



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

CRIMINAL APPEAL NO. 74 OF 2018

FRANCIS KITUKU MUTUNGA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. J.N Mwaniki (SPM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 308 of 2015)

JUDGMENT

1. The Appellant **Francis Kituku Mutunga** was charged with the offence of **Concealing birth contrary to Section 227 of the Penal Code as read together with Section 36 of the same Act**. The particulars of the offence were that on **29th day of May 2015**, at Kivani Sub-location, Kivani location in Makueni district within Makueni county, the Appellant jointly with another not before court endeavoured by secret disposition of the dead body of a baby girl, a child who had been delivered by **SMM** to conceal its birth.
2. He faced a second count of **Killing an unborn child contrary to Section 228 of the Penal Code**. The particulars were that on **29th day of 2015** at Kilala sublocation, Kilala location in Makueni district within Makueni county the Appellant by administering drugs to **SMM** prevented from being born alive a child who was to be delivered by **SMM**.
3. After a full trial, the learned trial magistrate convicted him on count II and sentenced him to four (4) years imprisonment.

The Appeal

4. Aggrieved by that decision, the Appellant filed this appeal and listed 7 grounds stating that the learned trial magistrate erred in law and facts by;
 - a. **Relying on insufficient or no evidence to substantiate the offence of killing an unborn child in the absence of any of the primary elements of mens rea and actus reus.**
 - b. **Admitting and applying uncorroborated evidence against the Appellant.**
 - c. **Failing to recognize and appreciate material inconsistencies in the various accounts of evidence whose doubt should benefit the Appellant.**
 - d. **Upholding his opinion in the place of the evidence of an expert and off handedly rejecting or disbelieving the evidence of an expert which was exculpatory to the Appellant.**
 - e. **Placing unnecessary weight in the evidence of a co-accused who had already been convicted and failed to consider the likelihood of ill motive on the said testimony.**
 - f. **Convicting the Appellant when the case against him had not been proved beyond reasonable doubt.**
 - g. **Dismissing the Appellant's defence and shifting the burden of proof to him.**

5. The Appellant canvassed the appeal through written submissions filed by M/s O.N Makau while the Respondent submitted orally through learned counsel Mrs. Owenga.

6. A summary of the prosecution case is that Pw3 (SWM) who was a form four student at [particulars withheld] Secondary School left for school from home on 29/5/2015. She did not return home and this got her mother concerned. Her mother **HM** Pw1 stated that when Pw3 did not return home she called the headmaster who informed her that the girl was not in school that day.

7. Pw3 on the other hand testified that she had conceived in 2014 and kept it from her mother. On 29/5/2015 she was pregnant and had disclosed this to her friend DN who referred her to Malili who was the Appellant's co-accused. Malili then referred her to the Appellant after giving her Kshs. 3,000/= for the Appellant plus a phone and the Appellant's number for purposes of communication. Her intention was to get rid of the pregnancy.

8. The said Malili gave her directions on how to reach the Appellant. She took a vehicle at Kivani and alighted at Kilala. On arrival, she called the Appellant who directed her to his house. At the house he inserted some pills in her vagina and after some time a jelly like fluid started to flow. He then injected her on the arm. The Appellant had wanted to have sex with her but she declined. She gave him the Kshs.3,000/= Malili had given her and she left for Malili's place. She arrived there thirty minutes before Malili arrived.

9. Malili made her lie on a seat and made her strong tea. At 7:00 pm she swallowed pills given to her by the Appellant. She then felt as if she had labour pains and the foetus came out at about 11:00pm. She released it into a basin given to her by Malili who told her not to look at it as it was a taboo to do so. She felt relieved and slept.

10. She woke up early morning and left for school though she was bleeding heavily. At school the principal wanted to know where she had been but she declined to answer and was suspended. The money Malili spent on her was refunded by her boyfriend **Joshua Mwendwa** whose number she had given to Malili on request.

11. Meanwhile, Pw1 was on her way to school when she met Pw3 who was crying. She narrated to her all that had happened. Pw3's breasts were producing milk and she told her she had aborted and thrown away the baby.

12. Pw2 corporal Alice Mureithi recorded Pw1's and Pw3's statements. She testified that Malili was a midwife who linked Pw3 with the Appellant a health officer at Ndibani health centre who was to carry out the abortion. They met and he carried out the abortion which went well as she got no complications. She went to school the next day but was sent home for absenteeism. She stated that Pw3 was taken to Makueni hospital since she was having pain in the abdomen and breasts and it was confirmed she had had an abortion.

13. She also confirmed that Pw3 took the police officers to the Appellant's home where the abortion had been done. In cross examination she said the Appellant told them he is a medical doctor but he did not say whether he runs a clinic.

