

## IV. ABORTION AND FETAL INTERESTS

In 2010, when *Legal Grounds* Volume II was published, the chapter on abortion and fetal interests noted that while restrictive abortion laws continued to prevail in African countries, there was also a growing trend towards expanding access to legal abortion in recognition of a wide range of women's rights including the rights to life, health, non-discrimination, and freedom from torture, cruel, inhuman and degrading treatment.

That trend has since taken hold, with over fifty percent of African countries now providing for legal exceptions to the criminalization of abortion which extend beyond saving the life of a woman to preserving her mental and physical health. Two examples of countries where recent law reforms have occurred are Rwanda and Kenya, with Rwanda also allowing for exceptions on the grounds of rape, incest and forced marriage, and reducing the harsh criminal penalties that previously applied. The immediate outcomes of those reforms are reflected in *Case no. RPA 0787/15/HC/KIG*, in which a Rwandan court decided that a minor who became pregnant due to sexual violence had a legal right to abortion. However, there are ongoing challenges with implementation to ensure that legal reform translates to actual change for women seeking abortion care and health practitioners providing this essential service. Aspects of these challenges arose in the Kenyan case of *Republic v. Jackson Tali* where a nurse was sentenced to death for allegedly providing an abortion that resulted in the death of a woman despite contradictory evidence, and in the Zimbabwean case, *Mildred Mapingure v. Minister Of Home Affairs and 2 Others*, where burdensome procedural barriers prevented a woman who was raped by armed robbers from accessing a legal abortion.<sup>45</sup>

*Legal Grounds* Volume II also featured the 2008 South African case *Stewart v. Botha*, in which the judiciary showed its reluctance to take on the complexities of a wrongful life claim. This current volume includes a recent South African decision, *H v. Fetal Assessment Centre*, where the court distinguished itself from that earlier decision and delved into the legal questions that arise from a wrongful birth or life claim. Two other decisions from Kenya, *AAA v. Registered Trustees (Aga Khan University Hospital, Nairobi)* and *E.R.O. v. Board of Trustees, Family Planning Association of Kenya*, also support the perception that courts are increasingly more willing to recognise reproductive rights standards regarding contraceptive provision and wrongful life claims.

### ABORTION

*Case no. RPA 0787/15/HC/KIG*  
(2015), Unreported  
Rwanda, High Court

#### COURT HOLDING

IC had the right to access abortion in accordance with Article 165 of the Organic Law N° 01/2012/OL of 02/05/2012 instituting the Penal Code of Rwanda, as well as under Article 14(2) of the Protocol to

the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which is part of the law of Rwanda.

For purposes of the law on access to abortion, being defiled is the same as having been raped, so that every girl under age 18 who is pregnant as a result of sexual intercourse ought to be considered as having been raped.

## **Summary of Facts**

This was an appeal to the High Court by NJ on behalf of her daughter IC, who was 13 years old, against the ruling of the Intermediate Court of Nyarugenge (RP 0561/15/TGI/NYGE) denying IC access to abortion on the ground of rape. IC claimed that she was raped by NB after he gave her an alcoholic drink, and she got pregnant as a result. NJ initiated proceedings in the Intermediate Court requesting permission for IC to get an abortion on the ground that her life was in danger. The Court denied the request, basing its decision on the ground that there was no criminal charge convicting NB of the offence of rape, and that it was possible that IC had become pregnant without rape.

## **Arguments of Parties**

The Appellant argued that sexual intercourse with a 13-year-old could only be interpreted as rape. The medical report confirmed pregnancy and indicated that she was under 18 years old. Further, although the judge of the lower court expressed the view that a girl under 18 could become pregnant through ways other than defilement, he did not offer an alternative explanation as to how IC had become pregnant.

The Appellant also argued that the Court should not wait for conviction of the offender before it gave permission to access abortion on the ground of rape.

The prosecution, on the other hand, argued that Article 165<sup>46</sup> of the Organic Law N° 01/2012/OL of 02/05/2012 instituting the Penal Code of Rwanda (Penal Code), should be interpreted that only a “woman” who contracts pregnancy as a result of rape is allowed legal abortion on the ground of rape. According to the prosecution, legal abortion was not available to a “child” who contracts pregnancy as a result of defilement (sexual violation of a minor). The offence of defilement of a child is defined in Article 190<sup>47</sup> of the Penal Code. Article 217 of the Penal Code defines “a child” as a person under the age of 18.

## **Issues**

The issues before the Court were:

1. Whether Article 165 of the Penal Code includes a child;
2. Whether it was proven that IC was raped; and
3. Whether IC had the right to access legal abortion.

