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ASSIGNMENT: Termination of pregnancy:

A 30-year 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.

Questions

- a. What are the grounds for a lawful termination of pregnancy?
- b. Does the potential father have any legal rights in this decision?

Answer

The legal issues in this case bothers on whether Charity can lawfully terminate her pregnancy, whether Charity has a reproductive right to make a decision concerning the termination of her pregnancy and whether the potential father has a legal right in the decision of termination of the pregnancy.

Termination of pregnancy is of interest to lawyers and doctors because of the many controversial questions they throw up; abortion is the termination of pregnancy¹. By virtue of the human rights which are bestowed on human, there are certain rights that are important in medical law and ones which are more crucial to human reproduction. These rights include right to autonomy, right to life, and right to dignity. Right to autonomy is the capacity to think, decide and act on the basis of such decision and thought freely and independently without any hindrance, this differentiates it from freedom. It is an essential moral requirement to respect other people's autonomy.

Every adult person has a right to decide whether to have children or not. The principle of autonomy also brings about procreative autonomy which is a woman's freedom to terminate a pregnancy.

¹ Festus O. Emiri, *Medical Law and Ethics in Nigeria* (1st edn, Malthouse Press Limited 2012)

Abortion is defined as the discontinuation of a pregnancy before attainment of viability, in other words, the termination of pregnancy before the fetus is capable of independent existence. The abortion may be a spontaneous or miscarriage abortion which is unintentional or induced abortion which is intentionally done.² There is also sterilization which is the medical procedure that results in the terminations of the ability to produce offspring and also therapeutic sterilization which is undertaken to save the mother's life.

Induced abortion except where it is strictly done to save the life of the woman is illegal, for this reason, it is not possible for any pregnant woman who does not desire to have a baby even for the most serious or justifiable reasons except where her life is endangered by the continual carrying of the baby to undergo an abortion.³

Section 228 of the Criminal Code⁴ provides that anyone with the intent to procure miscarriage of a woman whether she is with or not with a child by unlawfully administering poison to her or any other means is guilty of a felony and liable to imprisonment for fourteen years.⁵ It should be noted that this also includes medical practitioners and health workers.⁶ **Section 299 of the Criminal Code**⁷ provides that any woman who with intent to procure her miscarriage by administering to herself any poison or any other means is guilty of a felony and liable to imprisonment for seven years. **Section 230 of the Criminal Code**⁸ punishes any person who unlawfully supplies to another anything, knowing that it is intended to be used to procure an abortion. The relevant provisions for the offence of abortion in the **Penal Code**⁹ are **Section 232,233,234,235 and 236**. Therefore, the law punishes both the mother and any person who participates and aids an abortion process. In respect of right to autonomy of an individual, termination of pregnancy in Nigeria is unlawful so it cannot be said that a mother has autonomy to decide on the termination of pregnancy in Nigeria.

Despite the general rule that abortion is unlawful in Nigeria, there are limited circumstances where abortion is permitted. Both the Penal code which is applicable in the northern part of Nigeria and Criminal Code applicable in the southern part of Nigeria provided for grounds where abortion can be terminated. **Section 297 of the Criminal Code**¹⁰ provides that a person is not criminally liable for performing in good faith and with reasonable skill a surgical operation upon an unborn child for the preservation of the mother's life and where the operation is performed

² Chibueze P.Okorie and Olubusola Adebayo Abayomi, 'Abortion Laws in Nigeria : A Case For Reform'(2019) (Volume 23)(issue 1) *Annual survey of international and comparative law*; 165-192

³ Ibid.

⁴ Criminal Code Act Cap C39, LFN 2004 , s228

⁵ Ibid.

⁶ Chibueze P.Okorie and Olubusola Adebayo Abayomi, 'Abortion Laws in Nigeria : A Case For Reform'(2019) (Volume 23)(issue 1) *Annual survey of international and comparative law*; 165-192

⁷ Criminal Code Act Cap C39, LFN 2004

⁸ Ibid.

