

# IN THE HIGH COURT OF KIRIBATI 2017

CRIMINAL CASE NO. 48 OF 2017

	[THE REPUBLIC	PROSECUTOR
	[	
BETWEEN	[AND	
	[	
	[BANRENGA TEBANO	ACCUSED

Before: The Hon Chief Justice Sir John Muria

31 August 2017

*Ms Taaira Timeon* for the Prosecutor

*Mr Teetua Tewera* for the Accused

## REASONS FOR SENTENCE

**Muria, CJ:** The accused, Banrenga Tebano, had been charged with five (5) counts of embezzlement by servant, contrary to section 266(a)(ii) of the *Penal Code*. The accused pleaded guilty and had already been sentenced to two years' imprisonment, suspended in full for two years and announced on 31 August 2017. These are the reasons for the sentence which are now published for the record.

2. The accused was employed by the Kiribati Housing Corporation as a Cashier, responsible for receiving money on behalf of her employer and depositing them with the Bank. On five occasions, between 30 October 2015 and 24 May 2016, the accused received money for the Kiribati Housing Corporation totaling \$22,339.23. The various amounts received were not deposited into her employer's Bank Account. Instead the accused used the money for her own benefit.

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3. For the prosecution, it is submitted by Ms Timeon, that the accused committed a serious offence of fraudulently using her employer's money. The amount involved was substantial and that the accused had breached her position of trust. In such a case, it is submitted that the accused's sentence must be one of custodial.

4. Counsel relied on a High Court case of *Republic –v- Terara Katioua* (29 October 2001) High Court of Kiribati Criminal Case No. 45 of 2000. The accused in that case was a man who was employed as a Sales Manager for Abamakoro Trading Company. He embezzled \$9,850.26. He was married and his wife and eight (8) children depended on him. He was sentenced to two years' imprisonment.

5. Ms Timeon submitted that a similar sentence should be imposed on the present accused. Not only that because the offence was serious, but also to deter the accused and other would-be offenders from committing such an offence in the future.

6. Mr Tewera, on behalf of the accused, submitted that in the present case, the accused is in a different position to that of the accused in *Republic –v- Terara Katioua's* case. The present case is concerned with a mother who, if imprisoned, would have an adverse effect on her three children, one of whom has disability and one is only six months old. The third child is attending Class 1 at school.

7. Mr Tewera relied on the cases of *Republic –v- Tekabu* [1996] KIHC 7 and *Republic –v- Awerika* [1970] KILR 131. The latter case involved a man who was charged with larceny by servant contrary to section 266(b) of the *Penal Code*. He was convicted and sentenced to two years' imprisonment. The former case

involved a single mother employed by Kiribati Oil Company. She was charged with attempted larceny by servant contrary to section 266(a)(i) of the *Penal Code*. The prosecution subsequently entered a *nolle prosequi* on that charge. The accused was re-indicted for fraudulent falsification of accounts contrary to section 299(1) of the *Penal Code*. To that charge, the accused pleaded guilty.

8. Mr Tewera relied on **Tekabu's** case to support his submission that it would be inappropriate to send a mother to prison because she needs to care for her disabled child and her six months old baby.

9. There can be no doubt that the offence of embezzlement by servant is a serious matter. It is so serious that the law stipulates a maximum sentence of 14 years' imprisonment that can be imposed on any person who is found guilty and convicted of the offence. Mr Tewera did not seek to persuade the Court otherwise of the seriousness of what the accused had done. Counsel simply focused on the submission that the circumstances of the present case justify a wholly suspended imprisonment sentence.

10. The cases cited by Counsel in their submissions tend to show a common stand taken by the courts in this jurisdiction that an offence of the nature with which the accused had been charged merits custodial sentence in the range of two years. But each case must be considered on its circumstances.

11. Sentencing is not a mathematical exercise. Rather it is a balancing exercise, weighing the circumstances of the offence against those of the offenders. It is in this balancing exercise that the ingenuity and professional skills of a sentencing judge that are brought to bear.

12. In the present case, I feel that there are three factual circumstances that need to be taken into account when considering the appropriate sentence to be

passed on the accused. The first is the circumstances of the offence. The second is the circumstances of the offender (accused). The third is the circumstances of those who would be affected by a custodial sentence of the accused. This is more pressing when it comes to sentencing a mother who has dependent children of tender years or with special needs.

13. The first and second circumstances are all too familiar to sentencing judges. I need not traverse them here. Suffice to say, that I have taken them into account as well in this case.

14. The third factor, that is, the circumstances of those who would be affected by a custodial sentence imposed on the accused, that I feel needs discussion. However, as each case is different, this third factor must be considered in the light of the factual circumstances of the present case.

15. The accused is a mother of three young children. The eldest child is eight years old and disabled. She is attending a Special School for People with Special Needs in Bikenibeu. The second child is six years old and attending Primary School, Class 1. The third child is a six-month old baby and still breastfeeding. Against those background factual circumstances, the Court must determine what, not only is appropriate but just and fair sentence, should be imposed on the accused.

16. Apart from the circumstances of the offence and the accused, at the forefront in the present case are the interest of the accused's children and the impact of a custodial sentence on the mother would have on her young children, one of whom is a child with special need and another, still breastfeeding. A sentence of imprisonment, clearly, would result in the separation of the children from their mother. Not only that the consequences of such a forceful separation would be severe on the children but also that the Court would be ignoring the

protection accorded to the children as preserved under the *Convention on the Rights of the Child (CRC) 1989*.

17. Kiribati has ratified the *Convention on the Rights of the Child* and would be obliged to pay heed to the implementation of the rights of the child as provided under the *Convention*. Article 3(1) of the *Convention on the Rights of the Child* provides:

**“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.**

18. I need only add that in *R (on the application of P and Q) –v- Secretary for the Home Department* [2001] EWCA Civil 1151 Lord Phillips emphasized the point that in sentencing a mother with dependent children, the rights of the child have to be weighed against the seriousness of the offence as a matter of balancing exercise. That principle, in my respectful view, applies equally in the circumstances of Kiribati.

19. The Courts in Kiribati are therefore obliged to take into consideration the rights and interest of the children of the accused in this case.

20. In the light of the above reasons the appropriate sentence of the Court is that which was already announced on 31 August 2017.

Dated the 28<sup>th</sup> day of October 2020

