IV. ABORTION AND FETAL INTERESTS

In 2010, when *Legal Grounds* Volume II was published, the chapter on abortion and fetal interests noted that while restrictive abortion laws continued to prevail in African countries, there was also a growing trend towards expanding access to legal abortion in recognition of a wide range of women's rights including the rights to life, health, non-discrimination, and freedom from torture, cruel, inhuman and degrading treatment.

That trend has since taken hold, with over fifty percent of African countries now providing for legal exceptions to the criminalization of abortion which extend beyond saving the life of a woman to preserving her mental and physical health. Two examples of countries where recent law reforms have occurred are Rwanda and Kenya, with Rwanda also allowing for exceptions on the grounds of rape, incest and forced marriage, and reducing the harsh criminal penalties that previously applied. The immediate outcomes of those reforms are reflected in *Case no. RPA 0787/15/HC/KIG,* in which a Rwandan court decided that a minor who became pregnant due to sexual violence had a legal right to abortion. However, there are ongoing challenges with implementation to ensure that legal reform translates to actual change for women seeking abortion care and health practitioners providing this essential service. Aspects of these challenges arose in the Kenyan case of *Republic v. Jackson Tali* where a nurse was sentenced to death for allegedly providing an abortion that resulted in the death of a woman despite contradictory evidence, and in the Zimbabwean case, *Mildred Mapingure v. Minister Of Home Affairs and 2 Others*, where burdensome procedural barriers prevented a woman who was raped by armed robbers from accessing a legal abortion.[45]

Legal Grounds Volume II also featured the 2008 South African case *Stewart v. Botha*, in which the judiciary showed its reluctance to take on the complexities of a wrongful life claim. This current volume includes a recent South African decision*, H v. Fetal Assessment Centre,* where the court distinguished itself from that earlier decision and delved into the legal questions that arise from a wrongful birth or life claim. Two other decisions from Kenya, *AAA v. Registered Trustees (Aga Khan University Hospital, Nairobi)* and *E.R.O. v. Board of Trustees, Family Planning Association of Kenya*, also support the perception that courts are increasingly more willing to recognise reproductive rights standards regarding contraceptive provision and wrongful life claims.

ABORTION

Case no. RPA 0787/15/HC/KIG
(2015), Unreported
Rwanda, High Court

COURT HOLDING

IC had the right to access abortion in accordance with Article 165 of the Organic Law N° 01/2012/OL of 02/05/2012 instituting the Penal Code of Rwanda, as well as under Article 14(2) of the Protocol to

the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which is part of the law of Rwanda.

For purposes of the law on access to abortion, being defiled is the same as having been raped, so that every girl under age 18 who is pregnant as a result of sexual intercourse ought to be considered as having been raped.

Summary of Facts

This was an appeal to the High Court by NJ on behalf of her daughter IC, who was 13 years old, against the ruling of the Intermediate Court of Nyarugenge (RP 0561/15/TGI/NYGE) denying IC access to abortion on the ground of rape. IC claimed that she was raped by NB after he gave her an alcoholic drink, and she got pregnant as a result. NJ initiated proceedings in the Intermediate Court requesting permission for IC to get an abortion on the ground that her life was in danger. The Court denied the request, basing its decision on the ground that there was no criminal charge convicting NB of the offence of rape, and that it was possible that IC had become pregnant without rape.

Arguments of Parties

The Appellant argued that sexual intercourse with a 13-year-old could only be interpreted as rape. The medical report confirmed pregnancy and indicated that she was under 18 years old. Further, although the judge of the lower court expressed the view that a girl under 18 could become pregnant through ways other than defilement, he did not offer an alternative explanation as to how IC had become pregnant.

The Appellant also argued that the Court should not wait for conviction of the offender before it gave permission to access abortion on the ground of rape.

The prosecution, on the other hand, argued that Article 165[46] of the Organic Law N° 01/2012/OL of 02/05/2012 instituting the Penal Code of Rwanda (Penal Code), should be interpreted that only a "woman" who contracts pregnancy as a result of rape is allowed legal abortion on the ground of rape. According to the prosecution, legal abortion was not available to a "child" who contracts pregnancy as a result of defilement (sexual violation of a minor). The offence of defilement of a child is defined in Article 190[47] of the Penal Code. Article 217 of the Penal Code defines "a child" as a person under the age of 18.

Issues

The issues before the Court were:

1. Whether Article 165 of the Penal Code includes a child;
2. Whether it was proven that IC was raped; and
3. Whether IC had the right to access legal abortion.

Court's Analysis

The Court considered the prosecution's argument that the Penal Code only allowed abortion for "women" rape survivors but not for "child" survivors of sexual violence. The Court's opinion however was that despite rape and defilement being couched in different language and under two separate provisions, they both involve non-consensual sex. The Court expressed the view that girls under the age of 18 do not have capacity to make decisions regarding involvement in sexual relationships, and that every occasion of sexual intercourse with girls under age 18 ought to be regarded as "rape" under the Penal Code. To support its view, the Court referenced the Rwanda National Protocol for Operationalisation of Exemptions for Abortion under the Penal Code, issued by the Ministry of Health, which provides the guidance that for purposes of access to abortion on the ground of rape, the pregnancy of a girl under age 18 should be treated as arising out of rape.

The Court agreed with the Appellant that, in the absence of evidence to the contrary, the only way that IC could get pregnant at 13 years old was because she was sexually violated. It therefore found that the lower court had erred in rejecting the claim that IC was pregnant as a result of a sexual offence committed against her.

The Court reiterated that a woman who has been raped, which includes a child who has been sexually violated, and became pregnant as a result, could access abortion legally pursuant to Article 165 of the Penal Code. The Court also recognised Rwanda's obligation under Article 14(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the "Maputo Protocol"), which is part of the law of Rwanda by virtue of Presidential Order 05/01 of 03/05/2015, to take the necessary measures to protect the reproductive rights of women by providing access to safe abortion in cases of sexual assault and rape.

The Court therefore found that the Appellant had the right to request access to legal abortion for IC on the ground of rape, in accordance with the law of Rwanda under the Penal Code, but also under the Maputo Protocol. This was based on the unrebutted evidence of the pregnancy, which implied that an offence of defilement, which entailed rape, had been committed against her.

In addition to the reasons explained above, the Court also took into account the views of IC and her reasons for seeking abortion. These included that she was embarrassed amongst her peers, and that she wanted to go back to school. The Court also took note of the fact that she was too young to become a parent.