14. PW4 was Dr. Emmanuel Loiposha, a medical doctor from Makueni hospital. He had a completed P3 form for SMM aged 17 years who had a history of illegal procurement of abortion on 29/05/2015. He examined her and the ultra sound done on 06/06/2015 showed that she had a complete abortion. That on first examination, the patient had blood from her vagina. That the contents of the P3 form were in line with the contents of the ultra sound film.

15. On cross examination, he said that the ultra sound was done days after the alleged incident and it showed no foetus activities in the womb. That he did not see any prior ultra sound films. He stated that a person who is not pregnant and does an ultra sound would show the same results. From the results, he could not say anything about the abortion and didn't know if Ndimbani dispensary exists.

16. His observation from the defence's treatment notes showed, S had premature labour subsequent to a pelvic inflammatory disease. That some medication was administered including some which reduced the uterus contractions. That the said medication also treats asthma. That S was referred to an ante natal clinic. The intended purpose of administering the antibiotic was to treat the inflammation. That the intended injection by the medic was to save the baby.

17. In re-examination, he stated that his conclusion about a completed abortion was as per the ultra sound films. That the documents by the defence were of the format used in hospital but he didn't know about the authenticity of their contents. He didn't know the author but could see the name of one Mutunga. That there was no signature on the entry bearing S on the patient column.

18. The Appellant who testified as Dw1 stated that he had a dispensary as a nurse and only knew S in court as one of the patients he had treated. That on the material day, he was not in Kivani as he was on duty at Ndimbani dispensary where he works. He later went home, about 20 kms away. He stated that he had an extract of an outpatient register of the material day which showed that S went to his clinic complaining of severe abdominal pains.

19. He had another register on medication and another one showing the HIV status. He further stated that the patient's pain was in the uterus and he found out that she was pregnant. He recorded that she had a pre mature labour due to pelvic inflammatory disease. He produced extracts from the hospital records as DEXB 1a – c

20. He went on to testify that Pw3 had vaginal discharge and itches. Since she was not accompanied by an adult he only attended to her because she told him she was 18 years of age. He gave the following drugs:

- **Amoxil - to treat the infection as it was the safest drug in pregnancy**
- **ABUTEM to dilate the bronchil and reduce the contractions in the uterus.**
- **BRUFEN – for pain and to reduce anxiety and make her rest.**
- **He recommended that they start ante-natal clinic but she declined.**

21. He denied making sexual advances at S or inserting drugs in her private parts. That he would not administer a drug and fail to record and that none of the drugs he gave could prevent birth. He said he works with a casual at his dispensary which has two rooms and has no privacy. He said he never followed on Pw3 after the treatment and if the child was born prematurely, it was not as a result of the drugs which he gave her.

22. On cross examination, he agreed that the records he had produced had a place for date, his signature, summary and comments. Those places had not been completed though they were supposed to. He was the nurse in charge at Ndimbani but would also do administrative work. He explained that a nurse provides nursing services including treating minor illnesses in a dispensary and premature labour is a minor illness. He added that if Pw3 had severe abdominal pain, he would have called for an ambulance.

23. He testified that he referred Pw3 to a major hospital but the records do not reflect that, though he made the referral in a treatment book. He confirmed meeting Pw3 on the material day, and said he had no grudge with her or her mother. Further that they had no reason to frame him unless they were being used by somebody else.

24. In re-examination, he said that the places not completed in the documents are completed at end month and there is no place to complete the details. That one document shows a place for the dispensary and has his name. The patient had mild abdominal pain caused by an infection and that was a minor illness. He denied having any disciplinary issue and added that most of the dispensaries are run by nurses.

The Appellant's Submissions

25. The Appellant submitted that the key issue for determination in this appeal is whether malice aforethought was proved. That the Appellant was on official duty during the commission/omission of the offence. That the extracts produced by the Appellant showing the treatment he administered do not show any malice aforethought on his part.

26. He submitted that the reasoning by the trial magistrate was marred by errors, and he totally disregarded the defence testimony and real evidence. That the prosecution's evidence was marred by inconsistencies and did not meet the required standard of proof.

27. He submitted that the evidence of Pw3 which the trial magistrate relied on was not corroborated at all. That Pw3 could not name the pills she was given or produce evidence of the same in court.

The Respondent's Submissions

28. Mrs. Owenga submitted that the Appellant was rightfully convicted. That he presented himself as a doctor and administered some medication to the complainant having known that she was expectant and intended to procure an abortion. That the medication he administered resulted in termination of the pregnancy.

29. She contended that in the defence, he merely alleged that he was treating an emergency. That the complainant was not very sick when she visited him and wanted an abortion which he did. She urged the court to uphold the conviction and sentence.

30. This is a first appeal and this court has a duty to re-evaluate and reconsider the evidence on record and arrive at its own conclusion. The court must bear in mind that it did not see nor hear the witnesses and so give an allowance for that. **See Okeno –v- R 1972 EA 32.**

31. Having considered the evidence on record, grounds of appeal and the rival submissions, I find the issue falling for determination to be whether the prosecution proved its case to the required standard.

