DUTY TO SAVE LIFE AND OBJECTION TO MEDICAL TREATMENT ON GROUND OF RELIGION

Osita Nnamani Ogbu*

Abstract

The Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration) and the international bill of rights guarantee the right to life which implies an obligation on the State to take steps to save life. However, notwithstanding the duty on the State to save life, it has been recognized that an adult can in exercise of his rights to life and privacy object to a particular type of medical treatment. In respect of a child, the court has held that agents of the State can secure a court order to override parental objection to particular type of medical treatment. While the decision is commendable, the requirement of court order to override the objection of a parent to a type of medical treatment for a child may endanger the life of the child in view of the time it may take to secure a court order. It is recommended that there should be a legislation which will enable public health institutions to give medical treatment to a child without parental consent and without court order where delay in obtaining a court order may endanger the life of the child. This article adopts a doctrinal approach.

* (Professor of Law) Faculty of Law, Enugu State University of Science & Technology Agbani

1. Introduction

The Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration)[1] and international human rights instruments subscribed to by the Federal Republic of Nigeria guarantee the right to life. The right to life imposes on the State duty to save life. The constitution and the international human rights instruments at the same time guarantee the right to freedom of thought, conscience and religion. Based on this latter right, it is being contended that a person has the right to object to a particular type of medical treatment, in which case a medical practitioner will be under obligation to defer to a patient's exercise of his right to object to a particular type of medical treatment even if such exercise of right puts or leaves the life of the patient in danger. Does this not amount to a right to choose to die?

Another pertinent question is whether there is conflict between the duty of the State to save life as an aspect of right to life and the right of a person to object to a particular type of medical treatment on religious grounds. A more complex question is whether a parent can on the ground of her or his religious belief object to a particular type of medical treatment for his child. This work seeks to address these issues. Interestingly, there are recent jurisprudence on the subject from Nigerian courts which will, however, be interrogated.

[1] Herein after referred to as the 1999 Constitution.

2. The Right to Life and the Duty of the State to Save Life

Section 33(1) of the Constitution of the Federal Republic of Nigeria 1999 (Fourth Alteration) which guarantees the right to life provides as follows:

> Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of a sentence of a court in respect of a criminal offence of which he has been found guilty.[2]

Article 4 of the African Charter on Human and People's Rights[3] also guarantees the right to life in the following terms: Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.[4]

In *SERAC & Anor v Federal Republic of Nigeria*[5] the African Commission on Human and People's Rights held that internationally accepted ideas of the various obligations engendered by human rights indicate that all rights – both

---

2 Other limitations on the right to life are contained in section 33(2) of the 1999 Constitution

3 The African Charter on Human and People's Rights was adopted on 17 June 1981. It entered into force on 21 October 1986 upon receiving the minimum ratifications.

4 Right to life is also guaranteed under Article 3 of the Universal Declaration of Human Rights (UDHR) and Article 6 of the International Covenant on Civil and Political Rights (ICCPR).

5 (2002) CHR 537 at 554-555.

civil and political and social and economic – generate at least four levels of duties for States that undertake to adhere to a rights regime, namely the duty to respect, protect, promote and fulfill these rights. The obligation to respect entails that the State should refrain from interfering in the enjoyment of all human rights; it should respect right-holders, their freedoms, autonomy, resources, and their liberty of action. The obligation to protect is intertwined with the tertiary obligation of the State to promote the enjoyment of all human rights by promoting tolerance, raising awareness or even building infrastructures. The last layer of obligation requires the State to fulfill the rights and freedoms it has guaranteed.

It is therefore submitted that based on these obligations section 33(1) of the 1999 Constitution does not merely impose a negative obligation on the State not to take life but it also imposes positive obligation on State agencies to act to save life.[6] If there is a duty on the State to save life, can a person choose to endanger his life by objecting to a kind of medical treatment which, based on medical expertise, will most likely save his life? This brings us to the issue of religious objection to medical treatment.

[6] For further reading on this topic please see ON Ogbu, *Human Rights Law and Practice in Nigeria 2nd Revised Edition Vol 1* (Enugu: Snapp Press, 2013) 138.