⁹ Penal Code Act Cap 532 ,LFN 2007

¹⁰ Criminal Code Act Cap C39, LFN 2004

with reasonable skill having regards to the patient's state of at the time and all the circumstances of the cases. This section provides a defence or protection to a medical practitioner who with surgical instrument operates on any person for her benefit.¹¹ It should be noted that the operation is done by a registered medical doctor and not a pharmacist, a nurse, or a lab attendant.

In the case **R v Bourne**¹², an obstetrician surgeon was charged with criminal abortion on a 15 year old girl who became pregnant as a result of sexual rape assault on her by a soldier, the physician admitted that he performed the surgery but was done lawfully as the operation was carried out to protect the young girl's health which could be gravely endangered if the pregnancy was not terminated. Mac Naughten J stated that the proper test to be applied was whether the defendant's action (the medical practitioner) was done in good faith for the purpose of preserving the girl's life and that if in the surgeon's opinion a delivery cannot result without death to the mother, the surgeon is entitled to save the mother's life. He further directed that if the pregnancy was likely to make the mother to be challenged physically or mentally, then such surgeon is operating to preserve the mother's life. Hence the surgeon was not held liable.

From the above case, it can therefore be said also that a ground for lawfully terminating a pregnancy can occur where the pregnancy is as a result of rape or incest. A lawful termination of pregnancy can occur when a pregnancy is terminated by a registered medical practitioner but this has to be when two registered medical practitioners are of the opinion formed in good faith that the pregnancy has not exceeded twenty weeks and the continuing of pregnancy would invoke risk greater than if the pregnancy were terminated. **The English Abortion Act**¹³ which was amended by the **Human Fertilization and Embryology Act**¹⁴, the act liberalizes abortion, it provides that abortion shall be lawful if two registered medical practitioner are of the opinion formed in good faith:

1. That the pregnancy has not exceeded twenty four weeks and the continuance of a pregnancy would involve risk greater than if the pregnancy were terminated or cause injury to her physically or mentally or any existing children of her family
2. That the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman
3. That the continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy were terminated
4. That there is a substantial risk that if the child were born it would suffer from physical or mental abnormalities as to be seriously handicapped

The pregnant woman's actual or reasonable foreseeable environment is taken into consideration in determining whether the continuance of a pregnancy would involve such risks as mentioned.¹⁵

¹¹ Festus O. Emiri, *Medical Law and Ethics in Nigeria* (1st edn, Malthouse Press Limited 2012)

¹² [1939] 1KB 687

¹³ 1967 applicable in United Kingdom

¹⁴ (HFEA) 1990

¹⁵ Festus O. Emiri, *Medical Law and Ethics in Nigeria* (1st edn, Malthouse Press Limited 2012)

Where there is evidence that a woman had been pregnant for twenty four weeks or more, there is a presumption that her child is capable of being born alive therefore a person shall be liable of the crime of child destruction when an abortion involves destruction before birth of a child capable of being born alive.¹⁶

In the case **Rance v Mid-Downs Health Authority**¹⁷, the plaintiff who was twenty six weeks pregnant had an ultra sound scan administered by the defendant, the radiographer taking the scan thought the scan showed a possible abnormality in the fetus, later this was discussed with her by her consultant and it was advised that no further action as abortion should be taken since there was no firm abnormality. When the baby was born, it suffered an abnormality and the mother sued for deprivation from exercising her right to terminate the pregnancy. The defendants were not liable, as even though the abnormality was discovered, the child was capable of being born alive as it was already twenty six weeks and destruction before it had an existence independent of its mother was unlawful unless it was necessary to preserve the mother's life.

Another issue concerning abortion is that if the conditions for lawful abortion are to be exercised in Nigeria, who will be entitled such right? Will the fathers consent matter? Does the potential father have legal rights in the decision of an abortion?

In most jurisdictions, the legal position is that a potential father has no right whatsoever in the determination of whether or not a pregnant woman should have an abortion. In the case of **Paton v Trustees of British Pregnancy advisory**¹⁸ services, a woman who had consulted two doctors was advised to have an abortion. Her husband attempted to restrain the proposed abortion by injunction, he claimed he has a say as to the destiny of the fetus of their marriage, the court held that since a fetus had no rights known to law or equity, then the husband could not acquire any right to restrain his wife from having an abortion. The decision of the court in this case will be repulsive in an African family setting in Nigeria as moral sentiments will ensue, the proposition would be considered strange. In this case, Sir George Baker of the Family Division of the Queens Bench stated that in his view a potential father has no legal right unforeseeable at law or in equity to stop his wife from having an abortion or to stop the doctor from carrying out the abortion.