The Court held that IC had the right to access abortion in accordance with the laws of Rwanda on the ground that she had been defiled, which for all purposes of the law on access to abortion, was the same as having been raped.

Conclusion

The Court authorised IC to undergo abortion at a designated facility.

Significance

Rwanda is one of the countries that has taken steps to implement the Maputo Protocol, which were undertaken by an executive act of domestication, and is therefore under a legal obligation to ensure the realisation of women's sexual and reproductive rights, including access to safe abortion on grounds including sexual assault and rape. It also has aligned its abortion provisions in the Penal Code with Article 14(2) of the Maputo Protocol. Further, Rwanda has taken measures to ensure that the law is clarified and made transparent to service providers as well as users through enabling policies such as the National Protocol for Operationalization of Exemptions for Abortion in the Penal Code of 2012 (Rwanda Ministry of Health, 2014).

Even where abortion is accessible on certain grounds, adolescents can still face challenges to accessing safe abortion, especially when access is tied to administrative procedures, such as the requirement to prove rape to a third party. It was also evident in this case, where an admission was made before the Court, that the child had attempted to procure an illegal abortion. Even in a country like Rwanda, where the law on abortion is quite progressive, the law was not so clear on access for minors until perhaps this decision. The significance of this decision therefore is that it clarified the law on access to safe abortion for minors. It demystified the apparent interpretive or administrative hurdles. The evidence that the girl is below age 18 and pregnant as a result of sexual intercourse is sufficient for her to obtain permission of the courts to access abortion in accordance with the law.

It was also significant that the Court heard the views of the child herself. This accords with the children's rights principle that the views of the child be taken into account. Further, it was a demonstration of the importance of consent and adolescent decision-making in that, even if in principle the parent consented on the child's behalf, this was buttressed by the child's own statement showing consent. This emphasises that abortion for a minor should be of the girls' own decision-making and should never be non-consensual. The child's views, and perhaps even her own "consent," in accordance with the evolving capacity of a child aged under 18, should be taken into account.

Further to this, however, the views of the child included socio-economic factors which are not specified in the abortion law, such as embarrassment amongst peers and disrupted education. This shows that the abortion law of Rwanda still falls short of addressing the full range of issues behind why women and girls need abortion services. Many girls and even women seek abortion on grounds such as these. To exclude them from allowable grounds for accessing abortion is not only out of touch with the prevailing reality, but also infringes on their reproductive rights.

Apart from the issue of abortion, this decision also raises an important question regarding the autonomy of adolescent girls in relation to sexual conduct. The Court stated the position of the law, which is that girls of below age 18 do not have capacity to decide on sexual relationships. This fails to take into account variations in age from very young adolescents, who may not be able to consent to sex, and older adolescents, such as 17-year-olds. Legal capacity as provided by the law may be at odds with the true capacity of a girl to self-determine matters of a sexual relationship. Development of autonomy in matters relating to sexuality is an important aspect of adolescent sexual development, and a law that simplistically removes the capacity of every girl below age 18 to decide about her sexual relationship might do more harm than good. Evolving capacities of girls and adolescents to determine matters relating to their sexuality should not be extinguished by law, or indeed any other instrument.

Mildred Mapingure v. Minister Of Home Affairs and 2 Others
(2014), Judgment No. SC 22/14, Civil Appeal No. SC 406/12
Zimbabwe, Supreme Court

COURT HOLDING

The police (first respondent) failed in their duty to assist the Appellant in accessing timely services in order to prevent pregnancy. The doctor (second respondent) also failed to carry out his professional duty to avert the pregnancy when it could have been reasonably prevented. These unlawful omissions took place within the course and scope of their employment, and therefore the first and second respondents were vicariously liable to compensate the Appellant for the harm resulting from the failure to enable her to prevent pregnancy.

The duty of the prosecutors and magistrate to act reasonably in the performance of their functions did not extend to the provision of legal advice, whether accurate or otherwise, to the Appellant. Therefore, the prosecutors and magistrate cannot be held liable for failing to take such reasonable steps as may have been necessary for the issuance of the requisite certificate for the termination of pregnancy.

Summary of Facts

On 4 April 2006, Mildred Mapingure, the Appellant in the case, was attacked and raped by robbers at her home. She immediately reported the matter to police and requested that she be taken to a medical practitioner to be given medication to prevent pregnancy (emergency contraception) and any sexually transmitted infection. Later that day, she was taken to hospital and was attended to by a medical practitioner. The medical practitioner said that he could only attend to her request for emergency contraception in the presence of a police officer. The medical practitioner further indicated that the medication had to be administered within 72 hours of the sexual intercourse having occurred. Mapingure duly went to the police station the following day but was advised that the officer who had dealt with her case was not available. She then returned to the hospital, but the medical practitioner insisted that he could only treat her if a police report was made available. On 7 April 2006, she went to the hospital with another police officer. At that stage, the medical practitioner informed her that he could not treat her because the prescribed 72 hours had already elapsed. Eventually, on 5 May 2006, Mapingure was confirmed pregnant.

Thereafter, Mapingure went to see the investigating police officer who referred her to a public prosecutor. She indicated that she wanted her pregnancy terminated, but was told that she had to wait until the rape trial had been completed. In July 2006, acting on the direction of the police, she returned to the prosecution office and was advised that she required a pregnancy termination order. The prosecutor in question then consulted a magistrate who stated that he could not assist because the rape trial had not been completed. She finally obtained the necessary magisterial certificate on 30 September 2006. When she then sought the termination, the hospital matron who was assigned to carry out the termination felt that it was no longer safe to carry out the procedure, and declined to do so.

Eventually, after the full term of her pregnancy, Mapingure gave birth to her child on 24 December 2006.

Mapingure brought an action against the Ministers of Health, Justice and Home Affairs for pain and suffering endured as well as maintenance of the child. The basis of her claim was that the employees of the respondents had been negligent in their failure to prevent the pregnancy, and subsequently to facilitate its termination.

In this earlier case, *Mapingure* v. the *Minister of Home Affairs & Ors,* HH-452-12, 2012 (2) ZLR, decided 12 December 2012, the High Court dismissed her claim and held that her misfortune was due to her ignorance as to the correct procedure to follow, and that it was not the duty of the relevant officials to give guidance to her on this, so that the respondents were neither directly nor vicariously liable. She appealed the decision to the Supreme Court.

