REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 95 of 2006

(From original conviction (s) and Sentence(s) in Criminal case No. 1141 of 2005 of the Senior Resident Magistrate's Court at Githunguri (Lucy Mutai - SRM)

ENID KAARI NG'ANG'A…….....…….…..APPELLANT

VERSUS

REPUBLIC…….....…….…....RESPONDENT

J U D G M E N T

ENID KAARI NG'ANG'A was charged with one count of **SUPPLYING DRUGS OR INSTRUMENTS TO PROCURE ABORTION** contrary to **Section 160** of the **Penal Code**. The particulars of the offence were as follows: -

"***On the 7th day of July 2005 at Ikinu SHAMMAH CLINIC in Kiambu District unlawfully supplied to RAHAB MUTHONI KAMAU drugs knowing that it was intended to be unlawfully used to procure the miscarriage of a woman named RAHAB MUTHONI KAMAU."***

After a full trial in which the prosecution called four witnesses and in which the Appellant gave a sworn defence and called no witness, the learned trial magistrate found the Appellant guilty of the offence, convicted her and sentenced her to two years imprisonment. The Appellant was aggrieved by both the conviction and sentence and therefore lodged this appeal. The Appellant has raised several grounds of appeal which I will summarize as follows:-

One that the Appellant carried out a medication treatment but did not deal with supplies of drugs or instruments.

Two that the conviction was based on mistaken identity

Three that the learned trial magistrate relied upon hearsay evidence.

Four that the Appellant also appealed against the sentence.

The Appellant argued the appeal in person while **Mrs. Gakobo**, learned counsel for the State represented the Respondent and opposed the appeal.

Going directly to the analysis and evaluation of the evidence, the prosecution case was that the Appellant assisted PW1, one RAHAB, a girl of 17 years at the time and the Complainant in this case to

procure an abortion of a 26 weeks old foetus. Rahab's evidence was that she approached the Appellant for the service on 5th July 2005 in the company of her boyfriend and another woman. Rahab said that the Appellant told her to go back 2 days later. On 7th July 2005 Rahab went back to the Appellant's clinic where the Appellant gave her two tables to take. That after the Appellant observed her for three hours, she gave her 14 tablets and instructions on how to take them. Rahab went home but at mid-night, she was in great stomach pains that she woke up her mother PW2. PW2 rushed to a neighbour who questioned Rahab. Rahab confessed that she was aborting. PW2 was not aware she was pregnant. PW2 went away and called another neighbour, a nurse, and by the time they went back home, the foetus had come out. The matter was reported to police the same night. PW3, the arresting officer arrested the Appellant the same night at her clinic after Rahab identified her. PW4, Faith, a Clinical Officer examined Rahab on 5th January 2006. In her evidence, she claimed to have seen the aborted 26 weeks old foetus which she said Rahab was carrying at the time of examination. She also claimed to have noted genitalia laceration and active bleeding with light red blood and an open cervix with bleeding. The P3 form was produced but not marked as an exhibit.

The Appellant in her defence which was unsworn denied committing the offence and stated that the case involved many people without elaborating. In her submission the Appellant denied that she supplied instruments and drugs for procurement of an abortion as alleged in the charge. The Appellant also denied having seen the lady in question.

Mrs. Gakobo for the State submitted that the evidence adduced in court was clear that the Appellant gave Rahab medicine and advised her on what to do. That after using the tablets, the foetus indeed came out. Learned counsel submitted that what the Appellant alleged that it was a case of mistaken identity could not be as Rahab went to the Appellant's clinic twice.

Section 160 of the **Penal Code** provides thus:

"***160 Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and is liable to imprisonment for three years."***

The prosecution had to establish that the Appellant supplied or procured for Rahab something while knowing that the thing was intended to be unlawfully used to procure an abortion. There was direct evidence by Rahab, PW1, that after visiting the Appellant's clinic twice, the Appellant administered 2 tablets on her, then supplied 14 others for use as advised in order to procure an abortion. There was the evidence of Rahab's mother Faith, PW2 to the effect that at midnight of the same day Rahab claimed the drugs were administered, a foetus was delivered by Rahab and that it was a still birth.

The evidence of PW4 left a lot to be desired for a very simple reason. PW4 a clinical officer examined Rahab on 5th January 2006. That was seven months after the date of the incident in question. Yet PW4 claims in her evidence to have seen the dead foetus which she said Rahab took to her at the time of her examination. PW4 also said that she noted active bleeding and concluded that the Complainant, Rahab, had aborted a child as a result of drugs and injection administered on her. PW4's evidence that an injection was administered on the Complainant contradicted the Complainant's evidence.

