

Republic v. Jackson Namunya Tali
[2014] eKLR, High Court Criminal Case No. 75 of 2009
Kenya, High Court

COURT HOLDING

The Accused, with malice aforethought, caused the death of the Deceased while assisting her to procure abortion.

Summary of Facts

Jackson Namunya Tali, the Accused, was charged with murder under Section 203 and Section 204 of the Penal Code of Kenya. The Accused, a nurse by profession, operated a medical clinic named M.P. Medical Clinic & Laboratory Services, at Gachie Trading Centre in Kiambu County, Kenya. In July 2009, he received a client by the name of Christine Atieno, and allegedly assisted her to procure an abortion which resulted in complications that led to her death.

Issue

Whether the Accused had committed the offence of murder.

Court's Analysis

In the opinion of the Court, the Accused claimed that the Deceased came to his clinic “while bleeding in pregnancy,” and sought medical help. He admitted administering some form of treatment which, in the Court’s opinion, led to complications and her death.

His defence was that she had sought medical attention at his clinic following a botched abortion elsewhere, and he was not responsible. He did not, however, produce a patient record to substantiate his claim that she was already bleeding and anemic upon arrival.

Though a medical expert testified that he was unable to determine the cause of the death, the Court found that there was direct and circumstantial evidence that the immediate cause of death was the bleeding that resulted in anemia due to interference with the pregnancy. The question was whether the Accused or someone else had interfered with the pregnancy.

The Court’s opinion was that the Deceased had gone to the Accused’s clinic while not bleeding and came out bleeding, though the Court did not explain how the evidence supported this conclusion. Nevertheless, the Court held that unless the Accused offered a plausible explanation, it could only be inferred that the Accused was responsible. His explanation of what transpired did not convince the Court that he had not interfered with the pregnancy in a way that led to complications and the death of the Deceased. Although there was no direct evidence that the Accused interfered with the pregnancy and caused death, the Court held that all the direct and circumstantial evidence, taken together, established that the Deceased had sought procurement of abortion from the Accused, and in assisting her, he caused her to develop complications and she died as a result.

Conclusion

The Accused was convicted of the offence as charged, and sentenced to death.

Significance

While it is not clear from the facts of this case whether the Deceased died as a result of complications associated with an attempted abortion, the Court's holding highlights the risks associated with unsafe abortions prevalent in most countries in Africa that have restrictive laws and policies on access to safe abortions. Kenya has maintained provisions on abortion in its code of criminal law adopted from colonial times. Sections 158, 159, and 160 of the Kenya Penal Code criminalise procuring an abortion, assisting a woman to procure an abortion, and supplying the means to procure an abortion. Further, Article 26(4) of the Constitution of Kenya prohibits abortion except "when in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law." While the Constitution offers some hope that the word "health" can be interpreted liberally, the challenge is that without clear guidance, qualified health providers are likely to interpret the law conservatively to avoid the possibility of being caught on the wrong side of the law. One recent scholarly article found that although many countries allow abortion in certain circumstances, they have failed to guarantee transparency in implementing these laws:

One of the major flaws with African abortion laws is that, though abortion is not absolutely prohibited and, furthermore, though there has been a discernible regional trend toward substantive liberalization of the grounds for abortion, in the overwhelming majority of countries, abortion laws have not been effectively implemented. The pervading public understanding ... is that abortion law is most prohibitive and abortion is something that is rarely, if ever, lawful.⁴⁸

It is notable that, in this case, the Court appears not to have undertaken any review concerning whether the alleged abortion would have been legal under Kenyan law. In fact, the Court concluded that performing an abortion was tantamount to "malice aforethought," supporting a murder charge.

Therefore, although the law of Kenya does in fact allow access to abortion in terms of Article 26(4) of the Constitution, without deliberate measures by the government to develop clear guidelines on how the law should be interpreted and applied, the public and even qualified health providers remain confused about the extent to which abortion is legally permissible. This failure of transparency in implementation of laws on abortion undermines access to safe abortion for girls and women who are entitled to such services under the law.

In the case at hand, the deceased had no way of knowing whether she would have qualified for a legal abortion to preserve her "health." Moreover, unscrupulous law enforcers also take advantage of this confusion to extort bribes from legitimate abortion providers and patients, driving access to legal abortion further underground.⁴⁹

In practical terms therefore, the law in Kenya severely restricts access to safe abortion services. It creates an environment where girls and women would rather seek abortion services outside the

public health system, as the deceased did. This case is therefore an example of such failure of transparency of which the ultimate consequences are preventable maternal ill-health and deaths from abortion complications.

At the micro-level, health providers bear the responsibility for abortion complications. At the macro-level, however, overwhelming evidence suggests that the unsafe abortion epidemic is linked not to malicious intentions of abortion providers, but to lack of access to safe abortion due to restrictive laws and policies that are not implemented in a transparent manner. This is the trend in countries like Kenya, Malawi, and others that have laws and policies restricting access to safe abortion. When public policy turns women away from safe abortion services, they will inevitably use unsafe methods, or seek alternative services, including services from unskilled practitioners.

The significance of this case therefore lies in its overshadowing of the macro-level picture. The Accused and others like him may be held responsible for the deaths of girls and women from unsafe abortions, perhaps logically so from a narrow criminal justice perspective. However, it is the governments that should ultimately be held responsible for the deaths due to preventable abortion complications from two different perspectives: First, because the persistent criminalization of abortion continues to deny women access to safe abortion services. Second, governments should be held accountable where they have failed to transparently implement laws that actually enable women and girls to access safe abortions, resulting in denial of services to which they are legally entitled. The South African experience is evidence of how states' choices regarding access to safe abortions can improve women's health. After 1996, when South Africa enacted the Termination of Pregnancy Act, which liberalised access to safe abortion, abortion-related deaths fell by 91%.⁵⁰

It is undeniable that abortion is a deeply contentious subject. However, improving women's health is a global concern that is high on many governments' agendas. This case should be a reminder that there is still room for states to make the choice to prevent avoidable deaths by providing access to safe abortion services to the fullest extent of their laws, and eventually decriminalise access to abortion.