

KIRIBATI COURT OF APPEAL

DIGEST OF SELECTED DECISIONS 1979 - 2017

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Civil Procedure

Abuse of Process

Application to strike out appeal on grounds that costs awarded to Appellant in other proceedings involving respondent have not been paid – argued that it is an abuse of process to allow appeal to continue – application dismissed – proper course is for respondent to take appropriate steps to enforce costs orders – not appropriate to seek to recover payment by applying to strike out appeal (*Teannaki v Attorney-General* [2001] KICA 8).

Amendment of Claim

Attorney General in respect of Minister of Public Works & Utilities sued respondent claiming damages for breach of contract – Attorney-General sought to amend statement of claim – respondent opposed unless it was awarded costs – s.8(2) Government Liability Act 2010 did not bar such an award as it was about claims *against* the Government only (*Attorney-General iro Minister of Public Works & Utilities v Waymars Trading Co Limited* [2013] KICA 5).

Appeals to Court of Appeal

Appeals in land cases are civil appeals under s.10(1)(6) Court of Appeal Act (*Uriam v Uriam* 2006] KICA 5).

Appeal from decision of High Court on appeal from Magistrates' Court restricted to question of law only by s10(1)(a) Court of Appeal Act 1980 – s15 of that Act applies only to an appeal “made under the provisions of this part of this Act” – appeal not involving question of law is not an appeal to which s.15 applies (*Teenga v Teenga* [2008] KICA 6).

Failure by appellant to apply for fixing of security for costs under r.17 Court of Appeal Rules – appeal stayed and listed for dismissal – no application for extension of time – adjournment refused and appeal dismissed (*Uaai v Tong* [2015] KICA 3).

Court of Appeal's power to hear appeals from land causes, as conferred by amendment to s79 Magistrates' Court Ordinance in 1990, was not retrospective – no power to hear appeal against decision made in 1989 (*Atera v Taketau* [2008] KICA 4).

High Court refusing to allow an appeal to be re-opened after it had been struck out – where Judge after leaving argument refuses to allow re-opening of appeal, it stands dismissed and dissatisfied party is limited to whatever rights of appeal it has – s10(1)(b) Court of Appeal Act 1980 confines appeal to question of law only – manner of exercise of judicial discretion not a question of law only (*Nakareke v Nenebo* [2010] KICA 16).

Leave to appeal needed for appeal against interlocutory decision of High Court (Court of Appeal Act s10(2)(f)) – High Court exercising discretion – Court of Appeal will only interfere if it can be shown High Court considered irrelevant matter, left out of account relevant matter, erred in law or applied any wrong principle (*Taberu v Redfern* [2002] KICA 1).

Proceedings in the High Court for certiorari directed to decision of Magistrates' Court in its land jurisdiction not an appeal – therefore appeal against High Court's decision is a general appeal, not a second appeal on point of law only (*Uouo v Tooki* [2008] KICA 7).

Attachment Order

High Court making attachment order on debtor's account with KPF – on learning that debtor had already given KPF a pledge as security High Court recalled its earlier order and made the attachment expressly subject to the pledge – judgment creditor appealed – held debateable whether High Court entitled to vary its order but amendment in fact unnecessary – prior charge had priority over attachment order – appeal dismissed (*Development Bank of Kiribati v Bank of Kiribati* [2009] KICA 13).

Consent order

Judgment entered against appellants by consent – one of church trustees then seeking to appeal claiming irregularity in that s6(1) Religious Bodies Registration Ordinance required all trustees to be sued – appeal dismissed because consent order can only be set aside by fresh action (*Church of God v Temaera* [2011] KICA 7).

Constitutional redress – nature of claim

Criminal convictions of respondent had been quashed - claim under Articles 10 and 17 of Constitution for compensation for breach of right to fair hearing – properly directed to Attorney-General – s4(5) Proceedings By and Against the Republic Act read consistently with Article 10 refers to liability in tort – claim for constitutional breach not a claim in tort – claim properly commenced by writ and statement of claim (*Attorney-General v Teraoi* [2013] KICA 4).

Further Evidence on Appeal

Admission of further evidence on appeal under Order 60 r.15 High Court (Civil Procedure) Rules – principle stated in *Ladd v Marshall* [1954] 1 WLR 1489 – land claim seeking determination of boundary – further evidence photographs obtained from SOPAC in Fiji – no attempt to get them at time of trial – available if reasonable diligence had been used – photographs would not have had important influence on result if admitted in evidence – High Court erred in exercise of discretion by admitting the evidence on appeal from Magistrate's Court – appeal allowed (*Tataua v Attorney-General* [2013] KICA 15).

Interest

After a damages award the High Court ordered payment of interest at 5% from original date of judgment until payment – payable as of right under s.17 Judgment Act 1838 (UK) – without need for pleading – 5% interest rate accepted as appropriate despite departing from rate mentioned in statute (*Attorney-General v Kee* [2011] KICA 8).

Judgment by default

Defendant inadvertently failed to appear at hearing where judgment entered for plaintiff – defendant's remedy is to apply for re-hearing in trial court – appeal dismissed (*Central Pacific Producers Ltd v Favae* [2016] KICA 9).

Respondent obtained judgment by default against appellant for price of goods sold and delivered – goods seized and sold under writ of fieri facias to satisfy debt – appellant then applying to have judgment set aside – High Court dismissed application – discretion under r.12 High Court (Civil Procedure) Rules 1964 to be exercised as it is at common law – unfettered discretion – in determining whether there may have been a miscarriage of justice and where overall justice lies, there are three dominant considerations: whether a defendant has a substantial defence, whether defendant's failure to take steps or appear at hearing is excusable and whether plaintiff will suffer irreparable harm if judgment set aside – onus of establishing substantial defence on defendant – appeal dismissed (*Waysum Kum Kee v Abamakoro Trading Ltd* [2001] KICA 9).

Jurisdiction of Magistrates' Court

No jurisdiction to rehear or review a matter which has been heard and decided in another court of equal jurisdiction (*Kauanga v Ria* [2001] KICA 2).

Plaintiff seeking injunction in Magistrates' Court to stop defendant from performing a sub-contract for electrical work alleging that defendant was unlicensed – Magistrates' Court ordering him to stop work – application to High Court for stay of judgment – High Court holding Magistrates' Court had no jurisdiction and quashing its order – High Court should not have made an order without hearing the parties – but High Court correct that Magistrates' Court had no jurisdiction – para 3 of Schedule 1 of Magistrates' Courts Ordinance empowered granting of injunction only where that court already had jurisdiction – no contractual relationship or civil wrong between parties – plaintiffs' appeal dismissed (*Tetabea v Lameko* [1990] KICA 4).

Legal representation

A person is denied right to fair hearing guaranteed by s10(8) of Constitution if he is denied right to be legally represented by a person qualified and available to appear – such right is not necessarily denied because a person is not allowed to be represented by a person who is not within the jurisdiction and not qualified to appear there (*Attorney-General v Orme & Reiher* [1989] KICA 2).

Recall of Court of Appeal Judgment

In extremely rare circumstances Court of Appeal has jurisdiction to recall one of its own judgments: r 6 Court of Appeal Rules, Order 63 r 5 High Court Rules (*Teebita v Teuna* [2010] KICA 15).

Res judicata

Vessel unlawfully detained by Police at Kirimati Island – owner’s claim against Attorney-General in respect of Commissioner of Police settled after judgment given for owner – owner’s claim did not include indemnity for claims by crew members – crew members then suing owner who sought indemnity from Attorney-General – pleas of res judicata by Attorney-General did not succeed against crew members because they were not parties to owner’s claim but succeeded against owner because under Rule in *Henderson v Henderson* (1843) 3 Hare 100, he should have included his claim for indemnity in his own action against the Attorney-General (*Attorney-General iro Commissioner of Police v Tirikai* [2011] KICA 3).

Claim for compensation under Articles 10 and 17 of Constitution for alleged breach of claimant’s right to fair hearing in criminal proceedings – claimant’s convictions had been quashed – Attorney-General pleading res judicata or issue estoppel arising in the proceedings – plea not upheld - Magistrates’ Court and High Court in criminal proceedings not courts of competent jurisdiction for purpose of awarding compensation and did not determine any issue needing determination in the civil proceedings – rule in *Henderson v Henderson* (1843) 3 Hare 100, 115 not applicable (*Attorney-General iro Republic of Kiribati v Baakoa* [2013] KICA 6).

Security for costs on appeal

Security fixed under r 17 Court of Appeal Rules but not paid and no application made for dispensation - r 17(2) requires dismissal unless Court directs otherwise – respondent could not be expected to wait another year for finality – adjournment refused and appeal dismissed (*Takinoa v Republic* [2006] KICA 2).

Unfair hearing

Claim for damage to motor vehicle – High Court ruling that each party could call only one witness as to loss – no attempt by Judge to make proper assessment of relevance and probative value of evidence sought to be called – not a fair hearing – appeal allowed (*Bobotin Kiribati Ltd v Meita* [2010] KICA 20).