Issues

The following were the issues for determination before the Supreme Court:

1. Whether the respondents' employees were negligent in the manner in which they dealt with the Appellant's predicament;

2. Whether, assuming an affirmative answer to the statement above, the Appellant suffered any actionable harm as a result of such negligence; and

3. If so, whether the respondents are liable to the Appellant in damages for pain and suffering and for the maintenance of her child.

Court's Analysis

The Court determined the Appellant's claim by applying the test for negligence. It followed the decision of the South African case of *Mukheiber* v. *Raath & Anor* 1999 (3) SA 1065 (SCA) in which medical negligence was in issue. According to the *Mukheiber* case, the test for medical negligence was whether

> (a) a reasonable person in the position of a defendant: (i) would have foreseen harm of the general kind that actually occurred; (ii) would have foreseen the general kind of causal consequence by which that harm occurred; and (iii) would have taken steps to guard against it; and (b) the defendant failed to take those steps. It also held that liabilities in relation to maintenance of a child in medical negligence cases cannot be unlimited, but can be "no greater than that which rests on the parents to maintain the child according to their means and station in life, and lapses when the child is reasonably able to support itself."

Applying this test to the facts before the court, it held that the doctor failed to terminate the pregnancy when it could have been reasonably prevented and that "a reasonable person in the position of the doctor would have foreseen that his failure to administer the contraceptive drug, or his failure to advise the Appellant on the alternative means of accessing that drug, would probably result in her falling pregnant." It therefore found the doctor negligent for having failed to take reasonable steps to prevent the pregnancy.

The Court also found the police to have been negligent for failing to act timeously in taking the Appellant to the doctor for her pregnancy to be prevented and their inaction amounted to unlawful conduct by reason of the omission to act positively.

It held that the role for the police cannot be confined to their statutory duties, so that, "In the specific circumstances of any given case, it may be legally incumbent upon them to act outside and beyond their ordinary mandate, so as to aid and assist citizens in need, in matters unrelated to the detection or prevention of crime." This was such a case where the omission to assist the Appellant was held to be unlawful.

Furthermore, the Court also determined that it was the responsibility of the victim of the alleged rape to institute proceedings for the issuance of a magisterial certificate allowing the termination of her pregnancy in terms of Section 5(4) of the Termination of Pregnancy Act. It held that the authorities could not be liable for not assisting her to terminate the pregnancy, because they do not have any legal duty to initiate and institute court proceedings on behalf of Mapingure.

In making the determination, the Court had judicial notice of international human rights instruments and made reference to various provisions relating to the reproductive rights of women, such as paragraph (e) of Article 16.1 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which guarantees women's rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education, and means to enable them to exercise these rights; and Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) which obliges states to recognise "reproductive rights of women by authorising medical abortion in cases of sexual assault, rape…" and also provide education and information on these rights.

However, although the Court recognised the normative role of international instruments in addressing women's rights, it said that pursuant to constitutional terms, these cannot operate to override or modify domestic laws until they are internalised and transformed into rules of domestic law. Nevertheless, after going through various provisions of the international human rights instruments, the Court noted that these were already recognised in the laws and administrative practices of Zimbabwe, and that the norms in these international instruments were therefore of great persuasive value in the application and interpretation of the statutes and common laws.

Conclusion

The Court partially allowed the appeal and granted Mapingure general damages for pain and suffering arising from failure to prevent her pregnancy. The Court dismissed her claim for damages for pain and suffering beyond the time her pregnancy was confirmed, and for the maintenance of her minor child, since the maintenance of the pregnancy was held to be her own fault.

Significance

It must be noted at the outset that the Court made its determination on the basis of the law of medical negligence rather than human rights norms. The significance of this case therefore relates

to the opportunity missed to interpret and apply human rights norms to national laws and policies relating to reproductive rights of women in Zimbabwe.

Indeed, the Court admitted that the rights stipulated in these international instruments were already recognised in the laws of Zimbabwe. Both the former and new Constitutions of Zimbabwe recognise the right to liberty. The new Constitution also recognises the right to personal security. Self-determination or the principle of autonomy is of central importance to reproductive rights, and is reflected in the provisions that the Court mentioned such as article 16(1) of CEDAW and article 14(1) of the Maputo Protocol.

The medical practitioner who treated Mapingure told her that she needed to be accompanied by a police officer or at least a police report, if available. It is not very clear whether this practice was supported by law or policy. Apparently, the Court took its legality for granted when it addressed the question of negligence of the police and doctor. This first barrier prevented Mapingure from accessing treatment to prevent pregnancy. While the Court found that the police and doctor were negligent, it did not question whether the practice of requiring a police officer to accompany the rape survivor or a police report for the survivor to access emergency contraception was in itself lawful.

Mapingure encountered the second barrier when she wanted to access abortion on the grounds of rape, as authorised under the Termination of Pregnancy Act. However, section 5(4) of the Termination of Pregnancy Act provided that permission could only be granted by the superintendent of the institution after a certificate was issued by a magistrate, and the medical practitioner to perform the termination was satisfied that a complaint of the alleged rape was lodged with the authorities. Further, that on a balance of probabilities, the unlawful intercourse which resulted in the pregnancy had taken place. On inquiring from the public prosecutor how she could get the certificate from the magistrate, she was misled to believe that the rape trial had to be completed first. Consequently, when she finally got the certificate, the hospital refused to perform the termination, stating the pregnancy was at an advanced stage.

Though Zimbabwe has relatively progressive policies and laws on reproductive health, including access to termination of pregnancy, the services were simply not available or were inaccessible for Mapingure. In the Court's analysis and finding, Mapingure was to blame for not knowing what to do, and trusting what the authorities told her about getting the certificate from the magistrate in order to terminate her pregnancy.

This decision could be contrasted with the Argentine case of *F. A. L. s/ Medida Autosatisfactiva* (2012) that came before the National Supreme Court. The facts in the lower court were similar to the *Mapingure case* in that it was about a girl who had become pregnant following rape and was previously denied access to an abortion by lower courts, but was allowed by the Superior Court. Following the abortion, the public defender appealed to the National Supreme Court, which said that forcing a woman who had suffered a sexual abuse to carry a pregnancy to full term infringed the woman's right to dignity and amounted to institutional violence. Perhaps of greater interest is what the Court said about the obligations of the state. It held that the state had a duty to provide the conditions necessary to enable such women to access abortion quickly and safely. Further,

the authorities should provide the necessary protocols for the performance of lawful abortion and remove any administrative barriers, including the need for third party authorisation. Furthermore, the state should put in place guidelines guaranteeing information and confidentiality to the woman. This resonates with the guidelines issued by the World Health Organisation (WHO) which recommends that states remove administrative barriers that make lawful access to abortion services difficult for women. It exhorts states to do away with such uncertainties and ambiguities about the law so that not only women, but also the health providers and other stakeholders in the chain of service-provision are clear about the policies and laws and are able to implement them effectively and efficiently.