3. Religious Objection by an Adult to Medical Treatment

The law has become quite clear on the issue of religious objection to medical treatment in respect of an adult since the Supreme Court decision in *Medical and Dental Practitioners' Disciplinary Tribunal v Dr John Emewulu Nicholas Okonkwo.*[7]

The facts of the case are as follows. The deceased, Mrs. Martha Okorie and her husband belonged to a religious sect known as Jehovah's Witnesses which believes that blood transfusion is contrary to God's injunction. Mrs. Okorie, a 29 year old woman, having had a delivery at a maternity on 29 July 1991 was admitted as a patient at Kenayo Specialist Hospital for a period of 9 days where the diagnosis disclosed a severe ailment and blood transfusion was recommended. The patient and her husband refused to give their consent to blood transfusion. Dr Okafor of the Hospital consequently discharged the patient on the request of the husband. Upon her discharge from Kenayo Hospital, she was taken to JENO Hospital by her husband where Dr Okonkwo, the respondent, accepted to treat the patient without transfusing blood.

The patient died on 22 August 1991. The respondent was thereafter charged before the Medical and Dental

[7] (2001) 5 NSCQR 651. Though on consent to medical treatment, a different issue arose *The* case of *Dr Rom Okekearu v Danjuma Tanko* (2002) 9-11 SCNJ 1. For a brilliant comment on the case see Yusuf, AOA "The Significance of the Supreme Court of Nigeria's decision on patient consent to medical treat *in Dr Rom Okekearu v Danjuma Tanko.*

Practitioners' Disciplinary Tribunal for attending to the patient in a negligent manner and thereby conducting himself infamously and also acting contrary to his oath as a medical practitioner. He pleaded not guilty to the charge. After the conclusion of the trial, the Tribunal found the respondent guilty on the 3 counts and suspended him for a period of six months on each of the charges. The sentence was to run concurrently. The respondent appealed to the Court of Appeal which allowed the appeal and set aside the decision of the Tribunal. The Tribunal appealed to the Supreme Court.

The Supreme Court in dismissing the appeal, observed that a consideration of a religious objection to medical treatment involves a balancing of several interests, namely, the constitutionally protected right of the individual; State interest in public health, safety and welfare of society, and, the interest of the medical profession in preserving the integrity of medical ethics and, thereby, its own collective reputation. To give undue weight to one of these other interests over the rights of the competent adult patient may constitute a threat to the liberty of the individual, unless legally recognized circumstances justify that weight should be ascribed to one over the others. Where, for instance, the health and safety of society is under threat, for example, during epidemic, public health and safety may be given a higher weight than the individual's human rights.

According to the Supreme Court, where, however, the direct consequence of a decision not to submit to medical treatment

is limited to the competent adult patient alone, no injustice can be occasioned in giving individual right primacy. Any rule of ethics or professional conduct that ignores the need to balance these interests or that gives undue weight to any of them without regard to individual circumstances will be out of touch with reality and may lead to unjust consequences.

The patient's constitutional right to object to medical treatment or, particularly, as in this case, to blood transfusion on religious ground is founded on the right to privacy[8] and right to freedom of thought, conscience and religion guaranteed by the 1999 Constitution. The Supreme Court did not consider in the case the question of the duty of the State to save life and the issue was not raised by counsel to the parties. Perhaps, it is because public hospital was not involved in the treatment. It is submitted that in appropriate cases, the issue should arise and should be given consideration to further clarify the law on the matter. The jurisprudence expounded by the Supreme Court implies that there is right to die when what right to life is what is guaranteed by the constitution.

The issue of objection to medical treatment on religious grounds may arise where medical treatment of a child is involved.

---

[8] For a criticism of the interpretation of the right to privacy to include individual autonomy see O N Ogbu, *Human Rights Law and Practice in Nigeria 2nd Revised Edition Vol 1* (Enugu: Snaap Press, 2014)

4. Religious Objection to Medical Treatment of a Child

While the matter is settled in respect of an adult, the position is not so in respect of a child. The 1999 Constitution is silent on the matter. In the circumstance, recourse may be had to the provisions of human right instruments that protect the right of a child. The major international instrument on the right of the child is the Convention on the Right of the Child.[9] At the African regional level, we have the African Charter on the Rights and Welfare of the Child.[10] These international instruments have been domesticated in Nigeria through the enactment of the Child's Rights Act 2003.[11]

Part 1 of the Act which is on the best interest of the child principle provides as follows.

> 1. In every action concerning a child, whether undertaken by an individual, public or private body, institutions of service, court of law, or administrative or legislative authority, the best interest of the child shall be of paramount consideration.

---

[9] Adopted and opened for signature, ratification and accession by the General Assembly Resolution 44/25 of 20 November 1989. It entered into force on 2 September 1990 in accordance with Article 49 thereto.