In Canada, the position is also the same, in the case of **Tremblay v Daigle**¹⁹, it was argued that since a potential father contributes to the conception of the fetus, he should also have an equal say in the destiny of the fetus, the court dismissing this argument, held that there is no such legislation or civil code in support of the allegation of a father's right. The reason behind this is

¹⁶ English Infant Life (Preservation) Act 1929 1(1) and (2)

¹⁷ [1991] 1 QB 587

¹⁸ [1979] QB 276

¹⁹ [1989] 62 DLR (4TH)

based on the fact that a fetus has no legal right until it is born as it still consists of an integral part of its mother, there is no existing right of the fetus which a potential father can act on.

In the case of **C v S**²⁰, the father of a fetus of eighteen to twenty one week's sought orders on his behalf and that of the fetus prohibiting the mother and her area health authority from aborting the fetus. He claimed that the proposed abortion would violate provisions of the Infant Life (Preservation) Act²¹ which made it an offence for any person with intent to destroy the life of a child capable of being born alive to cause it to die before it had an existence independent of its mother. The court refused to make orders ruling that although a fetus between eighteen and twenty-one weeks old showed signs of movement, it was not capable of being born alive within the meaning of the Act. The court did not grant the orders.

The case of **Paton v Trustees of British Pregnancy advisory** and **C v S** expresses the universal principle on the legal status of a fetus. In the issue of abortion, the pregnant woman's right is paramount; she has the sole right to determine the fate of her fetus. According to the European Commission of Human Rights, the reason for this rule is the fact that the mother or carrier of the baby is the one primarily concerned with the pregnancy, its continuation or termination and also her right to private life is in issue. However, it has been suggested that this area of law needs a rethink as to exclude the father who has contributed to conception in the decision making process is undesirable, there is need for balance, the views of others should not be completely ignored.²²

Based on what has been said, abortion is illegal in Nigeria and only in certain circumstances will there be lawful termination of pregnancy. Therefore, Charity would be able to terminate her pregnancy only when the exception is in issue which includes that the pregnancy has not exceeded twenty four weeks and the continuance of a pregnancy would involve risk greater than if the pregnancy were terminated or cause injury to her physically or mentally or any existing children of her family, that the termination is necessary to prevent grave permanent injury to her physical or mental health, that the continuance of the pregnancy would involve risk to her life greater than if the pregnancy were terminated and that there is a substantial risk that if the child were born it would suffer from physical or mental abnormalities as to be seriously handicapped.

As regards to the potential father, based on the universal decision in the case of **Paton v Trustees of British Pregnancy advisory** and **C v S**, a potential father does not have any legal right in the decision of charity terminating her pregnancy as the right of Charity is paramount and only she can make a decision regarding the termination of her pregnancy.

In conclusion, abortion is a crime in Nigeria and not only the person who gets an abortion will be convicted but also those who participated in the abortion process will be liable for a felony.

²⁰ [1988] QB 135

²¹ Act 1929 1(1) and (2)

²² Festus O. Emiri, *Medical Law and Ethics in Nigeria* (1st edn, Malthouse Press Limited 2012)

Where abortion is lawful, it has to be done by a medical practitioner and not a pharmacist or medical student and also the fetus must not be one capable of being born alive.

REFERENCES

1. Criminal Code Act Cap C39, LFN 2004
2. Emiri F.O., *Medical Law and Ethics in Nigeria*(1st edn, Malthouse Press Limited 2012)
3. English Infant Life (Preservation)Act 1929
4. Human Fertilization and Embryology Act HFEA) 1990
5. Okorie C.P. and Abayomi O.A., ‘Abortion Laws in Nigeria : A Case For Reform’(2019) (Volume 23)(issue 1) *Annual survey of international and comparative law*; 165-192
6. Penal Code Act Cap 532 ,LFN 2007
7. The English Abortion Act 1967 applicable in United Kingdom