The underlying challenge with the *Mapingure case* was that the Court did not really pay sufficient heed to human rights instruments and jurisprudence in determining the issues before it. Had the Court given more emphasis to the international human rights considerations, it may have been guided by the jurisprudence of treaty monitoring bodies such as *L.C. v. Peru*.In this case, a girl who became pregnant from sexual abuse attempted to commit suicide, seriously injuring herself. While she was eligible for lawful abortion on grounds of health, the authorities delayed responding to her requests for abortion and eventually denied her access. The CEDAW Committee found a violation of Article 12 of CEDAW and, amongst other issues, lamented the lack of effective procedures to operationalise the law that allowed access to abortion, resulting in authorities arbitrarily denying access to abortion services.

The CEDAW Committee reminded Peru that CEDAW imposed obligations to respect, protect and fulfil women's right to health care and that these included that states must provide education and information to health providers and women to ensure availability and accessibility of health care services, including abortion services.

Similarly, in *L.M.R. v. Argentina*, the Human Rights Committee found violations of several rights when a girl who became pregnant as a result of rape was denied access to abortion services, to which she was legally entitled. The Human Rights Committee noted how the complainant had to endure many administrative hurdles, going from court to court, just to exercise her legal right to abortion services. Again, apart from infringement of the substantive human rights norms, this was very much tied to the procedural injustice where the state and its agents frustrated the realisation of rights.

In its analysis of the Termination of Pregnancy Act, the Zimbabwean Court did point out that the absence of a procedural guide was a challenge, as subjects of rights could not easily discern what the law required. The Court acknowledged that further clarification is required. Even so, surprisingly, the Supreme Court held that the responsibility to terminate pregnancy fell squarely on the shoulders of Mapingure.

Republic v. Jackson Namunya Tali
[2014] eKLR, High Court Criminal Case No. 75 of 2009
Kenya, High Court

COURT HOLDING

The Accused, with malice aforethought, caused the death of the Deceased while assisting her to procure abortion.

Summary of Facts

Jackson Namunya Tali, the Accused, was charged with murder under Section 203 and Section 204 of the Penal Code of Kenya. The Accused, a nurse by profession, operated a medical clinic named M.P. Medical Clinic & Laboratory Services, at Gachie Trading Centre in Kiambu County, Kenya. In July 2009, he received a client by the name of Christine Atieno, and allegedly assisted her to procure an abortion which resulted in complications that led to her death.

Issue

Whether the Accused had committed the offence of murder.

Court's Analysis

In the opinion of the Court, the Accused claimed that the Deceased came to his clinic "while bleeding in pregnancy," and sought medical help. He admitted administering some form of treatment which, in the Court's opinion, led to complications and her death.

His defence was that she had sought medical attention at his clinic following a botched abortion elsewhere, and he was not responsible. He did not, however, produce a patient record to substantiate his claim that she was already bleeding and anemic upon arrival.

Though a medical expert testified that he was unable to determine the cause of the death, the Court found that there was direct and circumstantial evidence that the immediate cause of death was the bleeding that resulted in anemia due to interference with the pregnancy. The question was whether the Accused or someone else had interfered with the pregnancy.

The Court's opinion was that the Deceased had gone to the Accused's clinic while not bleeding and came out bleeding, though the Court did not explain how the evidence supported this conclusion. Nevertheless, the Court held that unless the Accused offered a plausible explanation, it could only be inferred that the Accused was responsible. His explanation of what transpired did not convince the Court that he had not interfered with the pregnancy in a way that led to complications and the death of the Deceased. Although there was no direct evidence that the Accused interfered with the pregnancy and caused death, the Court held that all the direct and circumstantial evidence, taken together, established that the Deceased had sought procurement of abortion from the Accused, and in assisting her, he caused her to develop complications and she died as a result.

Conclusion

The Accused was convicted of the offence as charged, and sentenced to death.

Significance

While it is not clear from the facts of this case whether the Deceased died as a result of complications associated with an attempted abortion, the Court's holding highlights the risks associated with unsafe abortions prevalent in most countries in Africa that have restrictive laws and policies on access to safe abortions. Kenya has maintained provisions on abortion in its code of criminal law adopted from colonial times. Sections 158, 159, and 160 of the Kenya Penal Code criminalise procuring an abortion, assisting a woman to procure an abortion, and supplying the means to procure an abortion. Further, Article 26(4) of the Constitution of Kenya prohibits abortion except "when in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law." While the Constitution offers some hope that the word "health" can be interpreted liberally, the challenge is that without clear guidance, qualified health providers are likely to interpret the law conservatively to avoid the possibility of being caught on the wrong side of the law. One recent scholarly article found that although many countries allow abortion in certain circumstances, they have failed to guarantee transparency in implementing these laws:

> One of the major flaws with African abortion laws is that, though abortion is not absolutely prohibited and, furthermore, though there has been a discernible regional trend toward substantive liberalization of the grounds for abortion, in the overwhelming majority of countries, abortion laws have not been effectively implemented. The pervading public understanding … is that abortion law is most prohibitive and abortion is something that is rarely, if ever, lawful.[48]

It is notable that, in this case, the Court appears not to have undertaken any review concerning whether the alleged abortion would have been legal under Kenyan law. In fact, the Court concluded that performing an abortion was tantamount to "malice aforethought," supporting a murder charge.

Therefore, although the law of Kenya does in fact allow access to abortion in terms of Article 26(4) of the Constitution, without deliberate measures by the government to develop clear guidelines on how the law should be interpreted and applied, the public and even qualified health providers remain confused about the extent to which abortion is legally permissible. This failure of transparency in implementation of laws on abortion undermines access to safe abortion for girls and women who are entitled to such services under the law.