Compulsory Acquisition of Land

Compensation

Market value of land under s.16 State Acquisition of Lands Ordinance (Cap 95B) – includes value of improvements on the land which were fixtures and had become the property of the landowner though erected by a sub-lessee – payment of compensation to a sublessee did not reduce landowner's entitlement (*Attorney General v Teenga* [2001] KICA 20).

Land used for growing coconut trees – value of trees – difficulty of assessing damages after liability established not relieving court from doing its part to assess them – deduction for contingencies including disease, destruction and crop failure (*Attorney-General v Koriri* [2007] KICA 20).

Constitution

Section 8(1)(c)(ii) of Constitution requiring provision to be made by law applicable to taking of possession or compulsory acquisition of property of any description to secure to any person having interest in or right over the property a right of access to the High Court for determination of the interest or right or legality of taking of possession or acquisition and the amount of any compensation – s.13 State Acquisition of Lands Ordinance 1954 held not to be in accordance with s.8(1)(c)(ii) and requiring modification under s 5(2) Kiribati Independence Order 1979 so that a claim for the determination of the legality of the taking of possession or acquisition of property is comprehended by its terms – notice given under s 8 of Ordinance invalid because it did not state that the land was in the opinion of Minister urgently required for a public purpose (*Teenga v Attorney-General* [1998] KICA 5).

Constitutional Breach

Fair Trial Breach

Magistrates' Court committing respondent to prison for six months' for contempt – released on bail for two and a half months – High Court holding proceedings in Magistrates' Court irregular and term of imprisonment far too severe – High Court awarding redress of \$1,250 for respondent for breach of his right to fair trial under s.10 of Constitution – High Court decision upheld – constitutional redress remedy reserved for rare cases of fundamental subversion of rule of law – conventional processes of review, rehearing and/or appeal will normally provide adequate remedy – scrupulous observance of natural justice requirements important when committal for contempt is in contemplation – serious procedural irregularities – respondent had no access to legal advice until brought to Tarawa from Nikunau two months after committal – appeal dismissed (*Attorney-General v Mbwe* [2006] KICA 3).

Delay – see **Criminal Procedure** *Attorney-General v Li Jian Pei* [2015] KICA 5).

Legal representation – see **Civil Procedure** *Attorney-General v Orme & Reiher* [1989] KICA 2.

Nature of constitutional redress claim – See **Civil Procedure** - *Attorney-General v Teraoi* [2013] KICA 4.

Constitutional Law

Government borrowing by bank overdraft and paying interest to bank – government entitled to borrow in accordance with written law (Public Finance (Control and Audit) Ordinance 1976, s.22(1) – s.2 Government Borrowing and Guarantee Ordinance 1973 is a written law authorising borrowing – s.22(2) Public Finance (Control and Audit) Ordinance authorises borrowing on fluctuating overdraft – borrowed moneys must be paid into Consolidated Fund (s.4) – interest and principal repayments are statutory expenditure and must be brought into annual estimates but are not to be included in Appropriation Bill (ss108(2) and 109(1)and(2) of Constitution) – payment of interest authorised by s.22(5) Public Finance (Control and Audit) Ordinance (*Attorney-General v Tito* [2007] KICA 14).

Contract

Debtor and creditor

Claim for repayment of loan – onus of proving payment on debtor (*Tekabeia v Korere* [2016] KICA 10).

Interpretation

Interpretation of contract to be ascertained by adopting the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract – background includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable person, except the previous negotiations of the parties and their declarations of subjective intent – plain and ordinary meaning of term in contract can be given another meaning when considered in context and against permissible background facts (*Unikannara v Catholic Beterin Ambo* [2007] KICA 9).

Undue influence by third party

Respondent sold ship to appellant receiving part of price – proceedings by respondent to enforce payment of balance met by defence that Minister with responsibility for appellant, a state owned company, had put pressure on appellant's board to force it to purchase the ship – High Court accepting Minister exercised influence over Board but found no evidence respondent knew of this and entered judgment for respondent – offer and acceptance to be assessed objectively – if purchaser outwardly conducts itself in a way making it reasonable for vendor to conclude purchaser is accepting vendor's offer to sell, it is immaterial whether purchaser privately had other intentions – vendor not concerned to inquire into purchaser's motivation in communicating acceptance – appeal dismissed (*Kiribati Shipping Services Ltd v Waysanj Kum Kee* [2009] KICA 15).

Co-operative Societies

Judgment creditor of insolvent society obtaining writ of fieri facias and proposing to take possession of society's property and sell it – society's registration cancelled and liquidator appointed – Attorney-General obtaining stay of execution from High Court – s.49 Co-operative Societies Ordinance providing for order of application of funds of society whose registration has been cancelled – no basis for excluding judgment creditor whose judgment has not been fully executed from order of distribution prescribed by s.49 – High Court's stay order not contrary to s.48 as it was not concerned with dissolution but with ensuring dissolution proceeded according to law – appeal dismissed (*Defiance Mills Ltd v Attorney-General* [1997] KICA 26).

Costs

Ministry acting as unofficial receiver of insolvent government-owned company and assuming obligation to meet amounts due to company's creditors from funds held on behalf of company – costs awarded against Ministry – award previously made against company – High Court not first satisfying itself that there were funds held by Ministry available for attachment – appeal allowed and matter remitted to High Court for consideration (*Attorney-General iro Ministry of Finance and Economic Development v Global Imports and Exports Ltd* [2012] KICA 2)

Crime

Abuse of office

(s.90(1)) Penal Code) – “right of another” refers to both public (ie government or a department of government) and private rights – when a payment is made to person other than the one who has a right to receive it, the rights of the latter are prejudiced – s 157 Criminal Procedure Code deals only with cases in which a person charged with a greater offence may be convicted of a lesser offence i.e. are constituted by same, but not all of, the elements of the offence charged – s.250(1) Criminal Procedure Code does not authorise High Court on appeal to make an order which would have been beyond the power of Magistrates’ Court (*Republic v Bauro* [1988] KICA 6).

Accomplice

Courts reluctant to act on uncorroborated evidence of accomplice because of danger it may be unreliable – Judge sitting alone, being aware of such danger, may nevertheless convict – any person deemed by s 21 Penal Code to have taken part in commission of the offence is an accomplice (*Republic v Taburuea* [1989] KICA 5).

Larceny – need for care in accepting uncorroborated evidence of accomplice – inappropriate intervention by trial Judge - guilty verdict unsatisfactory – appeal allowed (*Robwati v Republic* [2006] KICA 8).

Trial Judge failing to make reference in judgment convicting appellants of making false entry in a book (s 299(1) Penal Code) that a prosecution witness was an accomplice and of danger of conviction on such evidence unless it was corroborated – point of such importance that Judge’s failure to deal with it expressly in reasons will lead appeal court to hold there has been a miscarriage of judgment – but no substantial miscarriage and proviso to s.22(1) Court of Appeal Act applied – appeal dismissed (*Tekanene v Republic* [1998] KICA 6).

Admissibility of Evidence

Forgery (s.334(1)) Penal Code, Cap 6) and embezzlement by clerks or servants (s.266(a)(ii) – reliance by prosecution on photocopies of receipts and cashbook – photocopies not rejected at common law solely on ground they are not best evidence – therefore admissible unless excluded by s.35 Evidence Act 2003 or for other good reason – witness gave evidence of examining original cashbook – receipt, a primary record of a single transaction, is not a “book of account” as defined in s.32 which relates to secondary records – photocopies admissible - sentence of 10 years’ imprisonment upheld – sums involved in excess of \$100,000 – no plea of guilty or proposal for repayment – appellant a state servant (customs officer) – serious breach of trust – appellant un-cooperative – no remorse – appeal dismissed (*Teeta v Republic* [2008] KICA 1).

Arson

(s.312(d) Penal Code, Cap 8) – proof of common intention to prosecute unlawful purpose in conjunction with others (s.22) is often a matter of inference to be drawn or deduced from proved overt acts of accused which clearly show an apparent criminal purpose in common

between them, and if some positive act of assistance or involvement in the commission of a crime is voluntarily done, with knowledge of the circumstances, that is sufficient to support a conviction – statement by accused in a confession to Police made after the happening of the alleged crime cannot be treated as an act or declaration made in pursuance of a common design to prove the existence of a common intention – not essential for prosecution to prove ownership by virtue of s.120(c)(i) – setting fire to mine equipment – principle offenders sentenced to three years’ imprisonment and others present and assisting to 18 months’ imprisonment – sentences upheld (*Tenikomū v Republic* [1979] KICA 2).

Carrying on business contrary to Foreign Investment Act 1985

Carrying on business contrary to s.18(1) Foreign Investment Act 1985 and contravening condition of residency permit contrary to s.23(1)(k) Immigration Ordinance – prosecution appeal against acquittal – foreign national defendant – his Kiribati wife’s evidence that he was selling goods on behalf of business owned by her – sales persons not ordinarily described as dealing in stock they are selling – Act not criminalising conduct of employees and volunteers assisting in business – defence evidence not rebutted – immigration charge framed as related to business owned by defendant and failed for same reason – appeal dismissed (*Republic v Roy* [2017] KICA 5).

