Raweita Beniata for Applicant

Mr George Mackenzie for Respondent

JUDGMENT

Muria CJ: This is an application by the respondent to have the applicant's case struck out on the grounds of res judicata, an abuse of process and irregularity.

The case arose from a Magistrates' Court criminal proceedings in 2009 in Beru. In the 2009 proceedings, the appellant was charged with, tried and convicted of one count of Carrying an Offensive Weapon (knife) in Public and one count of Assault Causing Actual Bodily Harm. The appellant was sentenced to three years and six months' imprisonment on 28 April 2009. The appellant immediately served her sentence, first in Beru and later

transferred to South Tarawa where she continued to serve her sentence. She was released on bail on 4 September 2009 pending appeal.

The appellant appealed to the High Court against her conviction and sentence. On 24 September 2009, the High Court quashed both the conviction and sentence and ordered a re-trial in the Magistrates' Court. The re-trial was conducted on 4 September 2010 by a Single Magistrate in Betio, South Tarawa at which time the case against the appellant was withdrawn.

During the appeal in the High Court on 24 September 2009, the ground relied upon was that the trial before the Magistrates' Court was irregular. The minutes showed that the prosecutor gave facts and called no evidence. The appellant gave evidence. The Magistrates' Court simply accepted the facts as outlined by the prosecutor from the Bar table and convicted the appellant. The conviction clearly could not stand.

It appears that Originating Summons dated 23 September 2009 was also treated as the appellant's appeal against her conviction and sentence. It referred to as 'High Court Crim Appeal 10 of 2009' while the body of the document was headed 'Originating Summons'. The applicant subsequently filed another Originating Summons under O.58 r2 on 27 June 2011 with the same issues as those raised in the earlier Originating Summons.

RES JUDICATA

The respondent's case is that the issues now raised and relied on by the applicant are *res judicata*. Mr Mackenzie of Counsel for the respondent submitted that the matter had already been decided by the High Court in Crim. App. 10/09 and in the Magistrates' Court in the case Bet 614/2010 and as such the applicant is estopped from raising it again.

On the other hand, Mr Beniata of Counsel for the applicant contended that *res judicata* does not apply in this case. Counsel argued that the issues raised in the Originating Summons had not yet been dealt by the Magistrates' Court or by the High Court. The issues raised in the Originating Summons are:

1. Whether the failure of the Magistrates to afford a fair trial and due process to the Plaintiff before committing the Plaintiff to prison contravened her Constitutional rights in respect of which she is entitled to protection under Article 10 of the Constitution;
2. Whether the Plaintiff is entitled by way of redress to monetary compensation for the periods that she has spent in prison and for the periods that she has spent on South Tarawa awaiting the determination of her case;
3. Whether the High Court has jurisdiction under Article 17 of the Constitution to grant the Plaintiff redress in the form of monetary

compensation for an alleged contravention of her Constitutional rights.

It is true that the High Court dealt with the applicant's appeal on 24 September 2009. However, the High Court considered the appeal on the basis of the manner in which the Magistrate dealt with the case and found that the trial was irregularly conducted. No evidence was called by the prosecution to prove the charges. The Magistrate simply accepted the statement of facts from the prosecutor from the bar table. The High Court quashed both the conviction and sentence and ordered retrial.

The issues raised in the Originating Summons which were repeated in the subsequent Originating Summons were not considered by the High Court then. Those issues concern the claim by the applicant of breach of her constitutional right under Section 10 of the *Constitution* and her claim for redress under Section 17 of the *Constitution* for such breach. Those issues are still very much alive.

For the doctrine to apply in this case, the issues raised in the High Court in Crim. App. 10/09 and which are again the subject of the present application have been determined by the Court between the same parties. See *Attorney General –v- Baitongo Tirikai* (31/8/11) Civ. App. No. 5 of 2011. The issue of breach of the applicant's constitutional right and redress were raised in the High Court in 2009 but were never considered. Those issues have not yet been determined by the Court. As such the doctrine of *res judicata* cannot apply in this case.

It follows also that it is not an abuse of Court process for the applicant to seek the Court to consider and determine those same issues in this case.

In passing, let me remind the parties that it is highly irregular to appeal in a criminal case by way of an Originating Summons. Appeal is usually by way of "NOTICE OF APPEAL" and Originating Summons are for determination of issues in civil proceedings.

For the above reasons, the respondent's application is refused.

Dated the 28th day of March 2013

