



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Criminal Appeal 79 of 2009**

JANE AUMA KWEYU.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Jane Auma Kweyu was charged and convicted by Bungoma Court on a charge of attempt to procure abortion contrary to section 158 of the Penal Code and was sentenced to serve four (4) years imprisonment. She appeals against both conviction and sentence.

The grounds of appeal were mainly on the evidence presented before court, that no abortion was procured let alone, its attempt. The Appellant claims that the complainant gave birth to a healthy baby who died after two weeks at Busia District Hospital. The Appellant denies committing such an offence and claims that she was only a tenant in the premises housing the clinic where the complainant is alleged to have aborted.

The state did not oppose the appeal. Mr. Onderi told the court that the Appellant used to run a clinic with one Dr. Odhiambo who is her husband. The Appellant is not of the medical profession and cannot be held liable of attempt to procure abortion. Dr. Odhiambo is the one who attended to the complainant and ought to have been charged. When the doctor performed the abortion process on the complainant, it did not succeed. The complainant later gave birth to a live foetus which died later.

PW1 in her evidence said, the Appellant was running the clinic with the husband. It is accused who examined her when she went to the clinic and performed a procedure which never worked. She was doing that under the instructions of Dr. Odhiambo who was her husband. I agree with the state that the person who ought to have been charged was the doctor in charge of the clinic. The Appellant who is said to be the wife of the doctor has no professional qualifications. PW1 confirmed that when the process of procuring abortion failed, she gave birth to a foetus which was alive. It later died as it was undergoing treatment at Busia District Hospital.

The evidence before the court does not support a charge of attempt to procure abortion. The Appellant was wrongly charged with the offence. The doctor ought to have been charged with that offence. PW1 confirmed that the Appellant acted on the instructions of the doctor. He told her to assist the complainant. The Appellant who is not a qualified doctor cannot be held criminally responsible of procuring an abortion.

It is my finding that, the Appellant was wrongly charged with the offence. The conviction and the sentence imposed are hereby set aside. The appeal, is in effect allowed. The Appellant is hereby released forthwith unless otherwise lawfully held.

**F. N.MUCHEMI
JUDGE**

Dated, Delivered and Signed at Bungoma

This 25th day of November, 2009 in the presence of the appellant and the State counsel.