Contempt of Court

Showing disrespect within premises in which judicial proceedings are being had or taken, showing disrespect with reference to proceeding contrary to s.115(1)(a) Penal Code, Cap 65 – defendant arguing rudely with Bench of Magistrates after delivery of their decision in land case but before Court adjourned – appeal to High Court dismissed – second appeal on point of law only (s.21(1) Court of Appeal Act 1980) – proceedings still being “had or taken” when proven disrespect shown – appeal dismissed (*Tabwewa v Republic* [2017] KICA 8).

Customs Offences

Making false statement in matter relating to customs laws, contrary to s.134(1) Customs Act – customs officer falsely certifying goods to have been cleared from customs – defence of good faith actions under s.126(1) rejected – no honest belief that actions were within boundaries of duty or office (*Taabu v Republic* [2006] KICA 10).

Intimidation

(s.30(1)(b) Public Ordinance Cap 95) “person” in s.30(1)(b) must be construed in accordance with s.3 Interpretation and General Clauses Ordinance (Cap 1) – immaterial that prosecution did not prove British Phosphate Commissioners were natural persons or a body corporate or unincorporate (*Kaburoro v Republic* [1979] KICA)

Murder

Joint criminal enterprise – reference to Court of Appeal under s.20(1) Court of Appeal Act 1980 after acquittal – guidance given on operation of s.195 Penal Code where accused involved in joint criminal enterprise and death ensues from use of lethal weapon – where

evidence does not establish which of participants used the weapon, if its use was foreseen by the participants all are guilty of murder notwithstanding that the particular participant who administered the fatal blow cannot be identified – but if the participants did not foresee the use of a weapon of this type, none are guilty of murder even though they may individually have committed offences in the course of the attack (*Republic v Tabuki* [2001] KICA 5).

Provocation reducing murder to manslaughter - Judge must decide as matter of opinion, whether a reasonable man might have reacted to the provocation as the accused did – “reasonable man” means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today, i.e. the position of the ordinary citizen in the society of Kiribati as it is today – unproved customs or traditions of a village community not to be taken into account unless in the circumstances judicial notice can be taken of the custom – evidence that accused had time to cool off is one of the matters to be considered but does not result in any binding presumption or rule of law (*Republic v Bauro* [1988] KICA 5).

Provocation reducing murder to manslaughter - dual test: (1) was accused actually provoked into losing his self-control as a result of which he committed the act which killed the deceased? and (2) was the provocation such that it was capable of causing an ordinary person to lose self-control and to act in the way the accused did? Burden of negating provocation lies on prosecution – High Court had found appellant had desire for revenge against deceased which was inconsistent with provocation – Court of Appeal holding that circumstances which induced a desire for revenge may also lead to loss of self-control – immaterial that appellant sought revenge if he in fact lost self-control – appeal allowed – conviction for manslaughter substituted (*Mataroa v Republic* [1998] KICA 2).

Chairman of village association promoted attack on three families and arranged transport for participants though not personally present – member of one of the families was killed – appellant counselled the committing of an offence under 25 (1) Penal Code – finding that death of a victim of group attack was a probable consequence of his counselling upheld under s23 (*Tarabo v Republic*) [2006] KICA 12).

Whether act of intoxicated defendant was intentional - where no direct evidence and prosecution rely on inference to be drawn from other evidence, it must show not only that the inference is rational, but that it is the only rational inference that the circumstances allow and must rest upon more than mere conjecture (*Tamaroa v Republic* [2009] KICA 21).

Conviction on basis of s.22 Penal Code (Cap 67) – appeal on basis appellant did not share with co-defendant, who struck fatal blow, a common intention to prosecute an unlawful purpose of such a nature that murder committed by co-defendant was a probable consequence – original purpose can be changed or extended – co-defendant and appellant went beyond original purpose by continuing assault with use of stone by co-defendant – open to trial judge to find appellant responsible in law for probable consequence of use of stone - appeal dismissed (*Tanaea v Republic* [2013] KICA 14).

Powers of Search

Warrantless search of yacht – High Court ruling no case to answer because police officers had no authority to conduct search that revealed unlawful dangerous drug (cannabis) – dismissal of charges amounted to acquittal against which prosecution could appeal under s.18A Court of Appeal Act 1980 – s.45 Police Powers and Duties Act 2008 gave power of warrantless search of vehicle (defined to include a vessel) if police officer suspected, on reasonable grounds, the presence in the vehicle of something that might be an unlawful dangerous drug – power of seizure of drug – appeal allowed – acquittal set aside and charges remitted to High Court for hearing (*Republic v Afonso* [2017] KICA 7).

Reasons of trial Judge

Observations on approach appellate court should take on appeal challenging a finding of fact by trial Judge and on the drawing of inferences of fact – trial judge had opportunity of assessing overall probabilities in light of evidence given and in better position to make assessment than appeal court – no grounds for concluding he had failed to use or misused the advantage of seeing and hearing the witnesses – insufficient evidence to require trial Judge to consider possibility appellants were acting in defence of a co-accused (*Obaia v Republic* [2003] KICA 1).

Verdict need not be supported by elaborate reasons – decision to acquit or convict needs to be made without much delay – careful consideration needed but not long explanation – failure to deal expressly with point or argument of importance or demonstrably faulty chain of reasoning may lead appeal court to hold there has been a miscarriage of justice – Judge did not misuse advantage of seeing and hearing witnesses or act on evidence inconsistent with facts uncontrovertibly established by other evidence – appeal against conviction for indecent assault dismissed (*Kabeia v Republic* [2003] KICA 2).

Conviction of defilement on uncorroborated evidence of 11 year old girl – caution required but s.11 Evidence Act 2003 provides that corroboration not required – trial judge satisfied himself complainant knew she must tell the truth and warned himself he must think carefully before convicting on uncorroborated evidence – experienced at judging in Republic and must have been aware of culture differences and interpretation problems – where question of fact has been tried by judge without jury and it is not suggested he has misdirected himself, appellate court in reviewing record of evidence should attach greatest weight to his decision because he saw and heard the witnesses – judgment should not be disturbed unless plainly unsound - appeal dismissed (*Kaiaia v Republic* [2011] KICA 20).

Crime - Sentencing

Abduction

Wrongful confinement (s.248 Penal Code) – 18 year old female accepting appellant's invitation for a lift home in his car – he refused to let her out when she requested on two occasions – four months' imprisonment – no guilty plea – appellant a member of Parliament who would lose his seat under s.58(1) of Constitution as a result of imprisonment – betrayal of trust of schoolgirl – fear and distress caused to her – sexual undertone – appeal dismissed (*Uaai v Republic* [2004] KICA 6).

Arson

Malicious damage to property and unlawful wounding – attack by 20 people on house, missiles thrown at occupants inflicting injuries, house set alight – sentences of nine years' imprisonment reduced to five years for appellants with previous convictions for similar offending and three years for other appellants (*Taungea & 7 others v Republic*[1990] KICA 5).

See Crime – Arson – (*Tenikomū v Republic* [1979] KICA 2).

Burglary

Breaking with intent to commit a felony (s.294(b) Penal Code, Cap 6)) – fact that a police officer has not acted to stop commission of offence does not result in a prohibition on prosecution of offender – sentence of 12 months' imprisonment upheld (*Timeon & Butiaua v Republic* [1989] KICA 6).

Careless driving causing death

Sentencing Court failed to cancel offender's driving licence as required by s.56 Transport Act 2002 in case of serious traffic offence – “serious offence” in s.4(1)(e) Transport Act 2006 included careless driving causing death – appeal allowed – disqualification for one year (*Republic v Mereke* [2013] KICA 13).

Guilty plea - sentence of 18 months' imprisonment and three years' disqualification from driving upheld – if defendant wished to dispute meaning of “speedy manner” in Summary of Facts in respect of which he pleaded he should have sought to have question determined under s.269 Criminal Procedure Code by sentencing judge (*Kanooa v Republic* [2014] KICA 3).

Causing grievous bodily harm with intent

Assault on pregnant wife by beating and biting her – permanent disfigurement of face – guilty plea – three years' imprisonment upheld (*Toakarawa v Republic* [2006] KICA 9).

Prosecution appeal against sentence of two years' imprisonment – manifestly inadequate – guidance from *R v Taueki* [2005] 3 NZLR 372 (CA) – use of knife – sentence of three and half years substituted (*Republic v Teriao* [2013] KICA 12).

Sentences of 12 months' imprisonment suspended for 12 months – defendant youths aged 22 and 19 attacked smaller 15 year old boy punching and kicking him causing injuries – early guilty pleas and previous good character – appeal by Attorney-General allowed – suspension of sentences quashed. (*Republic v Dan* [2014] KICA 4)

Dangerous driving causing death

Defendant under influence of alcohol drove truck on wrong side of road, knocking down and running over a pedestrian killing him and then drove away without stopping – acquitted of murder but convicted of dangerous driving causing death – sentenced to life imprisonment – on appeal, sentence quashed and replaced by sentence of 13 years' imprisonment – s.13(5) Traffic Act 2002 required minimum sentence of 10 years imprisonment – eligibility for parole under s.11 Parole Board Act 1986 after half sentence served (*Tenubobo v Republic* [2011] KICA 15).