32. The Appellant took issue with the trial magistrate's reliance on the evidence of Pw3 to convict him. The reliance is evident from the judgment and it is clear that Pw3 was a co-accused who pleaded guilty and was convicted accordingly. The prosecution's case was that Pw3's pregnancy was terminated illegally and she pleaded guilty to the charge. She was therefore an accomplice by all means.

33. In the case of **Watete –vs- Uganda [2000] 2 EA 559**, the supreme court held that;

“In a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial”

34. It is trite that accomplice evidence though admissible, requires corroboration and will only be used on its own in exceptional circumstances. In **Kinyua –vs- R [2002] 1 KLR 257** the court held as follows:

“7. The firm rule of practice is that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if it is satisfied that the accomplice witness is telling the truth upon the court duly warning itself on the dangers of doing so.

8. Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.

9. If the court decides that the accomplice witness' evidence, though credible, requires corroboration, the court must look for, find and identify the corroborative evidence."

35. In this case, it is clear that the learned trial magistrate considered the issue of credibility when he stated as follows;

"Pw3 was a credible witness. The court saw no reason to brand her otherwise. There was no reason for her to make up a case against the accused. As a fact, her evidence in court was substantially in tandem with the facts she accepted as true when she pleaded to the offence on count 1"

36. I have carefully looked at the evidence of Pw3 and I do agree with the learned trial magistrate that indeed she was a credible witness.

37. The fact that Pw3 was pregnant on the material day is not in dispute. Even the Appellant who admitted being with her on that day agreed that she was pregnant but said that his interaction with her was for purposes of saving her unborn baby. Dr. Loiposha (Pw4) confirmed that the ultra sound conducted on 06/06/2015 showed that S had a complete abortion hence corroborating her evidence that she indeed terminated the pregnancy.

38. It was also Pw3's evidence that she procured the abortion on 29/05/2015, the day that her mother (PW1) confirmed that she did not return home as well as the day that she was absent from school as per the principal's letter (*exhibit 2*). Contrary to the Appellant's assertion, my considered view is that S evidence was sufficiently corroborated.

39. It was further Pw3's evidence that she went to the Appellant's house on the material day after getting instructions from Malili and the Appellant inserted some pills in her vagina and injected her on the arm. Malili's defence that she did not know Pw3 was, in my view, a mere denial and from the totality of the evidence on record, I am convinced that she was working in cahoots with the Appellant and she was convicted.

40. In fact, when Pw3 got to the Appellant's house, he only asked whether she was Pw3 SW and got down to business. He was therefore very much aware of what he was doing hence had the requisite *mens rea* contrary to his assertions. I agree with the learned trial magistrate that the medication administered by the Appellant (*actus reus*) is what terminated the pregnancy.

41. The defence offered by the Appellant was in my view a desperate attempt to save face. As correctly observed by the trial magistrate, the documents produced by the Appellant were in his handwriting yet he testified that at his clinic, patient's particulars are taken after which the patient is referred to him implying that someone else is responsible for recording of particulars.

42. He also stated that Pw3 complained of severe abdominal pains and he recorded that she had pre-mature labour due to pelvic inflammatory disease. This shows the diagnosis he made. On cross examination, he said that pre-mature labour is a minor illness which can be treated by a nurse. In re-examination, he said that she had mild abdominal pain caused by an infection.

43. I do not see how pre mature labour could change so fast into mild abdominal pain and eventually a minor illness. I agree with the learned trial magistrate that it does not require a medic to tell that pre-mature labour is an emergency case. Further, he said that he had referred Pw3 to a major hospital but his records did not reflect as much. He later in re-examination said he had done the referral in Pw3's patient book. So which is which?

44. When taken to task as to why his records were not dated, signed and filled with other relevant details, he said that those places are usually completed at end month. Again, why would one wait until end month to fill a date column? How would he remember the specific date that a particular patient visited the clinic? Is that a professional way of doing things? In a nut shell, the Appellant's evidence was marred with contradictions and inconsistencies which only served to amplify his incredibility. The prosecution's case was consistent and corroborative. Accordingly, I find the defence to have been properly dismissed.

45. As for the likelihood of ill motive alluded to by the Appellant, the evidence on record does not point to such not even remotely. The Appellant confirmed that he had no grudge with either Pw3 or her mother (Pw1) and that they had no reason to frame him up.

46. Pw3 was not trying to shift blame because she had actually pleaded guilty and it was not shown that she had been promised anything in exchange for her testimony. The weight attached to her evidence was in my view not unnecessary and that ground of appeal fails.

47. The result is that the appeal lacks merit and is dismissed. The conviction and sentence are upheld.

Orders accordingly.

DELIVERED, SIGNED & DATED THIS 8TH DAY OF AUGUST 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE