REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
HCCRA NO. 49 OF 2016

CHARLES ODHIAMBO OCHIENG ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

[Being an appeal from the decision of the SRM, Winam, Honourable B. K. Kasavuli Dated 11th day of October 2016, Criminal Case No. 1275 of 2012]

JUDGMENT

1. On 9th March 2012 **Winnie Akinyi Aketch**, deceased, who was 33 weeks pregnant went into labour and started bleeding and was rushed to Marie Stopes Hospital by her husband Benard Ochieng Opondo. A team of medics led by the appellant, himself a medical doctor, carried out a preliminary investigation which revealed that the foetus was dead and the placenta was displaced. They therefore decided to do an emergency Caesarian Section to remove the foetus and save the life of the mother. After the operation the deceased was taken back to the ward with her husband by her side until about 6.30am when he left to inter the remains of the foetus. All the while she was in pain but stable. However at around 2pm when her sister Emman Awino Aketch **(PW2)** went to see her she found her crying in pain. When however she later learnt that the deceased's condition had deteriorated she rushed there only to find utter confusion. She recalled seeing a Doctor Okula coming out of the threatre where her sister was being attended. She was afterwards told that her sister had died. The family of the deceased felt aggrieved and lodged a complaint to the police following which a post mortem was conducted on her body by Doctor Peter Asava **(PW6)** who opined that the death was a result of severe bleeding due to a tear on the posterior lower segment of the uterus which was not stitched. The appellant was then arrested and charged with this offence.

2. At the trial the appellant conceded that he in fact performed an operation on the deceased. He contended that by the time the deceased was taken to hospital she had bled for 2 hours and that when they did an ultrasound it showed the foetus was dead and the placenta had dropped from its original position and dropped towards the opening of the womb. He stated that as per their training they decided to do an emergency caesarian section to which the deceased's husband consented. He stated that during the operation they removed the foetus and the placenta and cleaned the uterus, stitched back the wound to its original position and the patient was taken back to the ward in a stable condition. Thereafter she was monitored after every 15 minutes for the first two hours during which time the vital signs were stable and there was no bleeding in the birth carnal. He stated that he personally talked to her before he left work at 5pm and that she was in high spirits. On the same day at about 10pm he received a call from a nurse who allegedly told him that the patient's condition had changed abruptly at 9pm and that Doctor Aggrey Okula had managed her but she had passed away. The appellant denied that he killed the deceased and stated that he had given her blood and had done all he could as a doctor to save her life. He contended that he did not see the impugned tear.

3. The trial magistrate after evaluating the evidence from both sides found the accused guilty of Manslaughter, convicted him and sentenced him to serve four years in prison. Being aggrieved he appealed and has been on bond pending appeal. His Amended petition of appeal is premised on the following grounds:-

    1. ***"THAT the learned trial magistrate erred in law and facts relying on the evidence from an alleged report from the Medical Practitioners & Dentist Board that was neither tendered in court nor corroborated.***

    2. ***THAT the learned trial magistrate erred in law and facts in making reliance on an "extraneous evidence" and going on a "frolic of his own" to find an evidence not adduced in court, thereby denying the Appellant the opportunity to defend the allegations on the said report by the Medical Practitioners and Dentist Board.***

3. ***<u>THAT</u> the learned trial magistrate erred in law and in facts in making reliance on contradictory evidence by the prosecution witnesses as to the real cause of the bleeding that led to the death of the deceased.***

4. ***<u>THAT</u> the learned trial magistrate erred in law and in facts in convicting the Appellant on uncorroborated evidence by the Prosecution witnesses.***

5. ***<u>THAT</u> the learned trial magistrate erred in law and in facts in convicting the Appellant when the prosecution did not prove its case beyond any reasonable doubt.***

6. ***<u>THAT</u> the trial magistrate erred in law and facts in disregarding the watertight evidence of the defence and proceeding to convict the Appellant.***

4. This court heard the oral submissions of the Learned Advocates which I need not reproduce here.

5. As the first appellate court I have a duty to reconsider and evaluate the evidence so as to arrive at my own conclusion all the while bearing in mind that I did not see or hear the witnesses testify. I have done so and come to the conclusion that the charge against the appellant was not proved beyond reasonable doubt.

6. The death of the deceased is attributed to ***<u>"severe bleeding due to unsutured posterior lower uterine segment tear"</u>***. From this one gets the sense that the appellant is blamed for not suturing the tear as a result of which the patient bled to death. He is in other words blamed for failing to do something which in law is an omission. The issue for determination therefore is whether or not the appellant by an unlawful omission caused the death of the deceased.

7. **Section 202(2) of the Penal Code** defines an unlawful omission as –

> ***"an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm."***

8. In this case it was upon the prosecution to prove, and this beyond reasonable

doubt, that the appellant had by an omission amounting to culpable negligence to discharge his duty as a doctor as a result of which the deceased died. Were that to be proved then it would not matter that he had no intention to cause her death or bodily harm. So what is culpable negligence? **Black's Law Dictionary, Eighth Edition, Page 1062** describes culpable negligence as follows:-

> ***" Culpable negligence; while variously defined, has been held incapable of exact definition, it means something more than negligence..... In connection with negligence, the word 'culpable' is sometimes used in the sense of 'blamable' and it has been regarded as expressing the thought of a breach of a duty or the commission of a fault; but culpable negligence has been held to amount to more than 'blameworthy' conduct ..... It does not involve the element of intent ..... On the other hand it has been said to be intentional conduct which the actor may not intend to be harmful but which an ordinary and reasonably prudent man would recognize as involving a strong probability of injury to others."***