Defilement of girl under 13

Defilement of girl under 13 (two offences) and assault occasioning actual bodily harm – sentence of 10 years' imprisonment – appellant aged 50 having intercourse twice with 12 year old relative and punching her in mouth on second occasion – offences of about same seriousness as rape – sentence reduced to seven years (*Kimaere v Republic* [2005] KICA 5).

Embezzlement by employee

Fraudulent falsification of accounts and forgery – three years' imprisonment reduced on appeal to two years (*Tooma v Republic* [2006] KICA 7).

Misappropriation of \$23,906 by employee of bank – plea of guilty to five charges of fraudulent falsification of accounts, forgery, obtaining money on forged document and larceny – 18 months' imprisonment – bank no longer out of pocket after restitution funded by appellant's relative – no previous convictions – but course of criminal conduct over extended period and sentence modest – appeal dismissed (*Iuta v Republic* [2011] KICA 14).

Appellant a 49 year old woman of previous good character had stolen over \$58,000 from her employer, a bank, over nearly a four year period, giving most of the money to relatives – ability to repay large part from her savings – bank detected offending in 1996 – appellant immediately made written confession but prosecution not commenced until 2003 – High Court imposed sentence of three years' imprisonment but suspending it, overlooking s.44(1) Penal Code which enables suspension only where sentence is for not more than two years – although three year sentence would be unexceptionable in crime of this magnitude, Solicitor-General agreed a suspended sentence should be imposed – appeal allowed and two year suspended sentence substituted (*Neeti v Republic* [2004] KICA 3).

See **Crime – Admissibility of evidence** (*Teeta v Republic* [2008] KICA 1) and **Crime – Sentencing – Previous conviction of felony** (*Toora v Republic* [2005] KICA 6).

False entries

False entry in Land Court records (s.299(1) Penal Code) and obtaining money by false pretence (s.301(a)) – land court record altered in order to obtain loan of \$1000 – appellant a Court Officer – effective sentence of one years’ imprisonment upheld (*Tabuia v Republic* [1997] KICA 14).

Two offences under s.299(1) Penal Code of making false entries in land court records purporting to show transfer to appellant and wife – done to obtain loans on security of land totalling \$18,500 – appellant a court official – effective sentence of two years’ imprisonment upheld (*Temwea v Republic* [1997] KICA 11).

Falsification of accounts

Falsification of accounts (s.299 Penal Code) and false pretences (s.301(a)) – appellant employed in Accounts Section of Government Ministry – obtaining \$5,467 by falsifying pay sheets and payment vouchers – no guilty plea – no attempt to repay in three years since discovery – no contrition – effective sentence of 18 months’ imprisonment upheld (*Isopo v Republic* [1990] KICA 6).

See **Crime Sentencing – fisheries offences** and **Sentencing Methodology – Fines**

Fisheries offences – see **Crime – Sentencing Methodology - Fines**

Indecent assault

Early plea of guilty to two counts of indecent assault and defilement of girl under 13 – appeal by prosecution against term of two years’ imprisonment – manifestly inadequate – increased to five years’ imprisonment for defilements and, concurrently one and half years’ imprisonment for indecent assaults (*Republic v Arawaia* [2013] KICA 11).

Circumstances very close to rape – sentence of two years three months’ imprisonment upheld (*Tokiau v Republic* [2006] KICA 26).

Conviction for defilement of girl under 13 years of age set aside on appeal and conviction for indecent assault substituted – lack of proof of penile penetration – sentence of five years’ imprisonment imposed by Court of Appeal concurrently with sentences for abduction and causing grievous bodily harm with intent – four year old girl caused severe vaginal injury – previous convictions – community requiring protection from appellant (*Tetaua v Republic* [2002] KICA 7).

Killing unborn child

Killing unborn child contrary to s.214 Penal Code and concealing birth of child contrary to s.213 – prosecution appeal against concurrent sentences of two years’ and six months’ imprisonment fully suspended – unusual circumstance that although defendant admitted by plea she intended the death of her unborn child, there was no violence or use of drug – aggravating factor of her prior conviction in 2000 for infanticide – single mother with three young dependent children – sentencing judge entitled to take view defendant needed counselling rather than punishment that would seriously affect her children – appeal dismissed (*Republic v Takuia* [2017] KICA 6).

Manslaughter

Appellant assaulting 60 year old female victim on very slight provocation – unpremeditated – no weapon used – both parties drunk – many previous convictions involving drink but only two for violence – no guilty plea – sentence of six years’ imprisonment reduced to four years (*Bename v Republic* [1990] KICA 2).

Early guilty plea – unprovoked attack with knife – appellant suffering from medical condition and a danger to the public – first offender – sentence of life imprisonment reduced to 12 years’ imprisonment (*Teratabu v Republic* [2008] KICA 2).

Murder

Fixing of non-parole period – phrase “the particular circumstances of the case” in s.11(1A) Parole Board Act 1986 embraces the circumstances of the offender as well as those of the offence, which is consistent with sentencing policy (*Tiiroo v Republic* [2009] KICA 20).

Perjury

Prosecution appeal against sentence of 12 months’ imprisonment fully suspended – defendant wife gave evidence at trial of her husband for raping her daughter – trial adjourned for over two years – husband and wife reconciling – on re-commencement of trial wife retracted her earlier evidence – perjury a serious crime normally attracting sentence of imprisonment – unusual circumstances that defendant did not act for financial gain or to avoid penalty for other offending - family pressures on her – “merciful” sentence not disturbed (*Republic v Beru* [2017] KICA 10).

Possession of forged documents

Possession of forged documents, attempted false pretenses and personation (ss.339(1), 371 and 360 Penal Code) – pleas of guilty – elaborate scheme of dishonesty – amount of \$6500 involved – appellant a foreigner with no local support – 5 years’ imprisonment reduced to 3 years (*Wong Kam Chung v Republic* [2001] KICA 17).

Previous conviction of felony

Simple larceny having previously being convicted of felony (s.(2) Penal Code) – appellant previously convicted of theft on three occasions – sentence of imprisonment for eight years reduced to 18 months plus order under s.37(1) for appellant to be conveyed to his home island to reside there for one year (*Toora v Republic* [2005] KICA 6).

Rioting

Taking part in riot and causing damage and going armed in public (ss.23(1) and 25(1) Public Order Ordinance, Cap 82), wilfully and unlawfully destroying property (s.319 Penal Code) and causing bodily harm (s.238 Penal Code) – appellant leader of group of at least nine people who were carrying weapons and caused damaged to a home and utensils – effective sentence of four years six months’ imprisonment upheld – appellant had many prior convictions – no guilty plea (*Teangabure v Republic* [2007] KICA 11).

Rape

Starting point for sentencing should be five years’ imprisonment – securing sexual intercourse through mistaken identity on part of complainant not inherently less serious than where use of force or threats of unaccompanied by violence beyond that inherent in act itself (*Attorney-General v Tengke* [2004] KICA 10).

Rape and assault occasioning actual bodily harm – appellant 17 – multiple physical injuries to victim aged 18 – early guilty plea – four year sentence upheld (*Nabuaka v Republic* [2006] KICA 14).

Defendant 16 years of age raping 31 year old married woman after entering her house where she was asleep – no accompanying violence – no physical injury caused – first offender – no guilty plea – sentence of three years’ imprisonment upheld – High Court had due regard for defendant’s youthfulness (*Bateriki v Republic* [2007] KICA 13).

Appeal by Attorney-General against suspension of five year sentence for rape – no power to suspend sentence of more than two years – suspended sentence quashed and replaced by sentence of five years’ imprisonment (*Attorney-General v Kauriri* [2015] KICA 6).

Crime – Sentencing Methodology

General Methodology

Court described a suggested general sentencing methodology – no power to fix non-parole period except for sentence of life imprisonment – s.11 Parole Board Act 1986 (*Tekaei v Republic* [2016] KICA 11).

Suspension of sentence

No power to suspend sentence of more than two years' imprisonment (*Attorney-General v Kauriri* [2005] KICA 6).

Fines

Fines for multiple charges relating to single event – biosecurity and importation charges made Biosecurity Act 2011 and Customs Act 2005 – defendant brought ashore fertiliser soil from foreign vessel's stores without declaring it – soil a restricted import – fines imposed in US dollars vastly exceeded maximum fine for most serious offence – aggregate of fines not reflecting overall gravity offending – reduced to aggregate of A\$7,500 (*Sokjin v Republic* [2017] KICA 3).

Fisheries Offences – masters of foreign fishing vessel entering and fishing within fishing limits of Kiribati without permit – fines of \$100,000 or six years' imprisonment in default – committal to prison on non-payment – s.5(7)(a) Fisheries Ordinance – penalty imposed manifestly excessive – nothing indicating masters had substantial income or assets and able to pay the heavy fines – wrong in principle to impose imprisonment on persons lacking means of paying fine – imprisonment designed to secure payment and lasts only until fine is paid – not designed as substitute for fine – not proper to impose fine without regard to ability of offender to pay – appeals allowed and order for fines of \$6000 payable forthwith, in default imprisonment for nine months (*Yang Xueqiang v Republic* [1997] KICA 16).