[10] OAU Doc. CAB/LEG/24.9/49. The Charter was adopted and opened for signature on 11th July, 1990. It entered into force on 29 November, 1999 upon receiving the minimum ratifications. The Convention and the Charter have been domesticated in Nigeria at the Federal level as the Child's Rights Act No 26 of 2003 which was enacted by the National Assembly on 31 July 2003.

[11] The long title of the Act reads: " An Act to provide and Protect the Rights of a Nigerian Child; and other related matters".

> 2(1) A child shall be given such protection and care as is necessary for the well-being of the child, taking into account the rights and duties of the child's parents, legal guardians, or other individuals, institutions, services, agencies, organizations or bodies legally responsible for the child.
>
> (2) Every person, institution, service, agency, organization and body responsible for the care or protection of children shall conform with the standards established by the appropriate authority particularly in the areas of safety, health, welfare, number and suitability of their staff and competent supervision.

It has been pertinently observed that the concept of the best interest of the child is a method of making decisions that requires the decision maker to think what the best course of action is for the child. To Joyce, the principle does not presuppose the personal views of the decision maker to reign but rather compels the decision maker to consider both the current and future interests of the child, weigh them up and decide which course of action is on balance, the best course of action for the child.[12]

---

[12] See Joyce, Theresa "The Best Interests of the Child and its Collective Connotations in the South African Law" (2010) Journal of Contemporary Roman-Dutch Law, Vol 73, 266, http.//ssrn.com/abstract+1824266 accessed March 2011. Cited in Emelonye, Uchenna "Assessing

Section 7(1) of the Child's Rights Act provides that a child has a right to freedom of thought, conscience and religion. Parents and where applicable, legal guardians are required to provide guidance and direction in the exercise of these rights having regard to the evolving capacities and best interest of the child.[13] All persons, bodies, institutions and authorities are required to respect the duty of parents and where applicable legal guardians to provide guidance and direction in the enjoyment of the right to freedom of thought, conscience and religion of a child.[14]

The Child's Rights Act adopted Chapter IV of the 1999 Constitution on Fundamental Rights as if it is part of the Act.[15] In any case, the adoption is a surplussage as the provisions of Chapter IV of the 1999 Constitution ordinarily applies to a child.

By section 13(1) of the Act, every child is entitled to enjoy the best attainable status of physical, mental and spiritual health. Every government, parent, guardian, institution, service, organization or body responsible for the care of a child shall endeavour to provide for the child the best

---

Proportionality and Best Interests Principles in the 2003 Child's Rights Act" in Chukwumaeze, U *et. Al.* (ed) *Lay, Social Justice and Development: A Festschrift For Professor Uba Nnabue* (Owerri: Imo State University, 2013) 477.

13 Section 7(2).

14 Section 7(3).

15 See section 3(1) of the Act.

attainable state of health.[16] The Act also enjoins the government to endeavour to reduce infant and child mortality rate.[17]

The question is whether in the light of the above provisions of the Child's Rights Act a parent can object to a desirable or necessary type of medical treatment for a child on the ground of the religion of the parent or supposedly that of the child. The specific guarantee of right to freedom of thought, conscience and religion to a child means that a parent cannot impose her or his own religion on a child. Consequently, a parent cannot legitimately object to a necessary kind of medical treatment for a child based on his or her own religion. Furthermore, though a parent or guardian is empowered to provide guidance and direction in the exercise of the right to freedom of thought, conscience and religion by a child, he or she must have regard to the evolving capacities and best interest of the child. The best interest of the child will presuppose that where the survival of the child is in issue it has to take precedence over the supposed religious belief of the child.

Where there is an objection to particular treatment of a child on the presumable ground of providing guidance or direction in the exercise of the child's right to freedom of thought, conscience and religion, what will be involved will be a

[16] Section 13(2).

[17] Sect9ion 13(3)(a).

consideration of whether the objection is in the best interest of the child.
In such a situation, health institutions will be at liberty to adopt the course of treatment that will ensure the survival of the child which is in the best interest of the child notwithstanding any objection by the parents.

The issue arose in the case of *Esabunor v Faweya.*[18] The facts of the case are as follows. The 2nd appellant was the mother of the 1st appellant, who was born on 19 April 1997 at the Chevron Clinic, Lekki Peninsula, Lagos. On 11 May 1997 the 1st appellant was sick and was taken to that Clinic which was owned by the 2nd respondent for treatment. The 1st respondent who was a medical doctor attached to the clinic examined the 1st appellant and found that the 1st appellant was suffering from severe infection which led to severe shortage of blood in his body. He therefore placed him on antibiotics and by the morning of 12 May, 1997, it was clear that the antibiotics were not working as the 1st appellant was convulsing and could not breathe properly and as such he was placed on oxygen therapy.