In the case at hand, the deceased had no way of knowing whether she would have qualified for a legal abortion to preserve her "health." Moreover, unscrupulous law enforcers also take advantage of this confusion to extort bribes from legitimate abortion providers and patients, driving access to legal abortion further underground.[49]

In practical terms therefore, the law in Kenya severely restricts access to safe abortion services. It creates an environment where girls and women would rather seek abortion services outside the

public health system, as the deceased did. This case is therefore an example of such failure of transparency of which the ultimate consequences are preventable maternal ill-health and deaths from abortion complications.

At the micro-level, health providers bear the responsibility for abortion complications. At the macro-level, however, overwhelming evidence suggests that the unsafe abortion epidemic is linked not to malicious intentions of abortion providers, but to lack of access to safe abortion due to restrictive laws and policies that are not implemented in a transparent manner. This is the trend in countries like Kenya, Malawi, and others that have laws and policies restricting access to safe abortion. When public policy turns women away from safe abortion services, they will inevitably use unsafe methods, or seek alternative services, including services from unskilled practitioners.

The significance of this case therefore lies in its overshadowing of the macro-level picture. The Accused and others like him may be held responsible for the deaths of girls and women from unsafe abortions, perhaps logically so from a narrow criminal justice perspective. However, it is the governments that should ultimately be held responsible for the deaths due to preventable abortion complications from two different perspectives: First, because the persistent criminalization of abortion continues to deny women access to safe abortion services. Second, governments should be held accountable where they have failed to transparently implement laws that actually enable women and girls to access safe abortions, resulting in denial of services to which they are legally entitled. The South African experience is evidence of how states' choices regarding access to safe abortions can improve women's health. After 1996, when South Africa enacted the Termination of Pregnancy Act, which liberalised access to safe abortion, abortion-related deaths fell by 91%.[50]

It is undeniable that abortion is a deeply contentious subject. However, improving women's health is a global concern that is high on many governments' agendas. This case should be a reminder that there is still room for states to make the choice to prevent avoidable deaths by providing access to safe abortion services to the fullest extent of their laws, and eventually decriminalise access to abortion.

HIGHLIGHT

ABORTION AND FETAL INTERESTS

Several countries in Africa have reformed or are reforming their national laws on access to legal abortion to expand the grounds under which a legal abortion should be provided. Examples include Kenya, Rwanda, Malawi, Sierra Leone, Ethiopia and Swaziland.[51] This trend is due in part to the global, regional and national recognition of the connection between restrictive abortion laws and high levels of unsafe abortion which contribute to avoidable maternal deaths particularly in the African region.

The recognition at the global level has led to an increased number of recommendations by UN treaty monitoring bodies to African countries urging them to decriminalise abortion. Accordingly, in January 2016, the UN Committee on the Rights of the Child stated that it was concerned at the high level of maternal mortality due to unsafe abortion and recommended that Kenya decriminalise abortion in all circumstances and review its laws to ensure better access to safe abortion.[52] Regional human rights mechanisms have also made concrete contributions to efforts to address restrictive abortion laws. In May 2014, the African Commission on Human and Peoples' Rights (the Commission) adopted a general comment on Article 14(2)(c) of the Maputo Protocol in which it urged governments to ensure that they authorise access to legal abortions as guaranteed by the Protocol.[53]

However, alongside the ongoing shift to expand access to legal abortion is a growing effort to limit its application. Some African states have invoked a right to life prior to birth to justify their failure to reform restrictive laws or their adoption of laws and policies that directly contradict regional and international human rights standards. Yet, this claim is not supported by any international human rights instrument or treaty. Documentary evidence shows that the drafters of the African Charter on Human and Peoples' Rights explicitly rejected language extending the right to life prior to birth. Equally, the Maputo Protocol implicitly reinforces the understanding that the right to life accrues at birth.[54]

A case in point is Kenya, whose 2010 Constitutional law reform provided for access to legal abortion on specific grounds, including where there is a need for emergency treatment, where the life of health of the woman is at risk, and as otherwise authorised by law. However, its health ministry subsequently withdrew the standards and guidelines it developed to guide healthcare providers on provision of safe abortion. It also issued a directive to all healthcare workers prohibiting them from obtaining any training on safe abortion. Likewise, Sierra Leone's reformed abortion law, which provided for expanded access to legal abortion, received a unanimous vote from its parliament to pass it into law, but the President was pressured into declining to sign it into law. Similar efforts to limit the application of current policies that provided for specific grounds for legal abortion are currently unfolding in Uganda.

In order to comply with their human rights obligations and address the rate of maternal mortality due to unsafe abortion in the region, African governments have a duty to eliminate all legal and procedural barriers that impede access to safe abortion.

WRONGFUL BIRTH OR LIFE

AAA v. Registered Trustees (Aga Khan University Hospital, Nairobi)
[2015] eKLR, Civil Case No. 3 of 2013
Kenya, High Court

COURT HOLDING

Medical practitioners providing family planning services owe a duty of care to their clients to provide services in accordance with the professional standards expected of them.

Damages were awarded for pain, suffering, and loss of amenities, and for the cost of raising and educating the child until she turned 18. Damages for the costs of antenatal care and delivery services were rejected as the claim was not particularised and proven by the Plaintiff.

Summary of Facts

The Plaintiff consulted the family planning clinic of Aga Khan University Hospital (the "Defendant") for an appropriate contraceptive to prevent her from having any more children. She was advised to choose the method of *implanon*, an implant that would prevent conception for three years from the date of insertion. She decided to choose this method and the procedure was done the same day. About a year later, her menses failed and she was confirmed pregnant. Further tests at the Defendant's clinic revealed that there was no *implanon* implanted in her arm. The Plaintiff claimed that it was the failure to implant the *implanon* that led to her subsequent pregnancy and the birth of her baby. The Plaintiff further claimed that both of these events were the result of the Defendant's negligence. She therefore sought damages for having suffered emotional pain, distress, psychological damage, physical incapacity, and financial hardship, including the cost of bringing up the child from the date of her birth until the child turned 18 years old. No defence was entered and an interlocutory judgment was entered on 14 May, 2014.

Issue

Since an interlocutory judgment had already been entered as unopposed by the Defendant, the issue before the Court was what damages should be awarded to the Plaintiff.