Fisheries offences – unlawfully loading fuel contrary to s.5(1)(d) Fisheries Ordinance – plea of guilty to 19 charges – master fined \$20,000 x 19 = \$380,000 and ship owner fined \$250,000 x 19 = \$4,750,000 – minimum penalties were \$380,000 for master and \$1,900,000 for ship owner under Reg 5(7) Fisheries Regulations – appeal against conviction dismissed – only in very exceptional circumstances can appeal against conviction succeed after plea of guilty, such as where appellant did not appreciate nature of charge or did not intend to admit guilt or, on admitted facts appellant could not have been convicted of the charge – need for real and effective deterrence – lengthy period of offending and number of offences – High Court failed to take account of one factor only, that ship owner suffered loss because of period for which ship held under arrest – fines on ship owner reduced by \$400,000 (*Athena Shipping PTE Ltd v Republic* [2009] KICA 22).

Fraudulent evasion of customs duty – High Court imposed imprisonment for two years and fine of three times value of goods (\$54,000) under s.134(1) Customs Act 1993 but ordered cumulative one year's imprisonment if fine not paid within three months – court having power to dispense with fine – general principle that fine should not be imposed if it is beyond the

capacity of offender to pay, even by instalments over reasonable period of time – only in exceptional cases should fine be imposed in conjunction with custodial sentence and an order for further imprisonment in default of payment – appellant having no hope of paying while in prison and effectively sentenced to three years' imprisonment – fine quashed and imprisonment term reduced to 18 months (*Biketi v Republic* [2003] KICA 3).

Criminal Procedure

Acquittal – setting aside

Charges against defendant dismissed under s.195 Criminal Procedure Code on basis of no case to answer at end of prosecution case – High Court held to be entitled as finder of fact, to consider sufficiency of all the evidence at that time – on Attorney-General's appeal against Acquittal Under S.19B Court Of Appeal Act 1980, Court Of Appeal Considered Conduct Of One defendant amounted to intimidation contrary to s.107) – Schedule 8 – Item 12 Customs Act 2005 – guidance on what should happen as consequence of setting aside acquittal – case remitted to High Court for it to consider whether to enter conviction (*Republic v Narayan* [2012] KICA 9).

Confession – nolle prosequi

Court has a discretion to refuse to hold a trial within a trial to determine a question of admissibility on the application of the accused – conducting of question interview under caution after accused has said he has nothing to say about alleged offence does not of itself render the interview inadmissible on the ground that it is oppressive – where Attorney-General before verdict or judgment enters a nolle prosequi under s.68 Criminal Procedure Code the Court has no power to acquit rather than discharge the accused (*Attorney-General v Tebana* [1988] KICA 8).

Delay

Appeal by Attorney-General under s.19A(b) Court of Appeal Act 1980 against permanent stay of criminal proceedings on ground of delay – charges of making false statements on oath and false statutory declarations – charges laid in October 2011 – application for stay made two years later – delays within High Court – prosecution not to blame – breach of s10(1) of Constitution of Kiribati (guarantee of fair hearing within reasonable time) – stay not mandatory or usual remedy – not proportionate response to breach that accused avoids facing trial where fair trial still possible – order for speedy trial – in event of conviction High Court to decide if modest sentence reduction should be given – death of relative prior to charging not prejudicial as hearsay evidence of prejudice (deceased's account of respondent's family tree) admissible under exception to hearsay rule (*Attorney-General v Li Jian Pei* [2015] KICA 5).

Disputed facts after guilty plea

See **Crime – Sentencing** – *Careless Driving Causing Death* – *Kanooa v Republic* [2014] KICA 3.

Leave to appeal

Application out of time against conviction for unlawful assembly, riot and arson – 20 months' delay – no affidavit in support by appellant – affidavit from his counsel stating that appellant decided to appeal when he discovered his position as lay magistrate was terminated as a result of his conviction – counsel blaming pressure of work as further reason – leave to appeal refused – no further excuse for great delay – application could have been filed much earlier with necessary preparation for appeal occurring later – appeal lacking merit – affidavit should have been made by appellant – lawyers who made affidavit should not appear in case as counsel because they may be required for cross-examination – counsel should not give evidence by affidavit (*Biribo v Republic* [2011] KICA 16).

No case to answer

Considerations which should guide court in ruling on submission of “no case to answer” – principles in English Practice Note [1962] 1 All ER 448 proper to be applied in Kiribati but not part of law of Kiribati – Practice Notes represent the views of judges on particular matters of practice and procedure (*Republic v Ngauea* [1989] KICA 4).

Obligation to put case to opponent's witnesses

Obligation of party to put to opponent's witnesses so much of that party's case that concerns the particular witness or to be taken to have accepted the account given by the witness – Rule in *Brown v Dunn* 5 R 67 at 76-77 - court could, in its discretion, have allowed prosecution to call rape complainant in rebuttal at close of accused's case, but was not obliged to do so – rebuttal evidence by prosecution witnesses can be called at discretion of trial judge, where evidence given by accused could not have been anticipated by the prosecution and where new matter had not been put in cross-examination of any prosecution witness (*Republic v Timeon* [1989] KICA 1).

Sanction of Attorney-General

Prosecution appeal against dismissal of charge of incest because of its failure to produce written sanction of Attorney-General required by s.159 Penal Code – on appeal prosecution producing sanction signed before filing of charge sheet in High Court – no requirement that sanction be endorsed on or accompany charge sheet – charge reinstated and remitted to High Court for trial (*Republic v Buatara* [2017] KICA 4).

Trial a nullity

High Court holding that conviction of respondent for unlawful and indecent assault on a female was null and void and quashed the conviction and sentence – Attorney-General seeking to refer matter to Court of Appeal under s.20 Court of Appeal Act 1980 – High Court's decision not an acquittal because respondent could have been tried again – Court of Appeal having no jurisdiction under s.20 (*Republic v Hugill* [1988] KICA 2).

Employment

Arbitration of dispute

s.9(1) Industrial Relations Code prevents High Court reviewing, amending or adding to arbitration award but not from acting under Order 58 r.1 High Court Civil Procedure Rules 1964 to determine a question of construction of an award or make a declaration of the rights of parties under it (*Kiribati Shipping Co Ltd v Kiribati Shipping Union* [2003] KICA 11).

Fisheries training

Dismissal from training programme – conduct of appellant not amounting to swearing and thus not a serious offence under r.14.4 of Fisheries Training Centre Management Rule Book justifying dismissal – decision of FTC quashed (*Maio v Attorney-General iro Ministry of Labour and Human Resources Development* [2012] KICA 7).

Overtime

Claimants engaged by Natural Statistics Office to do work under contract making no mention of overtime – refusal to work on Saturdays unless overtime paid – undertaking given to them by Director of Statistics it would be paid – within his ostensible authority – a separate matter to which parole evidence rule did not apply – claimants entitled to rely on Director's undertaking (*Attorney-General v Uan* [2011] KICA 6).

Public servant dismissal

Public servant dismissed after disciplinary hearing concerning loss of funds from her office – National Conditions of Service Clause D.30 prohibited disciplinary action against an employee on grounds connected with criminal charge until conclusion of criminal proceedings – after dismissal criminal proceedings commenced against employee but resulted in acquittal at trial – disciplinary proceedings lawful because they took place prior to laying of charge – employee not exposed to risk of self-incrimination while at the same time facing the charge – “criminal proceedings” not applying to anything done prior to charging of employee (*Kamaua v Attorney General iro Public Service Commission* [2014] KICA 1).

Strike

Whether carried out by union was lawful in accordance with s.27 Industrial Relations Code – procedures prescribed by Code for discussions and negotiations between parties not exhausted - wider discussion warranted – strike unlawful (*Kiribati Union of Teachers v Attorney-General iro Minister for Labour* [2012] KICA 4).

Termination

Appellant employed as general manager of respondent – contractual provision allowing either party to terminate at any time on one month's notice in writing – respondent exercising power under that provision – exercise of power did not have to be justified – no grounds for implying rules of natural justice – even if appellant had right to be heard, he had exercised

that right which did not necessarily mean right to be heard in person (*Tooma v Kiribati Insurance Corporation* [2009] KICA 7).

Termination

Contract of employment allowed Board of employer to remove employee from office for good cause – implied term that before Board exercised its powers the employee must be given reasonable opportunity to be heard by the Board – employee must be given reasonable notice of grounds upon which dismissal is being considered so as to be able to adequately respond – principles to apply in considering whether term should be implied (*Metutera v Kiribati Shipping Services Ltd* [2007] KICA 16).