## **Court's Analysis**

The Court considered the prosecution's argument that the Penal Code only allowed abortion for "women" rape survivors but not for "child" survivors of sexual violence. The Court's opinion however was that despite rape and defilement being couched in different language and under two separate provisions, they both involve non-consensual sex. The Court expressed the view that girls under the age of 18 do not have capacity to make decisions regarding involvement in sexual relationships, and that every occasion of sexual intercourse with girls under age 18 ought to be regarded as "rape" under the Penal Code. To support its view, the Court referenced the Rwanda National Protocol for Operationalisation of Exemptions for Abortion under the Penal Code, issued by the Ministry of Health, which provides the guidance that for purposes of access to abortion on the ground of rape, the pregnancy of a girl under age 18 should be treated as arising out of rape.

The Court agreed with the Appellant that, in the absence of evidence to the contrary, the only way that IC could get pregnant at 13 years old was because she was sexually violated. It therefore found that the lower court had erred in rejecting the claim that IC was pregnant as a result of a sexual offence committed against her.

The Court reiterated that a woman who has been raped, which includes a child who has been sexually violated, and became pregnant as a result, could access abortion legally pursuant to Article 165 of the Penal Code. The Court also recognised Rwanda's obligation under Article 14(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the "Maputo Protocol"), which is part of the law of Rwanda by virtue of Presidential Order 05/01 of 03/05/2015, to take the necessary measures to protect the reproductive rights of women by providing access to safe abortion in cases of sexual assault and rape.

The Court therefore found that the Appellant had the right to request access to legal abortion for IC on the ground of rape, in accordance with the law of Rwanda under the Penal Code, but also under the Maputo Protocol. This was based on the unrebutted evidence of the pregnancy, which implied that an offence of defilement, which entailed rape, had been committed against her.

In addition to the reasons explained above, the Court also took into account the views of IC and her reasons for seeking abortion. These included that she was embarrassed amongst her peers, and that she wanted to go back to school. The Court also took note of the fact that she was too young to become a parent.

The Court held that IC had the right to access abortion in accordance with the laws of Rwanda on the ground that she had been defiled, which for all purposes of the law on access to abortion, was the same as having been raped.

## **Conclusion**

The Court authorised IC to undergo abortion at a designated facility.

## Significance

Rwanda is one of the countries that has taken steps to implement the Maputo Protocol, which were undertaken by an executive act of domestication, and is therefore under a legal obligation to ensure the realisation of women's sexual and reproductive rights, including access to safe abortion on grounds including sexual assault and rape. It also has aligned its abortion provisions in the Penal Code with Article 14(2) of the Maputo Protocol. Further, Rwanda has taken measures to ensure that the law is clarified and made transparent to service providers as well as users through enabling policies such as the National Protocol for Operationalization of Exemptions for Abortion in the Penal Code of 2012 (Rwanda Ministry of Health, 2014).

Even where abortion is accessible on certain grounds, adolescents can still face challenges to accessing safe abortion, especially when access is tied to administrative procedures, such as the requirement to prove rape to a third party. It was also evident in this case, where an admission was made before the Court, that the child had attempted to procure an illegal abortion. Even in a country like Rwanda, where the law on abortion is quite progressive, the law was not so clear on access for minors until perhaps this decision. The significance of this decision therefore is that it clarified the law on access to safe abortion for minors. It demystified the apparent interpretive or administrative hurdles. The evidence that the girl is below age 18 and pregnant as a result of sexual intercourse is sufficient for her to obtain permission of the courts to access abortion in accordance with the law.

It was also significant that the Court heard the views of the child herself. This accords with the children's rights principle that the views of the child be taken into account. Further, it was a demonstration of the importance of consent and adolescent decision-making in that, even if in principle the parent consented on the child's behalf, this was buttressed by the child's own statement showing consent. This emphasises that abortion for a minor should be of the girls' own decision-making and should never be non-consensual. The child's views, and perhaps even her own "consent," in accordance with the evolving capacity of a child aged under 18, should be taken into account.

Further to this, however, the views of the child included socio-economic factors which are not specified in the abortion law, such as embarrassment amongst peers and disrupted education. This shows that the abortion law of Rwanda still falls short of addressing the full range of issues behind why women and girls need abortion services. Many girls and even women seek abortion on grounds such as these. To exclude them from allowable grounds for accessing abortion is not only out of touch with the prevailing reality, but also infringes on their reproductive rights.

Apart from the issue of abortion, this decision also raises an important question regarding the autonomy of adolescent girls in relation to sexual conduct. The Court stated the position of the law, which is that girls of below age 18 do not have capacity to decide on sexual relationships. This fails to take into account variations in age from very young adolescents, who may not be able to consent to sex, and older adolescents, such as 17-year-olds. Legal capacity as provided by the law may be at odds with the true capacity of a girl to self-determine matters of a sexual relationship. Development of autonomy in matters relating to sexuality is an important aspect of adolescent sexual development, and a law that simplistically removes the capacity of every girl below age 18 to decide about her sexual relationship might do more harm than good. Evolving capacities of girls and adolescents to determine matters relating to their sexuality should not be extinguished by law, or indeed any other instrument.