Court's Analysis

The Court noted that this was a unique case in the jurisdiction, and that there was little precedent to rely upon. The Court distinguished the Kenyan case of *ERO v. Board of Trustees Family Planning Association of Kenya, Nairobi HCC No 788 of 2000* on its facts, as the evidence in that case showed that conception had occurred prior to the sterilization. The Court therefore relied upon comparable court decisions from other jurisdictions to make its determination. The Court reviewed the decisions of English Courts in *Emeh v. Kensington and Chelsea and Westminster Area Health Authority* (1985) *2 WLR 215; (1984) 2 ALL ER 513* (*Emeh case*) and *Thake & Another v. Maurice* (1986) *1 ALL ER 497 (CA)* in recognition of the history of such litigation in England. The Court noted that the approach

previously taken by courts in such cases had been that the claimant would be compensated only for pain, suffering, loss of amenities, and loss of consortium. Courts historically would award damages for the upbringing of the child only if the child was born with congenital abnormalities. For a healthy baby, public policy dictated that the joy derived by parents in bringing up a child cancelled out the compensation that could otherwise be awarded.

The Court noted, however, that courts had since moved away from this policy and started awarding compensation for the cost of raising an unexpected child until the age of majority. The Court referred to the *Emeh case* cited above, which held that "the compensatable loss suffered by the Plaintiff as a result of the negligence in performing that operation extended to any reasonably foreseeable financial loss directly caused by her pregnancy" [55] and that there was no rule of public policy preventing the plaintiff from recovering in full the financial damage sustained; therefore, the plaintiff in *Emeh* was entitled to damages for "loss of future earnings, maintenance of the child up to trial, maintenance of the child in the future, Plaintiff's pain and suffering up to the time of trial, and future loss of amenity and pain and suffering, including the extra care that the child would require. . . ."[56] Mitigating factors which could reduce an award would include "the value of the child's aid, comfort and society to the parents."[57]

The Court also referred to a decision of an American court in *Sherlock v. Stillwater Clinic* ((1977) 260 NW 2D 169), where the Supreme Court of Minnesota addressed the "troublesome" issue of allowing recovery of damages for rearing a normal, healthy child. That Court had said that the costs of raising a child resulting from wrongful conception and birth are a direct financial injury to parents and that it would be short-sighted in today's society to say that the long term and enduring benefits of parenthood exceeded these costs. Further, leaving aside moral and ethical considerations, public policy should not deny the parents' recovery of damages. It also said that family planning is an integral part of modern marital relationships and that public policy had changed in line with statutes promoting family planning.

The High Court of Kenya held that medical practitioners owed a duty of care to clients to provide family planning services according to the professional standards expected of them. The Defendant was vicariously liable for the negligence of its medical staff. The Court held that damages were awardable (where appropriate) for each of the following claims:

1. pain and suffering, including psychological damage, mental distress and anguish;
2. costs of antenatal care and delivery services; and
3. expenses/costs related to care and upbringing of the child (medical, shelter, food, education, clothing, entertainment, etc.) from birth until the age of 18 years.

In assessing damages, the Court did not award any damages for the costs related to antenatal care and delivery, because the Plaintiff had failed to particularise and prove these "special damages" which had to be specifically raised by the Plaintiff. The Court therefore awarded general damages under the first and third claims above. However, in determining the amount of damages for pain, suffering, and loss of amenities, the Court distinguished awards made in England by taking into account the comparable standard and costs of living in the Republic of Kenya. The Court also noted

that the Plaintiff had not testified to having experienced any "particular undue pain or difficulty, pre-natal, natal, or ante-natal."[58]

In determining the amount of damages under the third claim the Court balanced the claimed damages with the joy and society that the parents will have in bringing up their child. The Court also noted that the new child was a girl, while the two previous children were boys. It also took account of the fact that the parents had failed to provide evidence substantiating the quantum of the damages claimed. It accordingly reduced the damages awarded under that claim, against the Plaintiff's claim.

Conclusion

The Court awarded general damages, but special damages were denied.

Significance

The cause of action in this case was negligence. However, access to contraceptives can also be discussed in terms of human rights. The right to contraceptive information and services is grounded in internationally recognised human rights, and this was especially brought to the fore at the 1994 International Conference on Population and Development (ICPD). The ICPD Programme of Action, which was a consensus document adopted by 179 countries at this conference, articulated the relationship between population and development in terms of human rights, and especially through the concept of sexual and reproductive health rights. The ICPD Programme of Action defined reproductive rights as rights already recognised in various national laws and policies, international human rights documents, and other consensus documents. Reproductive rights rested on the "recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health."[59] In the African context, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is an important human rights document as it specifically recognises reproductive rights and the right to sexual health. Article 14 of the Maputo Protocol states that:

> *1. Parties shall ensure that women's right to health, including sexual and reproductive health, is respected and promoted, including:*
>
> *(a) the right to control fertility;*
>
> *(b) the right to decide whether to have children, the number of children and the spacing of children; [and]*
>
> *(c) the right to choose any method of contraception.*

Article 14 (2) of the Maputo Protocol stipulates the measures which states are required to undertake to realise these rights, including to: "provide adequate, affordable, and accessible health services, including information, education, and communication programs to women, especially those in rural areas…."[60]

The African Commission on Human and Peoples' Rights (African Commission) issued an interpretive document, General Comment No 2 on Article 14(1)(a), (b), (c) and (f) and Article 14 (2) (a) and (c) of the Maputo Protocol, to interpret Article 14's provisions and guide implementation by states. In the General Comment, the African Commission reminded states parties to "ensure availability, accessibility and acceptability of procedures, technologies and comprehensive and good quality services, using technologies based on clinical findings."[61] This includes contraceptive services.

Indeed, the Constitution of Kenya, 2010, contains various provisions that are aimed at promoting sexual and reproductive health, including Article 43(1)(a) that specifically articulates the right to health, including reproductive health care. Family planning and access to contraceptives is a key priority area, according to the National Reproductive Health Policy of 2007.

Although a great deal more could be said about the human right to access contraceptives, in the current case the apparent scenario is that the health providers did provide the information and education that enabled the Plaintiff to exercise the right to choose her contraceptive method. When she made her choice, the health providers negligently failed to implant the chosen contraceptive, resulting in the Plaintiff conceiving and eventually delivering a child.

There are two reports that have been published which examine the human rights implications of the barriers to accessing family planning in Kenya. The first is a report published in 2007 by the Center for Reproductive Rights and Federation of Women-Lawyers - Kenya, entitled, *Failure to Deliver: Violations of Women's Human Rights in Kenyan Health Facilities*.[62] This report indicated, amongst other things, that there were numerous barriers to accessing contraception and family planning, including the cost, supply shortages, and abusive treatment that prevented women from seeking services at public facilities.