9. In **Ricarda Njoki Wahome *(suing as the administrator of the late WAHOME MUTAHI (deceased)* VS Attorney General & 2 Others [2015]eKLR** the court stated –

> ***"....if he professes an art, he must be skilled in it. There is no doubt that the defendant surgeon was that. He must also be careful, but the standard of care which the law requires is not insurance against all accidental slips. It is such a degree of care as normally skillful members of the profession may reasonably be expected to exercise in the actual circumstances of the case and in applying the duty of care of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention .... the burden is to prove that the damage was caused by negligence and was not a question of misadventure and that burden must be discharged on a preponderance of evidence."***

Court went ahead and added that;

> ***"In medical cases the fact that something has gone wrong is not in itself any evidence of negligence. In surgical operations there are inevitable risks."***

10. In this case the trial magistrate correctly stated that the test applied in the **Ricarda Njoki** case was the one in **Bolam V. Friern Hospital Management [1957] WLR 582** and approved by the **House of Lords in Maynard V. West Midlands [1947] 1 WLR 634** where the court held inter alia that –

"The Bolam test appears to treat medical negligence different from other negligence actions. When deciding whether an employee or driver has been negligent the standard of care is set by the court using the device of the reasonable man. When the defendant is a doctor, the standard of care has historically been set by other doctors via the Bolam test."

That test as correctly stated by the trial magistrate is –

"A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art."

11. The trial magistrate relied on the test in Bolam's case and the findings of the Medical Practitioners & Dentists Board which were that the appellant ***"had not achieved homeostasis in theatre and the deceased subsequently continued bleeding after the surgery and that caused her death."*** to convict the accused. It is instructive however that these findings of the Board were not produced in evidence. To the contrary the same were introduced into the proceedings vide a complaint against the court by Kennedy Aketch **(PW3)** vide a letter dated 7th February 2014. In the said letter he was complaining about the manner in which the case was being handled and about delay. The findings of the Board are themselves contained in a letter to PW3 dated 24th October 2013. However by the time he testified on 20th March 2013 the Board had not concluded its investigation and indeed in cross-examination he stated –

"I cannot confirm whether the accused is a Doctor. I had appointed Kanyangi & Company Advocates to take over the case. Mr. Kanyangi wrote to the Medical Board and the matter is yet to be concluded."

12. Clearly the trial magistrate acted in error in basing his judgment on the said findings as the same were not produced in evidence and the accused had not been

given a chance to interrogate them. This is not evidence that was improperly admitted by the court. It is no evidence at all as it was not adduced at the trial. This court cannot therefore even deal with it as provided in **Section 175** of the **Evidence Act.** It is also instructive that the Bolam test was applied in tort and whereas its applicability in the **Ricarda Wahome Njoki** case is not in doubt it is my finding that it cannot apply to this case. Here we are dealing with culpable negligence which in my view requires a higher standard of proof which if we were to take the definition of culpability in the Black's Law Dictionary (Suppra) at Page 406 would be –

> ***"criminal culpability would require "a showing that the person acted purposely, knowingly, recklessly or negligently with respect to each element of the offence."***

13. Culpable negligence is in the same Black's Dictionary (suppra) defined thus –

> ***"..... has been said to be intentional conduct which the actor may not intend to be harmful but which an ordinary and reasonably prudent man would recognize as involving a strong probability of injury to others ....."***

14. Even were the Bolam test to apply it was the appellant's evidence that he did not see the impugned tear. It is my finding that no evidence was adduced to contradict this. There was also no evidence that he saw the tear but deliberately refused to attend to it but instead closed up the uterus and left the patient to die. It was his evidence that by the time he left the hospital at 5PM the patient's condition was stable and she was not bleeding. He also stated that when he spoke to her she was in high spirits. Again this was not rebutted yet there were potential witnesses like the nurse who was taking care of the deceased and the cousin who was with her who were not called to testify. It is also noteworthy that evidence was led by none other than the deceased's sister **(PW2)** that when she rushed to the hospital upon learning that her condition had deteriorated she saw one Doctor Okula coming from the theatre where she (deceased) was being attended. What caused Doctor Okula to attend to the patient is not clear as he was himself not called as a witness. What he did with the patient was also not disclosed. It is however

instructive that in his own notes which were produced by the appellant as exhibit D-4 he stated that he did not see the any sign of intra-abdominal blood. The burden of proof in a criminal case never shifts to the accused person and the accused is never under a duty to prove his innocence. This case is no different. It is my finding that the omission to call Doctor Okula as a witness and to adduce evidence of what he did with the patient left a gap in the prosecution's case which the appellant could not be called upon to fill. Indeed apart from the findings of the Board which as I have stated were not part of the evidence and cannot therefore form the basis of a conviction there was no other evidence to prove culpable negligence on the part of the appellant. The omission to call Doctor Okula or anybody else in the medical team that attended to the deceased casts a shadow of doubt on the prosecution's case. The benefit of doubt must by law go to the appellant but not to the respondent.

15. Accordingly I am satisfied that this appeal has merit. The same is allowed. The conviction is quashed and the sentence is set aside. The appellant should be set at liberty forthwith unless otherwise lawfully held.

Signed and dated at Kisumu this 2nd day of May 2018

E. N. MAINA
JUDGE

Signed and delivered at Kisumu this 30 day of May 2018

T.W. CHERERE
JUDGE

In the presence of:-

For the State — Mr Hola
For the Appellant — Mr Ojoro
Appellant
- Court Assistant — Lolo