Unlawful termination – damages

Conditions of service provided for termination by either party on giving one month's notice and allowed for payment of one month's salary in lieu of notice – employment terminated by employer on six days' notice – appeal from decision allowing employee unpaid balance of one month's salary – decision upheld – employer could have lawfully terminated on one month's notice – employee therefore entitled only to equivalent salary – no common law or contractual right to reinstatement (*Baraniko v Solar Energy Co Ltd* [2014] KICA 2).

Employment terminable on one month's notice – reasons not having to be given by employer – termination unlawful under contractual provision if payment of one month's salary not made almost immediately – no evidence manner of dismissal caused by employee to be out of employment for balance of two year contract period – award of special damages set aside – general damages for embarrassment and distress awarded (*Tarawa Fishermans Co-operative Society Ltd v Tekauta* [2012] KICA 3).

Workmen's compensation

Special constable injured while on duty – entitlement to compensation to be determined at date of accident which preceded coming into force of terms and conditions giving compensation rights to special constables – no entitlement of plaintiff (*Attorney-General v Kakiauea* [2011] KICA 2).

Deceased held to be employee, not independent contractor – test for so ascertaining – if relationship depends entirely on true construction of written document it is a question of law but if, as in present case, it has to be determined by investigation and evaluation of factual circumstances, it is regarded as question of fact to be determined by trial court – fairly open to High Court to find deceased was employee – s.6 Workmen's Compensation Ordinance providing that where deceased workman left wholly dependent dependents amount of compensation is a sum equal to 48 months' earnings or \$25,000, whichever was the less – difficulties in assessing damages did not relieve court from assessing them in the best manner it could – award of \$22,000 upheld (*United Marine Products v Angatiri* [2007] KICA 17).

Equitable Remedies

Undue influence – damages

Where normal equitable remedies do not provide proper basis on which to compensate plaintiff for loss, the Court should seek to achieve practical justice between parties – approach applicable even where parties cannot be restored to their original positions (*Orme v Tiare* [2001] KICA 15).

Land

Absence of party

Magistrate has discretion under r.28 Magistrates' Court Rules to proceed with hearing in absence of party or knowledgeable relative appointed to represent them – but only in extreme case would court be justified in doing so – court should go to great lengths to ensure no decision made against interests of absent party without solid foundation in evidence – one magistrate may not override decision of another in the absence of fraud (*Tekee v Kakiaba* [2006] KICA 21).

Accession – paternity

s.65(2)(i) Magistrates' Court Act (Cap 52) does not restrict operation of s.65 to a child under two years of age – s.65(1) is silent as to age – Land Court had jurisdiction to determine paternity of party (*Inatio v Inatio* [2003] KICA 9).

Accession – half siblings

Children of one parent should be regarded as brothers and sisters for purpose of land accession – no distinction between sons and daughters of an owner and the same mother and father and sons and daughters of an owner and a different mother or father (s.11 Native Land Code (Cap 61)) (*Mangoniti v Mangoniti* [2005] KICA 15).

Accession – adopted child

Adopted child to be treated in law as if born as child of adoptive parents (s.9(iii) Native Lands Act Cap 61)) (*Tinoa v Tianuare* [2005] KICA 11).

Accretion

Passage of water closed off by accretion beginning on appellant's land and going on until it adjoined land on other side of passage – land had accreted upon lands of both parties – when mid channel was reached it was accreting towards land on other side, not towards the sea – s.16(i) Lands Code therefore not applicable – at common law boundary was middle of passage (*Kautu v Rinikarawa* [1997] KICA 20).

Adjournment – representation

Single Magistrate refusing adjournment after appellants' lawyer on several occasions failed to attend hearing – case then decided adversely to appellants – appeal on ground of breach of natural justice dismissed by High Court – appeal to Court of Appeal on question of law only – confirmed that no breach occurred – right of representation by counsel not unqualified-further delays prejudicial to respondents and risked bringing administration of justice into disrepute – additional ground of appeal sought to be raised for first time in Court of Appeal – other than in exceptional circumstances, contrary to principle to allow this–argument, in any event, unmeritorious (*Bwebweatekai v Reue* [2017] KICA 2).

Refusal of adjournment by Magistrate – matter before court for five months and twice adjourned because appellant not ready but appellant had some documentary support for her case – appellant absent in order to keep appointment to see President – her son not able to represent her interests adequately – in exercising discretion concerning granting an adjournment court conducts a balancing exercise with ultimate issue being need to do justice as between parties – s.28 Magistrates’ Court Rules allows appointment of relative to represent party but Magistrate must ensure proposed appointee is capable of adequately representing party – son had told Court he did not have crucial document – no inquiry by Magistrate as to his knowledge – error of law not to ascertain son’s competency and in failing to adjourn case when it became apparent he was not competent – further short delay not prejudicial or unfair to respondent – appeal allowed, decision quashed and new hearing in Magistrates’ Court ordered (*Erimiriki v Tekabu* [2003] KICA 7).

Appeals in land cases

Appeals in land cases are civil appeals under s.10(1)(b) Court of Appeal Act (*Uriam v Uriam* [2001] KICA 5).

General appeal lies from any judgment or decision of Magistrates’ Court to the High Court in any land court or matter by virtue of s.75(1) Magistrates’ Court Ordinance (*Iabeta v Moniara* [2001] KICA 3).

Babai Pits – Rectification

High Court directing Magistrates’ Court to rectify register as to location of babai pits if necessary – Magistrates’ Court having no express power to rectify the register but on appeal on land matter High Court has the powers which it would have if constituted by Judge sitting alone (s.89 Magistrates’ Court Ordinance) which includes power to give such directions as the Court considers appropriate for purpose of ensuring justice is duly administered by Magistrates’ Court (s.89 of Constitution) – thus power to order magistrates to rectify babai pit register provided rectification did not impair the indefeasibility of any title – amendment to location merely fixes situation of a pit without affecting title to it (*Kaibakia v Tabokai* [1997] KICA 23).

Breach of natural justice

Magistrates’ Court in 1995 ordered registration of land in name of respondent based on will of her grandfather – appellant father of respondent seeking to set aside registration because of alleged invalidity of will – appellant never given notice of 1995 hearing – denial of natural justice – 1995 decision set aside (*Tebano v Keangimawa* [2012] KICA 1).

Certiorari proceedings to quash decision of magistrates brought 16 months after grant of leave – appeal against dismissal by High Court – delay alone not justifying dismissal – no prejudice to respondent – Magistrates’ Court appearing to have acted in breach of natural justice in determining case in absence of defendant and without evidence of service of proceedings upon appellant – appellant entitled to remedy of certiorari as a matter of justice to quash decision affected by fundamental vice – Magistrates’ Court having jurisdiction in

absence of service on appellant – error of law on face of record (*Teuie v Toanikai* [2015] KICA 1).

Concurrent findings in lower courts

Interpretation of Magistrates' Court decision in I-Kiribati language – I-Kiribati magistrates in Magistrates Court and in High Court concurred in their interpretation – appellate court normally declines to review evidence for third time – interpretation a question of law but in determining that question concurrent factual findings made on meanings of text in I-Kiribati – appeal dismissed (*Tabeata v Bonto* [2015] KICA 8).

Boundary dispute before Magistrates' Court on multiple occasions – single Magistrate held no power to rehear matter as boundary had been determined by agreement in earlier decision – High Court sitting with two magistrates confirmed decision – only in rare case would expatriate judges in Court of Appeal reverse concurrent findings in boundary dispute – appeal dismissed (*Tamarewe v Tekautu* [2017] KICA 1).

Delay in bringing proceedings

Sale can be approved if next of kin have agreed to it and sufficient land remains for seller and children – application to review decision of Magistrates' Court under s.14 Land Code authorising sale of land – application for review dismissed by High Court – appeal by former husband and a daughter of seller who had not consented – husband not a “native” within s.2 Native Land Ordinance and prevented by s.5(1) from acquiring the land or claiming equitable interest by estoppel – significant delay in daughter's application for review – purchaser prejudiced by payment of purchase price as seller not able to repay it if transaction set aside – seller and purchaser had also applied for variation of sale agreement increasing area sold and price – variation granted because Magistrate misled into believing all children of seller had agreed to sale – variation decision obtained by fraud and purchaser's title not protected by indefeasibility provisions of s.4 Native Land Ordinance – daughter refused relief in respect of original sale agreement because of prejudice to purchaser but sale of additional area set aside (*Posada v Posada* [2014] KICA 6).

Application for special leave to commence certiorari proceedings to quash decision of Magistrates' Court made in 1991 approving a sale of land – High Court decision requiring leave because of 19 year delay affirmed because of prejudice to respondents – observations on desirable procedure in cases where leave to commence judicial review proceedings has been granted (*Kaotan v Junior Kum Kee* [2012] KICA 5).