It was at this stage that the medical personnel at the Chevron Clinic believed that without blood transfusion, the 1st appellant would die. The 1st respondent therefore informed the 2nd appellant that the life of the 1st appellant was in danger and only a blood transfusion could save his life. However, the 2nd appellant refused to consent to the transfusion of blood on

[18] [2008] 12 NWLR (pt 1102) 794.

the ground that she was a Jehovah's Witness and blood transfusion was forbidden by her religion.

The development was reported to the police by the management of the 2nd respondent. Thereafter, the 3rd respondent, on behalf of the 4th respondent, applied for and obtained an order from the Magistrate's Court presided over by the 5th respondent, authorizing the medical authorities of the 2nd respondent to do all that was necessary for the protection of the life and health of the 1st appellant. The order of the court was executed and the 1st appellant's condition improved so considerably that he was discharged a few days later. By an application dated the 15 May 1997, the 2nd appellant asked the 5th respondent to set aside the order of 12 May 1999 on the ground that it was fraudulently obtained. The application was dismissed as the order, having been complied with, could no longer be set aside.

The appellants thereafter applied to the High Court of Lagos State for an order of certiorari removing into the High Court the entire proceedings including the ruling or orders made by the 5th respondent for the purpose of being quashed. The 1st appellant also claimed N10,000,000.00 damages against the 1st and 2nd respondents for unlawfully injecting or transfusing blood into his body without his consent and/or consent of the 2nd appellant while the 2nd appellant claimed N5,000,000.00 as damages for denial of parental right. All the reliefs of the appellants were dismissed by the High Court.

Dissatisfied with the decision of the High Court, the appellants appealed to the Court of Appeal. The Court of Appeal unanimously dismissing the appeal held as follows. The code of ethics of the medical profession, otherwise known as Published Code of Ethics, enjoins a doctor not to allow anything including religion to intervene between him and his patient and that he must always take measures that leads to the preservation of life. The code of ethics places a great burden on medical practitioners in such a way that they cannot accede to the wish of a citizen who will allow a child to die on account of religious belief.

> Galinje, JCA, observed pungently as follows:
> The procedure adopted at the Chief Magistrate Court may be inelegant, but it was done by the Police in order to prevent a commission of crime. It is a procedure that is based on criminal law and the essence was to invoke the jurisdiction of the court. In the circumstance of the case, the court could have even acted on verbal application to prevent what was obviously a crime that was to be committed. For the essence of law is to preserve life and property, create environment for human beings to live a contented and dignified life.[19]

The Court of Appeal did not ground its decision on the provisions of the Child's Rights Act or the 1999 Constitution

[19] At 810.

but rather on the duty of the police to prevent the commission of a crime. The Court of Appeal also observed that although a person has a right to choose a course for his or her life, that right is not available to determine whether her or his son should live or die on account of her religious belief. In the instant case, the 1 and 2 respondents acted upon an order of court duly procured by the Commissioner of Police on behalf of the State. The authority or right of the appellants to withhold consent to the blood transfusion was therefore overridden by the court order.

The Court further observed, rightly in our view, that though the right to privacy and the right to freedom of thought, conscience and religion implies a right not to be prevented, without lawful justification, from choosing the course of one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to one's religious belief, the limit of these rights in all cases are where they impinge on the right of others or where they put the welfare of society or public health in jeopardy.

According to the court, if a decision to override the decision of a competent patient not to submit to blood transfusion or medical treatment on religious grounds is to be taken on the ground of public interest or recognized interest of others, such as dependent minor children, it is to be taken by the courts. In the instant case, the 1st and 2nd respondents acted upon an order of court duly procured by the Commissioner of police on behalf of the State. The authority to withhold consent to

the blood transfusion was in the circumstance overridden by the court order.

