

REPUBLIC OF KENYA
IN THE PRINCIPAL MAGISTRATE COURT AT WINAM
CRIMINAL CASE NO 1275 OF 2012

REPUBLIC.....PROSECUTION

VERSUS

CHARLES ODHIAMBO OCHIENG..... ACCUSED

JUDGEMENT

INTRODUCTION

CHARLES ODHIAMBO OCHIENG herein referred to as the accused was first arraigned in court on 24/9/2012 on charges of manslaughter contrary to section 202 as read with section 205 of the Penal Code.

The particulars of the charge were that *on the 9th day of March 2012 at Marie Stopes Kisumu nursing home in Kisumu town within Nyanza province, unlawfully killed WINNIE AKINYI AKETCH.*

The accused denied the offense and a total of six prosecution witnesses were called to establish a case against the accused. The accused also adduced his evidence in defense and called one witness.

The facts of this case are, that on 9/3/12, the deceased namely one **WINNIE AKINYI AKETCH** and PW1 **Benard Ochieng' Opondo** her husband, were in the sitting room of their house together with PW1's step-mother and brother having breakfast. The deceased who was pregnant at that time went into the bedroom. She then flashed PW1 on his mobile phone and when he went to check on her, he realized she was in labor pains.

PW1 left the house and returned after a while in a hired vehicle at which point he realized the deceased had started bleeding from her private parts. The deceased was immediately rushed to *Marie Stopes Nursing Home* Kisumu by PW1, his brother and sister. On reaching the hospital and after 5 minutes of

their arrival, PW1 was taken into a room where he found 8 medics, one of them being the accused. The accused informed PW1 that his wife had to be treated and he agreed to that suggestion because he could see that she was in a lot of pain. PW1 was called back into the same room after 5 minutes and the accused confirmed to him the death of the infant. The accused went further to say that the medics were still going to operate the deceased to save her life. The operation was done and the deceased came out alive. However, she was in a lot of pain and kept asking for water to drink which she was not given and at 5:00 P.M, it marked the end of the accused's shift and he left the hospital.

At around 10:00 P.M. the deceased passed on after developing complications from the operation and at that time, she was under a different doctor's care.

PW6 **DR PETER ASAVA** who conducted a postmortem on the body of the deceased told the court that on examination of the deceased, his major findings were mainly in the digestive system where he scooped three liters of blood. Also in the genital urinary system and the lower segment of the uterus a 4cm scar which was bleeding was noted. On the lower segment of the uterus there was also a scar which was bleeding and had not been sutured. In conclusion, PW6 stated that he formed the opinion that the cause of death was severe hemorrhage due to the non-sutured posterior lower uterine segment tear. The doctor then produced the report as an exhibit in this case.

DEFENSE CASE

Upon the close of the prosecution case, the accused tendered his defense and told the court that the deceased had been attended to at the hospital on 28/12/2011 and 16/2/2012 but on the later date, her chief complaint was lower abdominal pain and a shock. She was discharged with good improvement but on 9/3/2012, she was brought back to the hospital by her husband while bleeding profusely from her birth canal for more than two hours. The deceased was then admitted and several tests conducted and when the ultra sound was done, it was found out that the fetus which was 33 weeks old had died and this is what necessitated the emergency Cesarean operation which was consented to by the husband

of the deceased. After the operation, the dead fetus was removed and the placenta and the womb sutured. According to the accused, there was no bleeding as at the time the deceased left the theater room. It was his further defense that the deceased was later moved to the wards where she remained in high spirit until the time the accused left the hospital at 5PM. It was at 10pm that he was called by a nurse who told him that the deceased had changed her condition abruptly at 9pm but she was managed by DR AKULA before she died. The accused therefore denied killing the deceased and noted that he had given her blood and did all that a good Doctor could have done.

FINDINGS

In this matter, I have considered the evidence on record and the filed submissions and there is no dispute that the deceased was operated on by the accused at Marie Stopes Nursing Home on the 9/3/2012 but she died at night at 10pm.

Secondly, I have equally considered the evidence by DR ASAVA that the cause of death was as a result of severe hemorrhage due to non-sutured posterior lower uterine segment tear and I find that the evidence by DR ASAVA demonstrates that the accused after performing the said operation, he failed to suture the posterior lower uterine segment tear of the deceased.

Thirdly, there is also evidence on record that, after the death of the deceased, KENNEDY AKETCH, the brother to the deceased lodged a complaint against the accused with The Medical Practitioners & Dentists Board who wrote back after dealing with the complaint and made 4 findings and at NO.3, it was found that the accused did not achieve homeostasis in theatre, the patient subsequently continued bleeding after the surgery and that caused her death. The other vital findings of the Board were that there was no keeping with the deterioration of the patient, the patient was not observed closely after theatre from about 1:00 P.M to her death at around 10:00 P.M. in the night and finally that the competence of the entire Marie Stopes staff in handling this, comes into question.

It is also worth noting that the Board considered the medical notes to have been an afterthought hence I

do not find them relevant in support of the defense by the accused that he did all that he was to do as a good doctor.

DETERMINATION

The accused was charged with the offense of manslaughter contrary to section 202 as read with section 205 of the Penal Code. Section 202 (1) of The Penal Code defines Manslaughter as the killing of another person by unlawful act or omission.

(1) any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.

An unlawful omission is defined under Section 202(2) of the Penal Code 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.

The Court, in **Ricarda Wahome Njoki case**, relied on the test in **Bolam v Friern Hospital Management Committee**, held that:

“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.”

In the case at hand, the most important issue to be considered in arriving at the guilty or innocence of the accused is whether the evidence on record shows that he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.

The answer to this essential issue is well answered by the findings of the Medical Practitioners and Dentist Board which comprises of medical men skilled in the art of medicine. The medical board in its findings found out that the accused had not achieved homeostasis in theatre and the deceased subsequently continued bleeding after the surgery and that caused her death. This to my mind and in view of the definition of the offense of manslaughter coupled with the findings by DR ASAVA that the tear that caused severe bleedings was not sutured, it is now clear to my mind that this was an omission

on the part of the accused which led to an act of culpable negligence on his part. The accused's duty was to preserve the life of the deceased but in failing to suture the tear, she bled severely and lost her life due to the negligence of the accused.

In conclusion therefore, I am satisfied that the prosecution's case has been proved beyond any reasonable doubt and the accused is hereby convicted as charged as required under section 215 of the Criminal Procedure Code of the Laws of Kenya.

DATED and DELIVERED at Winam this 11th Day of October, 2016



B.KASAVULI

SENIOR RESIDENT MAGISTRATE

Coram;

C/c Oniala

Mrs Amala for the State