

FACT SHEET

Abortion Stigma and Its Effect on Access to Justice

*Jackson Namunya Tali
v. The Republic of Kenya*

CENTER
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REPRODUCTIVE
RIGHTS

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For more than 25 years, the Center for Reproductive Rights has used the power of law to advance reproductive rights as fundamental human rights around the world.

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On October 19, 2017, the Court of Appeal of Kenya acquitted Jackson Tali, a registered nurse who had been arrested in July 2009 and sentenced to death in September 2014 after a young woman with pregnancy complications died in his care.¹ The prosecution alleged that Mr. Tali had been trying to assist the woman to procure an illegal abortion, and that this alleged botched abortion had led to the woman's death.

The Court of Appeal found that the investigating officer and the trial court, referred to an abortion theory that was unreasonable and unproven in Court to warrant the conviction and death sentence meted out to Mr. Tali.

This case is important because health service providers should never be placed in a position in which they fear providing medical services to women seeking reproductive health services. Abortion stigma should not impact how disputes regarding the conduct of medical providers in the delivery of reproductive rights services are adjudicated.



Introduction

In July 2009, a pregnant woman came to Tali's health clinic in Gachie, Kiambu County experiencing severe pain and bleeding. After diagnosis, Mr. Tali determined that she needed to go to a bigger and better equipped health facility to receive specialized medical attention. Because she could not afford to hire an ambulance for the transfer, Mr. Tali agreed to transport her to the next facility. The woman died in Mr. Tali's car while being transferred.

Mr. Tali was then charged and convicted of the murder of the woman. In the trial court the judge believed Mr. Tali had been trying to assist the woman to procure an abortion, and that this alleged botched abortion had led to the woman's death. However, the government pathologist testified that he was unable to determine the cause of the death because there was no direct evidence that the accused had interfered with the pregnancy and caused her death.

Mr. Tali was convicted, sentenced by the trial court, and incarcerated in 2009. He was then denied bail pending appeal in September 2016 despite having presented strong grounds for appeal and having undergone a series of administrative delays in getting the court record to enable a hearing of the appeal.

On appeal, Mr. Tali argued that the legal criteria to convict for murder were not fulfilled in his case and that there was no evidence of an unlawful act or omission by himself. The "unlawful act" relied upon by the trial court was an alleged attempt by Mr. Tali to procure an abortion for his patient, but to reach this conclusion, the trial Court relied on facts that were unsupported or were directly contradicted by other facts. In addition, Mr. Tali argued that there was no evidence that the deceased died from an alleged attempted abortion. Mr. Tali also argued that the trial court was wrong in shifting the burden of proof of exoneration onto himself, which constituted a constitutional violation.



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The Court of Appeal's Findings

Upon hearing the appeal, the Court of Appeal pronounced itself on several issues highlighted by both Mr. Tali and the State. Of note are the court's pronouncements that highlight how abortion stigma may have impacted the quality of the prosecution and judgment during the trial. For example, the Court stated:

“In this case there was no pretence [sic] by the prosecution that it was focusing on any one or more of the elements [of murder] stated above to prove causation or intent. The theory of attempted abortion that was latched on by the investigating officer and eventually accepted and, with respect, unduly embellished by the trial court...”²

The Court of Appeal found that the prosecution failed to tender evidence that the medical instruments and equipment collected from Mr. Tali's clinic and the blood samples, all of which were taken for forensic examination, had connected Mr. Tali with the attempted abortion and therefore the death of the deceased.³ The Court also found that there was no evidence that the medication given to the deceased by the appellant the day before her death was toxic or related to abortion.⁴

The Court of Appeal took issue with the way the explanation given by the accused during his initial trial was dismissed. In the Court of Appeal's words:

“The appellant in this case gave an elaborate defense explaining his interaction with the deceased, Grace and Owino (prosecution witness 6). His evidence was given short shrift and peremptorily dismissed by the trial court without proper and contextual analysis”⁵

“On the whole we are far from satisfied that the offence of murder was proved beyond any reasonable doubt. All that was established was suspicion that the appellant may have had a hand in the death of the deceased, but mere suspicion, however strong, is never probative of an offence in our criminal justice system”⁶.

The Court thus allowed Mr. Tali's appeal, quashing the conviction and reversing the death sentence imposed upon him. The Court ordered his immediate release from prison unless otherwise lawfully held.⁷



Why This Case Is Important

Mr. Tali is one of many health service providers who have been prosecuted in circumstances supposedly related to the provision of abortion services.⁸ His story illustrates how disputes regarding the conduct of medical providers in the delivery of reproductive rights services are adjudicated, impacting on access to justice.

Abortion stigma, compounded by the government's failure to provide clear guidelines on abortion services, has negatively impacted Kenyan health care providers and stifled their ability to perform the full function of their job.

Kenya's 2010 constitution provides for the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care. It also provides for access to safe abortion services when the life or health of the pregnant woman is in danger or in cases of emergency. However, Kenyan women continue to be denied essential

reproductive health services, including quality maternal health care and access to safe and legal abortion services. Without clear guidance, qualified health care providers are likely to interpret the law conservatively to avoid being punished.

The continued uncertainty among Kenyan public health care providers and law enforcement officers on issues related to abortion and the pervasive environment of stigma undermines the constitutional rights of women and girls. It deprives them of potentially life-saving medical information and services and obstructs health care providers' ability to provide health care to women who present with pregnancy complications because it leads them to fear criminalization and professional sanctions.

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