Galinje, JCA, had strong words for the 2nd appellant. His Lordship said:

> From the history of this case, I entertain no doubt in my mind that the lower court was right when it refused to grant the application for an order of certiorari. The 2nd appellant's religious belief had no bearing on the wanton dissipation of the 1st appellant's life. Clearly, the 1st appellant, being an infant, was incapable of giving consent to die on account of the religious belief of the 2nd appellant. The 2nd appellant's desire to sacrifice 1st appellant's life is an illegal and despicable act, which must be condemned in the strongest terms.[20]

Though this decision is commendable for according the desired importance to the sanctity of human life, the decision would have contributed more meaningfully to our human rights jurisprudence if anchored on the human rights instruments or the Child's Rights Act. If that course had been taken, it would have been obvious that the 2nd appellant cannot, based on her own religious belief object to blood transfusion for the 1st appellant. Secondly, the court ought to have held that the medical institution should have carried out the blood transfusion based on the best interest of the child

[20] At 811.

without the necessity of recourse to court for an enabling order. Insistence on court order where there is such objection may endanger the life of the child because of the delay that may arise from waiting to obtain the court order.

The Supreme Court of Nigeria affirmed the decision of the Court of Appeal in *Esabunor v Faweya.*[21] Consistent with the reasoning of the Court of Appeal, the Supreme Court held as follows.

> All adult persons have the inalienable right to make any choice they may decide to make and to assume the consequences. Accordingly, an adult person who is conscious and in full control of his mental capacity, and is of sound mind has the right to either accept or refuse medical treatment, including blood transfusion. In such case, the hospital has no choice but to respect the person's wishes. However, different considerations apply to a child because a child is incapable of making decisions for himself and law is duty bound to protect such a person from abuse of his rights even by the child's parents. So when a competent parent or a person *in loco parentis* refuses medical treatment or blood transfusion for a child on religious grounds, the court should step in. The court should take a decision after considering the child's welfare,

[21] (2019) 7 NWLR (pt 1671) 316

> i.e. saving the life of the child and the best interest of the child. These considerations outweigh whatever religious belief the parent of the child may have about any form of medical treatment because the child may grow up to reject his parent's religious beliefs. And the decision of the court should be to allow the administration of blood transfusion especially in life threatening situation. In this case, the 1st appellant was then only one month old, was incapable of deciding for himself. On the other hand, the 2nd appellant, his mother, acted on her religious belief. In the circumstance, the 5th respondent was right in granting the said 4th respondent's application, which allowed the 1st respondent to save the life of the 1st appellant.

The Supreme Court observed pertinently in the case that law exists primarily to protect life and preserve the fundamental right of citizens inclusive of infants. The Supreme Court also anchored its decision on the provisions of the Child's Rights Act. The Supreme Court noted that Section 13 of the Child's Right Act provides for the right to health and health service of the child. Section 13(2) provides that every government, parent, guardian, institution, service, agency, organization, or body responsible for the care of a child shall endeavor to provide for the child the best attainable state of health. According to the Court, having regard to the provisions of the Child's Right Act, it would have amounted to a great injustice

to the 1st appellant if the court stood by and watched the 1st appellant being denied of basic treatment to save his life on the basis of the religious conviction of his parent (the 2nd appellant).[22]

The Supreme Court also, rightly in our view, alluded to section 59(1) of the Child's Right Act, 2003 which provides that where it appears to the court in proceedings in which a question arises as to the welfare of a child, that it may be appropriate for a care supervision order to be made with respect to that child, the court may direct the appropriate authority to undertake an investigation of the child's circumstances.

However, there is still a gap in this area of law. For instance, where a child is in imminent danger of death, and may likely die if there is delay in obtaining a court order, the Child Rights Act ought to have provided that in such circumstance, a medical institution should act without a court order. The fact that there is palpable delay in Nigeria's judicial process goes without saying.

5. Conclusion

The conflict between the duty of the State to protect life and the right to freedom of thought, conscience and religion in relation to religious objection to medical treatment by an adult has been resolved in favour of the religious right of the adult. This appears to amount to indirect recognition of right

[22] At 343-344.

to die which is not one of the limitations on the right to life. In any case, in respect of an infant, the Court of Appeal and the Supreme Court have rendered decisions on the subject which are consistent with the provisions of International and Regional human rights instrument and national laws which protect the rights of the child as against the preferences of the parent or guardian on religious ground when the life of the child is in danger. It is recommended that there should be express statutory provision on the matter to prevent any form of doubt as what is involved is the precious lives of children, and as many Nigerians may not be aware of the Supreme Court decision on the matter. Furthermore, in situations of likelihood of imminent death of a child if urgent decision is not taken, the requirement of court order before the decision of parents or guardians opposing medical treatment of children on religious ground is overridden and this is unsatisfactory. In certain cases the sick child may die before the court order is obtained. In the circumstance, it is recommended that a law should be made which will enable medical institutions or at least public medical institutions to act without court order or prior to obtaining court order where a child is in imminent danger of death if urgent action is not taken.