Appeal from decision declining to extend time in which to apply for certiorari – first respondent sold to second respondent land belonging to appellant in 1991 – sale approved by Magistrates' Court without knowledge of appellant – appellant's proceedings not issued until 2008 - appellant had been living overseas but living on land since 2004 – unusual case in which despite a 17 year delay, it was appropriate to extend time – first respondent lacked title and so incapable of passing title to second respondent – first respondent registered, sold and obtained court approval knowing of appellant's interest and deliberately withholding knowledge from appellant – while appellant and family allowed 10 years to go by between learning of sale and bringing proceedings, they were not inactive and trying, ineffectually, to

contest the sale – no material prejudice to second respondent – normally delay of 17 years fatal but other factors relevant: nature of original invalidity, date on which applicant learns of decision under challenge, steps taken by applicant thereafter, extent delay attributable to lawyers and extent to which innocent third parties have taken steps in reliance upon original decision before being advised of challenge – appeal allowed (*Tabora v Uruatarawa* [2009] KICA 9).

Appeal against striking out by High Court of application to re-open earlier decision of High Court where appellants alleged fraud in respondents' acquisition of land – earlier High Court decision struck out case for want of prosecution – High Court had also struck out present case on same basis taking view that appellants had changed their legal representation to “buy time” – no evidence of this – appeal allowed and case remitted to High Court for rehearing of application (*Karotu v Mannaua* [2011] KICA 18).

Application for leave to appeal out of time had been granted but was rescinded because applicant had not disclosed that respondent had carried out extensive improvements after expiry of time to appeal – delay of three and a half years – application reheard but dismissed – no acceptable explanation and prejudice to respondent (*Batee v Trustee for Jehovah's Witness Church* [2006] KICA 17).

Evidence on appeal

High Court received evidence on appeal from Magistrates' Court of practice of Native Lands Commission – not precluded from doing so by proviso to s.34 Magistrates' Court Ordinance which was designed simply to prevent High Court hearing land matter at first instance – proviso says nothing about what evidence may be received on appeal – s.59 of Ordinance can be applied only where no title has been registered but court finds a title did exist – not intended to apply to Court to which title has already been registered (*Kibae v Ueantabo* [1997] KICA 19).

Fraud

What must be proved to establish fraud – person making allegation of fraud must prove evidence or statement challenged was a false statement of fact; that the person making it knew it was false and that it was intended that the person or court to which it was made would act on it – person making it must have known that the statement challenged was dishonest and morally wrong, and done to deceive – standard of proof is on balance of probabilities but because of serious nature of an allegation of fraud, there must be strong convincing evidence – evidence of fraud must be compelling and allow of no other reasonable explanation – whether there was fraud is purely a question of fact, not a question of law giving Court of Appeal jurisdiction upon an appeal from exercise by High Court of its appellate jurisdiction - appeal dismissed (*Bukaineti v Tekimwa* [2007] KICA 7).

Fraud

Indefeasibility under s.4 Native Lands Ordinance – protects registered proprietor against adverse claims of which he did not have notice – cannot be relied upon where order for

certiorari has quashed order granting title because of proprietor's own acts (*Uriam v Uriam* [2006] KICA 5).

Indefeasibility – estoppel

High Chief of Butaritari and members of family registered as proprietors of land under s.64 Magistrates' Court Ordinance – High Chieftainship disestablished in 1963 which vested land in Crown by default – Chief and family members had no equitable interest and land ceased to be native land – Crown, later the Republic, failed to rectify register – individuals later purported to acquire interests in the land by succession or purchase from the Chief and family members – Magistrates' Court ordered registration of such interests it wrongly understood had been so acquired – persons taking steps upon false assumptions and carrying out improvements – rectification of register by High Court order in 2000 to remove those individuals – indefeasibility of title under s.4(2) Native Land Ordinance subject to implied qualifications not preventing a court examining circumstances of registration – legal title could be defeated by appeal or certiorari – Magistrates' Court decisions conferring new interests made without jurisdiction – estoppel available as basis for individuals who had acted in reliance on apparent state of title to claim compensation – respondents needing to file statement of claim in High Court particularising basis on which claim to equitable remedy in estoppel advanced (*Attorney-General v Ngatau* [2010] KICA 6).

Indefeasibility – question of law

Magistrates' Court determined land ownership – issue whether an earlier order of that Court had given appellants an indefeasible title – therefore question of law for High Court to determine – appeal allowed and case remitted to High Court to determine appeal from Magistrates' Court – High Court empowered to call for case records by s.81 Magistrates' Courts Ordinance (*Atunibeia for Issues of Katoba and Titaake v Terara for Issues of Orokai and Others* [2014] KICA 7).

Issue estoppel

Boundary dispute – earlier decision of Land Court did not fix boundary in dispute – respondent not party to that decision – contradiction in later High Court decision not creating issue estoppel (*Takeita v Onorio* [2016] KICA 12).

Jurisdiction of Magistrates' Court

No jurisdiction to rehear or review a matter which has been heard and decided in another court of equal jurisdiction (*Kauonga v Ria* [2001] KICA 2).

No jurisdiction to hear and determine an action for trespass to native lands when amount claimed exceeds \$3,000 – Schedule 1 of Magistrates' Court Ordinance providing jurisdiction in actions of contract or tort only when claim did not exceed \$3,000 (*SMEC v Teinwakamwaka Landowners* [1998] KICA 4).

Landlord and tenant

High Court had dismissed appeal from single Magistrate's decision refusing to order eviction of respondent who had given evidence that he had a lease and had paid a substantial sum for buildings on the land – application by appellant to adduce further evidence declined because of two year delay and appellant knew deponent's evidence was relevant before High Court hearing – second appeal to Court of Appeal on point of law only – question of whether s.10 State Lands Act 2001 applied by which land within the Act cannot be alienated except by transfer back to the State or by ministerial permit under s.13 – lease stated Act applied but issue not raised in High Court – factual issues to be resolved – case remitted to High Court (*Waysang v Reiti* [2011] KICA 17).

Lease for 99 years at agreed rental – subsequent accretion to land – lessee allowing persons to occupy accreted land – lessor seeking their eviction and compensation – High Court holding effect of s.12(2) Native Lands Ordinance was that accretion was part of lease and correct rent had been paid – lessors had no right of re-entry – appeal dismissed but Court of Appeal drew attention to Rent Review Ordinance providing for five yearly reviews of rent reserved by a lease, which included any accretion (*Tautau v Attorney-General* [1997] KICA 12).

Plaintiff leased building that encroached on landlord's adjacent land – landlord accepted additional rent from plaintiff but declined to sign tendered lease of encroachment – presumption of continuance supporting inference of continued acceptance of the additional rent after landlord aware of basis of payment – lease by estoppel of encroachment – but landlord may be entitled to terminate it by appropriate notice to quit (*Highland v Attorney-General* [2016] KICA 13).

Licence to occupy

Respondent occupying land by permission of owners – did not leave when asked to do so in 1993 but proper inference that appellants were still permitting him to share land under licence to occupy which came to an end when they commenced proceedings for eviction in 2007, and he then became a trespasser – proceedings not statute-barred (*Tebeia v Aviu* [2008] KICA 3).

Prerogative powers

Powers of High Court to set aside etc decisions of Magistrates' Court under s.81 Magistrates' Court Ordinance (with 12 month limitation period) do not supercede High Court's prerogative powers as confirmed by s.89(1) of Constitution – s.81 gives High Court power to act of its own motion and to exercise all powers, authorities and jurisdiction of Magistrates' Court – no time limit to exercise of prerogative powers but they are inherently discretionary and a principal obstacle to granting of relief is undue delay by applicant (*Atanta v Tabaua* [2005] KICA 7).

Law Practitioners

Claim by lawyer to enforce master costs agreement for 5% commission on recovery of debts owing to bank – master agreement made prior to practice rule of Law Society forbidding such commission arrangements – master agreement constituting standing and irrevocable offer by lawyer to accept retainers from bank – not proved by bank its earlier instruction to lawyer in terms of master agreement given after rules in force – rules not having status of regulations so any breach may not have made agreement unlawful (*Development Bank of Kiribati v Maitinnara* [2015] KICA 2).

Refusal of Attorney-General to issue certificate of qualification for admission to practice law – appellant had convictions for fraud and theft – Attorney-General, without interviewing appellant, concluded he was not a fit and proper person – Rule 3(2) Admission Rules 1992 (2) required interview before issuing a certificate but if Attorney-General concludes applicant is not qualified, or is not a fit and proper person, a certificate can be refused without an interview (*Tawaia v Attorney-General* [2001] KICA 21).

Proceedings of Maneaba Ni Maungatabu

Majority of members

Bill declared to be a confidence issue rejected by 21 votes to 19 - whether rejected by “majority of all of the members” with consequence that Maneaba was dissolved under s.78(1)(b) of Constitution – Parliament had 42 members but one had been disqualified and his seat was vacant (s.57) – only 41 members entitled to vote – 40 present and voting with one absent – “members” refers to individuals and is distinct from “seats” – Speaker correct to rule there had been a rejection by requisite majority (*Tokataake v Attorney-General* [2003] KICA 4).