The other report was published in 2012 by the Kenya National Commission on Human Rights, entitled, *Realising Sexual and Reproductive Health Rights in Kenya: A myth or reality?*[63] This report also indicated there were barriers to accessing family planning related to socio-cultural barriers, commodity insecurity and prohibitive costs. Neither of these reports address the quality of the family planning services that are available.

E.R.O. v. Board of Trustees, Family Planning Association of Kenya
[2013] eKLR, Civil Case 788 of 2000
Kenya, High Court

COURT HOLDING

The Family Planning Association of Kenya ("FPAK") was not liable for breach of duty of care to the Plaintiff, who gave birth to a child 9-10 months after having a permanent family planning procedure performed at a FPAK clinic. The Plaintiff was already pregnant at the time of the procedure, and the pregnancy was not therefore a result of the Defendant's negligence.

Summary of Facts

The Plaintiff brought suit against the Defendant, the Board of Trustees for FPAK, seeking damages for negligence arising from a tubal ligation procedure performed on her by the Defendant's agents. Prior to the tubal ligation procedure, the Plaintiff was subjected to a pregnancy test using a urine sample to exclude pregnancy. The results were negative. The FPAK staff proceeded with the procedure.

Approximately 9.5 to 10 months following the procedure, the Plaintiff gave birth to a child. This was the basis of the Plaintiff's allegation that the pregnancy resulted from negligence by the FPAK staff in performing the tubal ligation procedure, and her claim for damages. The Defendant denied her claim.

Issues

The issues before the Court were the following:

1. Whether the Defendant owed a duty of care to the Plaintiff;
2. Whether the Defendant, through its servants or agents, was negligent in carrying out the procedure on the Plaintiff; and
3. Whether the Plaintiff has suffered injury as a result of the negligence of the Defendant and its staff.

Court's Analysis

The Court held that the Defendant owed the same duty of care to the Plaintiff as would a doctor to his patient, as set out in *M (a Minor) v. Amulega & Another* [2001] KLR 420. This duty of care is carried out on behalf of the Defendant by its staff and, as such, if the staff is negligent in giving treatment, the Defendant is liable. The Court acknowledged that such negligent acts by staff members would constitute a breach of the Defendant's duty.

The Court held that the Defendant did not breach its duty of care. According to the Court, the evidence weighed in favor of a finding that the Plaintiff was already pregnant at the time of the procedure. While a blood test would have more accurately detected the pregnancy, such testing was prohibitively expensive and essentially unavailable to the Plaintiff. Accordingly, the Court found that it was reasonable for FPAK staff to rely on the negative urine test results in moving forward with the procedure. The subsequent examination of the Plaintiff's fallopian tubes, which were completely blocked, indicated a successful procedure and further supported the Court's holding.

Having held that there was no breach of duty of care, the Court did not examine the third issue.

Conclusion

The Plaintiff failed to prove her case, and therefore her claim was dismissed.

Significance

This case was instituted in 2000, 10 years before Section 43(1)(a) of the Constitution of Kenya, 2010 which recognises the right to health care services, including reproductive health care, came into effect. However, a ruling was made 13 years in the future, in 2013. No information was provided in the judgment for this lengthy delay.

Although this case was decided entirely on the private law of negligence, further scrutiny of the case reveals that the duty to provide information might have been taken for granted by the providers. It is not indicated in the case that the health providers warned the Plaintiff that the urine-based pregnancy test might not detect a very early pregnancy. It was likey taken for granted that her chance of getting pregnant was remote since she had indicated that she had been using an injectable contraceptive method.

The Court focused on the fact that the health providers did everything according to proper protocol regarding the procedure. However, further scrutiny of the judgment reveals that one thing was overlooked in the pre-operative procedures. The providers should have warned the Plaintiff that the urine-based pregnancy test was not failure-proof. The lack of this important piece of information had serious consequences for the Plaintiff.

This case is significant in terms of human rights, in relation to the right to receive information. The right to health care services, including reproductive health care, includes the right to receive the necessary information about procedures in order for clients to make informed choices.

H v. Fetal Assessment Centre
[2014] ZACC 34
South Africa, Constitutional Court

COURT HOLDING

The issue of whether a child could claim damages against a medical expert for pre-natal misdiagnosis that could have enabled the mother to exercise her informed choice to terminate the pregnancy, and resulting in the birth of the child with a disability, presented a complex factual situation and an uncertain legal position. It could therefore not be determined using the exception procedure, which allows a claim to be dismissed as having no merit without a court hearing any evidence.

A child's claim against a medical expert whose misdiagnosis resulted in the birth of the child with a disability could potentially exist.

Summary of Facts

The applicant was a boy born with Down syndrome. His mother instituted a claim for damages in the High Court on his behalf, against the Fetal Assessment Centre (Centre), for wrongful and negligent failure of the Centre to warn the mother of the high risk of the child being born with Down syndrome. It was alleged that, had she been warned, she would have chosen to undergo an abortion. The

applicant claimed damages for past and future medical expenses and general damages for disability and loss of amenities of life. The respondent defended the claim as being bad in law, and not disclosing a cause of action recognised in law. The High Court had upheld the defence of exception and dismissed the claim as having no merit without hearing the evidence. The applicant sought leave to appeal to the Constitutional Court.

Issues

The Constitutional Court isolated the following issues for determination:

1. Whether a child's claim for damages against a medical expert for pre-natal misdiagnosis of a condition that deprived the child's mother of the informed choice to terminate the pregnancy potentially existed; and

2. Whether the exception procedure was appropriate in determining the matter.

Court's Analysis

The Constitutional Court (the "Court") recognised the importance of the exception procedure as a useful mechanism "to weed out cases without legal merit". The Court indicated that it had previously ruled that questions regarding development of common law would better be served after hearing all the evidence. It referenced *Carmichele v. Minister of Safety and Security* ([2001] ZACC 22) in which the Court held that it would be better not to determine an issue involving developing the Common law using the exception procedure, especially in cases where the issue presented a complex factual situation and an uncertain legal position.

The Court then addressed the issue of whether the child's claim could be recognised in law, a question which in its view was complex and had important normative implications. It rejected the use of the term "wrongful life", because it suggested that courts would be involved in determining the paradox of whether non-existence was preferable to existence. It therefore distinguished its approach from *Stewart and Another v. Botha and Another* [2008] ZASCA 84; 2008 (6) SA 310 (SCA), wherein the South African Supreme Court of Appeal held that a child could not advance a similar claim, precisely because the Supreme Court thought allowing the child to make a claim involved making value judgments regarding existence or non-existence of a child.