I have looked at the P3 form which is unmarked but was enclosed in the original court file. Failure to have an exhibit marked is fatal and in such circumstances it ought not to be referred to in a judgment. For purposes of demonstrating a point I will refer to the exhibit P3 form. It is evident that PW4 copied the information she wrote on the P3 form on 5th January 2006 from treatment notes from Githunguri Health Centre dated 7th July 2005. The notes were signed by a clinical officer one **MUIGAI**. It is not clear whether the said **MUIGAI** was one and the same person as PW4. However, PW4 did not claim so in evidence and neither did she say that she had seen Rahab on 7th July 2005. Further, other injuries were noted on Rahab which PW4 did not mention in her evidence and which opened a different angle to the whole saga. The clinical officer's notes of 7th July 2005 indicate that Rahab had a 3rd degree tear in the cervix which needed urgent repair in a hospital. The cause of the tear was not given nor were any

explanations offered concerning the same. The clinical officer did not commit herself or himself whether the abortion noted had been induced and or by what means. The hospital admission and treatment notes were not before the court neither were the findings of the doctor and medical interventions given to Rahab in hospital disclosed.

PW4's evidence was inconclusive as to cause of the abortion. That not withstanding it was not important for the prosecution to prove that the tablets supplied to Rahab were actually used to procure the abortion. The offence would be complete if the prosecution was able to prove that the Appellant did in fact supply or procure for Rahab the alleged tablets knowing they were intended to be unlawfully used to procure a miscarriage. The issue is whether the prosecution discharged that burden.

There are serious misdirections in the learned trial magistrates finding including the learned trial magistrate's consideration and finding that the Appellant injected the Complainant and administered some tablets. There was no such evidence given by the Complainant. The Complainant said she was accompanied by two others when she went to the Appellant's clinic for the alleged supply. The Appellant on the other hand denied seeing Rahab or supplying any tables to her as alleged. The evidence before the court was therefore the word of Rahab as against that of the Appellant.

The prosecution failed to call two essential witnesses whose evidence would have provided the much needed corroboration to Rahab's evidence. That evidence was very important because Rahab, the Complainant herein, was an accomplice to the offence charged and a principle offender. She was in fact the perpetrator of the offence having approached the Appellant for the service in the first place. The fact that the Appellant denied any involvement in the offence made the need for corroboration of Rahab's evidence even more critical.

In **BUKENYA & OTHERS vs. UGANDA 1972 EA 549 LUTTA, Ag. V-P** of Court of Appeal for Eastern Africa made this celebrated holding.

"***(IV) The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.***

(V) where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

In the instant case, vital witnesses were left out by the prosecution and the evidence of Rahab was hardly sufficient to prove the case. This was a fitting case to make an adverse inference that the evidence of the witnesses not called by the prosecution may have been adverse to the prosecution case.

In **NDUKU vs. REPUBLIC (1985) KLR 413**, **HANCOX JA, PLATT** and **GACHUHI Ag. JJA**, quoted from **REPUBLIC vs. KARIUKI (1945) 12 EACA 84** at page 84 with approval thus: -

"***A point which is sometimes lost sight of in considering accomplice evidence is that the first duty of the court is to decide whether the accomplice is a credible witness. If the court, after hearing all the evidence, feels that it cannot believe the accomplice it must reject his evidence and unless the independent evidence is of itself sufficient to justify a conviction the prosecution must fail, if however, the court regards the accomplice as a credible evidence, it must then proceed to look for some independent evidence which affect the accused by connecting or tending to connect him with the crime. It need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connection with the crime. But in every case the court should record in its judgment whether or not it regards the accomplice as worth of belief."***

In the instance case, the learned trial magistrate did not comment in her judgment whether she found the Complainant in this case an accomplice. Consequently, the learned trial magistrate did not make any note or record of the Complainant's credit worthiness and neither did she consider the need for, nor look for corroboration of the Complainant's evidence.

As the appellate court, at this stage of the proceedings, I am unable to comment on the Complainant's manner and demeanour for the obvious reason that unlike the trial court, I did not have the opportunity of seeing her. However it is quite clear to me that from the nature of her evidence and the charge, the Complainant was an accomplice. The Complainant's evidence needed corroboration as to who supplied the alleged tablets. There was no evidence found on record, whether direct or circumstantial to corroborate the Complainant's evidence. I also noted that the prosecution did not produce the tablets alleged to have been supplied to the Complainant by the Appellant despite the fact that the evidence before court strongly suggests that the Complainant did not use all of them.

In absence of vital witnesses being called to support the Complainant's accomplice evidence and due to lack of corroboration and in view of the Appellant's denial making the evidence before court the word of the Complainant against that of the Appellant, in these circumstances I find that the conviction entered in this case was not safe and should not be allowed to stand. I allow the appeal, quash the conviction and set aside the sentence. The Appellant should be set free unless she is otherwise lawfully held.

Dated at Nairobi this 11th day of October 2006.

……

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Mrs. Gakobo for the State

CC: Wambui

……

LESIIT, J.

JUDGE