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COURSE: HEALTH LAW II (LPB 516)

ASSIGNMENT TITLE: REPRODUCTIVE RIGHTS- ABORTION

SCENERIO: Termination of pregnancy

A 30-years-old lawyer, Charity, is happily married and has a good income. She has just discovered she is pregnant. She does want children at some point but has also just been nominated for promotion at work. She knows she would not get the promotion if she told her boss she was pregnant.

She decides that, at this time in her life, the promotion is more important to her than having a baby.

She consults her general practitioner (GP) a few weeks later, having finally decided that she would like to have an abortion. She asks the GP about whether she has a right to an abortion.

Question

- a. What are the grounds for a lawful termination of pregnancy?

- b. Does the potential father have any legal rights in this decision?

LEGAL ISSUES:

- i. What are the grounds for lawful termination of pregnancy?
- ii. What are the legal rights or otherwise of the potential father of an unborn child as regards termination of the pregnancy

INTRODUCTION

Abortion can be defined as an intentional expulsion of the product of conception any moment from conception up till the birth of the child. It can also be defined as the removal of pregnancy tissues, product of conception or the foetus and placenta from the uterus.

Abortion in Africa with emphasis on Nigeria, is largely prohibited and regarded as a crime. Studies have however, shown that at least 760,000 abortions happen every year, mostly outside the legal parameters, and from 3,000 to 34,000 women die annually from unsafe abortions. While safe abortions have a very low complication rate, unsafe ones — those performed by providers without adequate training otherwise known as ‘quarks’ in settings that does not meet medical standards, can lead to haemorrhaging (excessive blood loss), infection and perforation of the bowels or uterus and in worst cases, eventual death of the woman. This is in contrast with situation in a country like the United States where abortions are legal and has about 0.6 deaths for every 100,000 procedures. This demonstrates that Africa has a higher abortion rate than the U.S. notwithstanding the restrictive laws in most countries. It further suggests that the illegality of abortion makes it ironically more prominent and it unfortunately leads to more deaths as many people end up undergoing unsafe procedures in the hands of ‘quarks’.

Abortion in Nigeria is governed by two legislations. That is the Penal Code in the northern states and the Criminal Code operating in the southern states. Both laws criminalizes abortion except in

some exceptional cases. This was exemplified in the landmark case of *Rex v. Bourne (1939) 1 K.B. 687* (applicable in the southern states) where it was held that abortions are to be performed for physical and mental health reasons. The provisions of the criminal code on abortion are contained in sections 228, 299, 230 and 297. The provisions spell out the offence of procuring a miscarriage either by the woman or a third party such as a medical practitioner. Abortion falls under 'felony' and is punishable by imprisonment ranging from three years to fourteen years. Abortion is regulated in the Penal Code by sections 232, 233 and 234. These provisions just like in the Criminal Code, criminalize abortion. The Penal Code however, introduced the penalty of fine and life imprisonment depending on the circumstances of each case.

1. GROUNDS FOR LAWFUL TERMINATION OF A PREGNACY

Notwithstanding the prohibition of abortion, there are some exceptions or lawful grounds for the termination of a pregnancy as contained in the Criminal and Penal Code. These exceptions are:

i. **Where the where the continued pregnancy would endanger the life of the woman;**

This means that when a pregnancy get complicated to the point of standing as a threat to the mother's life, a termination of such pregnancy, would be legal. For instance, an 'ectopic pregnancy', is a commonly terminated one as it causes great danger to the life of the mother as well as the impossibility of the child to grow in the fallopian tube where such pregnancies are usually located. This is backed by the provisions of section 297 of the Criminal Code which provides that a person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

ii. **Where the child when born would be seriously handicapped;**

This arises from complications associated with pregnancy and as such, where it has been certified that the baby when born, would be seriously handicapped such as having a mental disorder or any other serious deformity that would possibly cause the child to have a difficult life.

iii. **Where the pregnancy is a result of rape or incest;**

This is because it is common practice for a woman who has been a victim of rape, to flush her system against unwanted pregnancies and any other underlying conditions that might arise. If for one reason or the other the woman is unable to carry out the flushing in due time thereby resulting in pregnancy, she can lawfully terminate such pregnancy. Little is however, said about pregnancy caused by incest.

iv. **When a pregnancy is terminated by a registered medical practitioner;**

This signifies that only a duly registered and so recognised medical practitioner, can lawfully terminate a pregnancy. This implies that any such termination by an ordinary person or 'quack', would be a criminal offence and would not be able to escape liability.

All these exceptions or grounds must however, be attested to by the opinion of two registered medical practitioners formed in good faith. They must also ensure that the pregnancy has not exceeded its 20th week. That is 5 months as this is the period where the limbs and other parts of the baby starts developing.

From the above grounds, it can be said that Charity has no due cause of action and would have to keep the pregnancy except the pregnancy falls under the exceptions stated above.

This is because her unwillingness to have a baby at this stage of her life, is not a legal ground for a lawful termination of pregnancy.

2. THE LEGAL RIGHTS OR OTHERWISE OF THE POTENTIAL FATHER

Paternal rights and abortion issue is an extension of both the 'Abortion Debate' and the 'Father's Rights Movement' as abortion has become a factor of disagreement between partners. These movements seek to grant potential fathers legal rights to have a say in the termination or otherwise of their unborn children. There is however, generally no rights in any Nigerian law, allotted to a potential father as regards making decision relating to the termination of pregnancy. A potential father only has moral rights which largely, have no legal backing.

The illegality of a paternal right is exemplified in the landmark U.S Supreme Court case of *Roe v Wade 410 U.S 113 (1973)* where it was held that the Constitution of the United States protects a pregnant woman's liberty to choose to have an abortion and any law preventing it would be unconstitutional. Similarly, in the Supreme Court in the case of *Planned Parenthood of Central Missouri v. John Danforth 428 U.S. 52 (1976)* the court upheld the right to have an abortion, declaring unconstitutional the statute's requirement of prior written consents from a parent (in case of a minor) or a spouse (in the case of a married woman).

Noteworthy also are the cases of *Tremblay .v. Daige* where the Supreme Court of Canada ultimately ruled that there was no precedent for a man's right to protect his 'potential progeny' as a foetus was not recognised as having life under the Quebec Charter of Human Rights and Freedom. There was also the United Kingdom case of *Stephen Hone v. Claire Hansell* (ex-girlfriend) where Stephen unsuccessfully tried to prevent Claire from having an abortion.

There are however, countries like Japan, China, South Korea, Malawi, Syria, United Arab, Emirates, Kuwait, Guinea among others, have been reported to have laws which requires a woman to firstly receive the approval of her husband before carrying out an abortion. These laws are however, circumvented in some countries where there is sincere concern for physical and mental health of the mother. These indicates that the rights accruing to a potential father in making decisions relating to an abortion, largely depends on the laws in each region, state or counties.

Thus the potential father of Charity's pregnancy has no legal rights in her abortion decision in Nigeria as there is no law that grants such rights.

In conclusion, abortion is an act which is prohibited in Nigeria and as such any termination must be in accordance with the exceptions provided for by law.