In the opinion of the Court, the paradox had to be acknowledged because avoiding it masked value judgments that have to be brought under the scrutiny of constitutional values and rights. The Court was aware that in the final analysis, a court determining the matter might still rule that a child could not claim. However, the point was that the matter raised issues that could not be addressed by way of the exception procedure. It held therefore that the proper procedure was for the High Court to hear the substantive matter and not to dispose of it prematurely without hearing the merits.

The Court proceeded to address the possibility that the child's claim could in fact be allowed if the matter was to be considered, taking into account all the relevant facts. It reviewed comparable foreign jurisprudence and noted that while some countries allowed parents to claim damages due to negligently-caused unwanted pregnancies, most countries did not address the issue of the child as a claimant. It also noted that the variability in treatment of claims on "wrongful birth" was due to the

diverse constitutional, political and social contexts within which the law of the country was created, or in other words, the legal culture. From this analysis, the Court concluded that the South African legal culture required that the issue be determined with respect to constitutional values. The Court therefore affirmed that the law, including common law, must conform to the values of the Constitution of the Republic of South Africa, 1996, and the development of the law ought to promote the spirit, intent and objectives of the Constitution. The Court observed that the values and rights that were particularly important included equality, dignity and the right of children to have their best interests considered of paramount importance in every matter concerning them.

The Court then considered whether common law could be developed to recognise the child's claim, taking into account the principle of the best interests of the child, as well as other constitutional values. It examined this in relation to the elements that ought to be proven to sustain the claim, including: harm or loss, wrongfulness, negligence, and causation.

The Court recognised the difficulty of proving harm or loss in the absence of physical injury or harm to his person or property. Referencing the law as explained in *Natal v. Edouard (*[1990] ZASCA 60; 1990 (3) SA 581 (A)) and endorsed in *Mukheiber v. Raath and Another* ([1999] ZASCA 39; 1999 (3) SA 1065 (SCA)), the Court affirmed that legal harm was not only physical injury to the person or property, but included the added financial burden to the parents as a result of the birth of the child. In the context of constitutional rights, the Court said that the harm to the parents might be addressed as an infringement on the right of the parent to exercise free and informed choice regarding reproduction. However, the added financial burden remained a legal loss that had implications if the child was to be considered a potential claimant. This harm or loss to the child would become apparent only if parents were unable to pursue their claim. The Court highlighted that even if in this circumstance the child suffered no loss of constitutionally protected choice, the best interests of the child principle required that the issue of loss for the child also be considered.

The question that the Court addressed then was what would happen if for some reason the parents failed to make a claim against a negligent medical practitioner, as was the issue in this case. The Court postulated that a court could find the medical expert liable for the child's claim, for the same loss for which he would have been liable to the parents.

With regard to the claim of wrongfulness, the Court was of the opinion that the principle that the best interests of children be given paramount importance in every matter concerning them implicated the medical expert's misdiagnosis that results in birth of a child with a disability. In the event that the parents failed to claim, the best interests of the child principle would not allow the loss to lie with the child. The Court's view was that allowing loss to lie with the child might breach a duty not to cause such loss and invoked the rights of the child under Section 28(2) of the Constitution. However, in order for liability not to be indeterminate, either parents or the child may claim, but not both cumulatively. The Court concluded that it would not be inconceivable to impose liability with respect to the child where the parents failed to claim.

On the element of causation, the Court was of the view that pre-natal misdiagnosis would not be the cause of the disability itself, but of the birth of the child with a disability. It therefore considered the misdiagnosis as part of the chain of events that led to the birth that resulted in the loss.

As for negligence, the Court said that this would have to be proven in accordance with established principles. The Court also said that the damages were already those recognised in law that the parents could claim.

In conclusion, the Court held that a child's claim against a medical expert whose misdiagnosis resulted in the birth of the child with disability might potentially be found to exist. The Constitutional Court was therefore of the view that the High Court ought to hear the substantive matter and make a determination in light of constitutional values and rights.

Conclusion

Leave to appeal was granted, and the order of the High Court was set aside and replaced with an order of leave for the plaintiff to amend the particulars of the claim.

Significance

The decision of the Court hinged on its cognisance of the fact that the decision to terminate pregnancy involves making value judgments. When a woman makes a choice to terminate pregnancy, she is effectively choosing whether the potential developing life in her should continue to exist or not. South African law allows a girl or woman to choose to terminate pregnancy on request up to 12 weeks of gestation. The reasons a woman may want to terminate pregnancy are varied, and include avoiding financial burden. The fact that the law allows people to terminate pregnancy on such grounds therefore implies that the law accepts certain value judgments that form the basis of the decision to terminate pregnancy. This cannot be avoided.

If a woman can claim damages for "wrongful birth", should it now become a metaphysical issue just because it is the child claiming damages for his or her own wrongful birth? Take for instance the case of *Registered Trustees of Aga Khan University Hospital, Nairobi*, (Civil Cause no. 3 of 2013, High Court of Kenya) (*Aga Khan*)**,** in which the applicant successfully claimed damages for maintenance of a child who could not have been born if not for the negligence of the health provider in providing contraceptive services.

The *Aga Khan* case might be the case that properly raises the paradox of existence or non-existence, because in this instance the choice to use contraceptives or not determines the coming into existence or not of a child and even when couples use contraception, unintended pregnancy can still result. In the present case however, the choice is rather about the continued existence or non-existence of the foetus. This is what raises the paradox because the termination of pregnancy is based on the perceived risk of having a child with a disability, which as the Court suggested, involves a value judgment. The Court seemed to have addressed this difficult issue by first basing its decision on the premise that the law implicitly accepts the value judgment that persons make when they choose to terminate pregnancy on various grounds. Secondly, the Court said that it was dealing with a situation when the child was already born, because prior to being born, the issues do not arise.

The Court's analysis in developing the common law to allow the child to claim is important as it builds on the jurisprudence on application of human rights principles and values in determining issues impacting on the rights of the child. This was also particularly significant because in the process, the Court had to address the ethical-legal dilemma otherwise couched in the term "wrongful birth." It should be noted, however, that the Constitutional Court did not make the final decision on the matter, but only gave its opinion on how the High Court could approach the issue in the appeal.