On issue of confidence a monetary bill was defeated by 25 votes to 19 – s.78(1)(b) of Constitution provides for dissolution if issue of confidence rejected by majority of all members – 41 members of Maneaba – speaker ruling Maneaba dissolved – election occurring before appellants’ originating summons heard in High Court - appeal against High Court decision that it was too late to give a remedy - “majority of all members” means “the greater number” and hence there had been a majority of two - Chief Justice not disqualified from hearing case because at the time he was a member of the Council of State – consequences of granting or refusing relief having regard to public interest, appropriately to be considered in exercise of High Court’s discretion – impractical to revert to situation when confidence vote lost (*Bataroma v Attorney-General* [2004] KICA 17).

Refusal of Speaker to allow debate

Refusal of Speaker to allow debate on motion of no confidence under s.68(1) of Constitution – High Court has jurisdiction under ss.68(1) and 88(1) to determine some questions concerning proceedings of Parliament – Speaker disallowing motion under Rule 38(4) of Rules of Procedure of Maneaba on ground that matter had previously been fully debated – High Court held issues raised were entirely different – finding not open to High Court because of lack of relevant evidence about the issues – Speaker’s reasons were specific in terms of Rule 38(4) – Parliament subsequently dissolved for a general election which had occurred – nothing now turning on validity of Speaker’s decision – appeal allowed (*Iuta v Taitai* [2013] KICA 3).

Summoning by Speaker

Speaker giving notice summoning Maneaba and appointing dates for its meeting which was less than 21 clear days as required by Rule 2(1) of Rules of Procedure of Maneaba – whether “emergency” existed allowing Speaker to dispense with such notice (Rules 7(5) and 67(2) – Speaker concerned about country’s financial situation, a matter not mentioned in Rule 67(2) – internal proceedings privilege of Parliament not applying to summoning of Parliament – decision amenable to jurisdiction of High Court – list in definition of emergency situations illustrative rather than restrictive – Speaker’s decision there was an emergency a reasonable one – s.77(3) of Constitution requiring meeting of Maneaba within thirty days of second ballot in a general election not applicable as there had been no second election pursuant to Reg 26 of Election Regulations (*Teangana v Tong* [2004] KICA 18).

Surcharge of member's salary

Public finance - validity of notice issued by Cabinet to appellant, a former Beretitenti/Cabinet member and present member of Maneaba under s.47B Public Finance (Control and Audit) Ordinance (Cap 79) seeking to surcharge salary under s.47A on ground he had claimed and received payments from public funds in excess of lawful entitlement – previous Cabinet notice had been quashed by High Court under s.47D – second notice not discriminatory under s.15 of Constitution – Cabinet not prevented from giving second notice – res judicata not applying as earlier decision concerned only with process, not merits of claim (*Teannaki v Attorney-General* [2001] KICA 8).

Religious Associations

Challenge to change of name of Kiribati Protestant Church to Kiribati Uniting Church – Court of Appeal unable to determine whether dispute between church members was justiciable because it could not resolve differences in two translations of crucial clause in Constitution of Church – but proceeding on assumed basis that courts have jurisdiction, finding made that procedure adopted by General Assembly was sufficient to achieve purpose of name change – amendment procedure under clause 96 of Constitution of Church did not require strict compliance in giving notices to Assembly members who in practical terms had been made well aware that the name would be the subject of a proposed constitutional amendment (*Koae v Mikaere* [2017] KICA 12).

Taxation

Income tax

High Court entitled to rely upon certificate of Commissioner of Taxes signed as Secretary of Internal Revenue Board (s.138 Income Tax Act 1990 and s.3(1)(g) Inland Revenue Board Act 1990) – Board may estimate income of taxpayer and assess accordingly (s.100(3)) – assessments signed for the Board (*Kum Kee v Attorney-General* [2001] KICA 22).

Tort

Conversion

Appellant agreeing to repair respondent's motor vehicle - retained vehicle for four years without repair and removed parts of it – respondent claiming compensation of \$3,000 – plaintiff did not return vehicle when sued – High Court upheld award of \$3,000 in Magistrates' Court – appeal to Court of Appeal limited to question of law (s.10(1)(b) Court of Appeal Act 1980) – Magistrate finding that appellant had converted vehicle to his own use – denying owner of goods his right of ownership including right to possession for indefinite period may amount to conversion – no error of law by Magistrate – damages for conversion ordinarily value of goods at date of conversion – estimate of damages is a question of fact, not law – appeal dismissed (*Posada v Talanga* [1990] KICA 7).

Defamation

Absolute privilege – slanders alleged to have been uttered by Chief Registrar of High Court – Registrar not to be regarded as a high official entitled to immunity – protection of qualified privilege in absence of express malice sufficient (*Attorney-General v Tawaia* [2001] KICA 11).

Newspaper article defaming politician – defence of qualified privilege rejected – in general no common interest between newspaper and its readers unless circulation of newspaper strictly limited within a clearly confined group – spreading calumny to excessive degree to others without the same interest will deprive the defendant of privilege – award of \$55,000 damages not excessive - improper for defendant's lawyer to have wanted Judge to disqualify himself for alleged bias except on an evaluation of available evidence and without client's instructions – encouragement should not be given to litigants to believe that if they disqualify Judge they will have case tried by someone more likely to decide case in their favour – critical question is whether Judge will decide matter fairly and impartially, not whether they have intention to decide a point in a particular way (*Timeon v Mwemwenikarawa* [2011] KICA 10).

Non-compliance with Court order by plaintiff – statement of claim struck out as embarrassing and prejudicial to fair trial of action – second statement of claim also held to be embarrassing and prejudicial and struck out as abuse of process, with leave to amend refused and appellant's action dismissed – no failure by appellant to comply with order of Court – second statement of claim could not be regarded as an intentional and contumelious disregard of Court's judgment – non-compliance due to inadvertence and not an abuse of process – hardship to defendants in having large claim hanging over their heads was an unfortunate incident of any litigation and no reason to deny legal redress – second statement of claim capable of amendment – leave to file further statement of claim but appellant to pay costs of the two applications in High Court (*Iuta v Tito* [1998] KICA 7).

Detinue

Shipping agent acting for owners of containers requiring authority established under Kiribati Port Authority Act 1990 to ship back containers in its yard – authority failing to do so – claim in detinue by agent – some containers sealed and some containing goods of third parties –

authority having power under s.24 of Act to sell contents of containers not removed from its premises within 21 days of the time they were so placed – s.24 not creating duty to exercise powers in section – mere possession of another’s goods without authority not a tort in absence of manifestation of intent to keep them adversely or in defiance of owner’s rights – s.15(1) Customs Act 2005 provides that goods imported into Kiribati are under customs control until released, destroyed or exported – offence under s.107 to touch goods under customs control without authorisation under s.41 or s.51 – Controller of Customs had advised authority it was improper for person under than customs officer to break a customs seal – no refusal by authority to return containers or assertion of dominion over them inconsistent with rights of shipping agent (*Kiribati Ports Authority v Mikaere* [2011] KICA 1).

Negligence

Aircraft damaged by hitting dog during landing – duty of care on part of Civil Aviation Authority because it failed to adopt its usual practice of sending out a mobile patrol to clear runway of obstacles or report if clearance was not possible – pilot entitled to rely on authority to carry out this routine in timely and efficient manner – although s.59 Civil Aviation Act imposed responsibility on pilot for operation of aircraft, his liability (if any) must be assessed in light of service the authority elects to provide (*Civil Aviation Authority v Coral Sun Airways Ltd* [2011] KICA 5).

Police telling respondent to leave his house for his own safety – in his absence villagers destroyed his boat and stole his fishing equipment – whether police owed him duty of care to safeguard his property – principles for establishing when duty of care is owed – no special characteristic to relationship between respondent and police – no undertaking by police to look after his property – police did not owe duty of care to him in the circumstances – appeal allowed (*Attorney-General v Tio* [2003] KICA 10).

Prisoner found dead in police cell – failure to prove cause of death – evidence of suicide inadmissible hearsay – alleged failure of police to take reasonable care to protect drunken prisoner from harm was in any event not shown – extent and nature of duty depends on circumstances – no reason to suspect suicidal tendencies – guidelines from English Code of Practice not requiring constant surveillance – leaving prisoner unobserved for 10 minutes not in breach of duty of care (*Ionatan v Attorney-General iro Commissioner of Police* [2017] KICA 14).

Negligence – damages

42 year old plaintiff employed in public service – retirement age 50 – special damages equivalent to eight years’ salary – general damages of \$25,000 for pain, suffering, disability, loss of enjoyment of life and future economic loss including value of nursing care for his family (*Taraia v Reue* [2007] KICA 19).

Negligence – damages – vicarious liability

Appeal against liability and damages by employer of driver who ran down and killed plaintiff’s husband – High Court decision that reckless or negligent driving occurred in course of employment and not as “frolic of his own” upheld - High Court awarded \$15,000 damages

under Law Reform (Miscellaneous Provisions) Act 1934 – in excess of conventional award of \$3,500 for loss of expectation of life but, in view of evidence of respondent widow's dependency on deceased, award of \$11,500 made for lost earnings – Court of Appeal exercising power under r.22(4) Court of Appeal Rules enabling variation of High Court decision notwithstanding absence of cross-appeal – appeal against award of \$15,000 dismissed (*Tenubobo v Mawanei* [2017] KICA 13).