



INFORMED CONSENT FOR MEDICAL TREATMENT IN NIGERIA: THE RIGHTS OF MENTALLY INCAPACITATED ADULTS AND THE LEGAL LIMITS OF THE NEXT OF KIN

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ARTICLE

ABSTRACT

The Constitution guarantees an individual's right of autonomy a corollary of which is the unfettered right to give or withhold consent to any kind of medical treatment. It is therefore clear that in Nigeria, a medical practitioner has the legal obligation to obey the decision of a patient who has the requisite mental capacity. However, it is not clear if a medical practitioner must obey the decision of the next of kin if an adult patient lacks the mental capacity to give or withhold consent to a medical treatment. This article argues that contrary to customary medical practice in Nigeria, in the absence of a valid advance directive by a mentally-incapacitated patient, the extant laws in Nigeria point to the fact that a next of kin cannot withhold consent to a life-sustaining medical treatment on behalf of the mentally incapacitated adult. It is therefore important to examine the legal rights of a next of kin in Nigeria in order to protect mentally incapacitated patients from decisions that might lead to their unlawful death contrary to section 33 of the Nigerian Constitution as amended.



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Keywords: Informed consent, Nigeria, next of kin and medicine

1.0 Introduction

A cursory internet search shows that in Nigeria, several mentally incapacitated patients have lost their lives simply because their next of kin refused to give the requisite consent for life-sustaining medical treatment.¹ It is therefore imperative to examine Nigerian laws

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¹ 'My wife died because her Jehovah Witness family refused blood transfusion- Husband' (Premium Times, 7 January 2013) < <https://www.premiumtimesng.com/news/114117-my-wife-died-because-her-jehovah-witness-family-refused-blood-transfusion-husband.html> > accessed 22 May 2020; 'Pregnant woman dies as Jehovah Witness husband refuses blood transfusion' (TVC/News, 20 February 2018) < <https://www.tvcnews.tv/pregnant-woman-dies-as-jehovah-witness-husband-refuses-blood-transfusion/> > accessed 22 May 2020; Laila Ijeoma, 'Jehovah Witness dies after

that guide the giving and withholding of consent in the medical practice especially when the patient is mentally incapacitated. Whilst the right of competent adults to give or withhold consent for life-sustaining medical procedures has been analysed and upheld by the Supreme Court in *Medical and Dental Practitioners Disciplinary Tribunal v. Nicholas Okonkwo*² and *Okekearu v. Tanko*,³ it was not until *Tega Esabunor and anor. v Tunde Faweya and ors.*⁴ that the Supreme Court placed a limit on the right of substitute decision-makers to give and withhold consent for life- sustaining medical procedures on behalf of a mentally incapacitated patient. Regrettably, this judgment was limited to the right of minors *vis á vis* the corresponding rights of their parents to give and withhold consent on behalf of their minor children.

This paper examines the limit of the right of the next of kin of an incapacitated adult patient to withhold consent for life-sustaining medical treatments in Nigeria. Specifically, it discusses the implication of the Supreme Court judgment in Esabunor's case, section 33 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) Cap C 23, Laws of the Federation of Nigeria, 2004⁵ and sections 300, 311 and 339 of the Criminal Code Cap C 38, Laws of the Federation of Nigeria, 2004⁶ on the right of the next of kin in medical practise. It concludes that the available legal authorities in Nigeria show that a next of kin cannot withhold consent to a life-sustaining medical treatment on behalf of the mentally incapacitated adult.

2.0 Informed Consent in Nigeria

The right of autonomy is safely embedded in the provisions of the Constitution which guarantee individuals' right to personal liberty and freedom of thought, conscience and religion, as found in section 35 and section 38 of the Constitution, respectively. A corollary of this right of autonomy is that an adult of sound mind is at liberty to accept or refuse any medical treatment whether life-sustaining or not. This right includes a corresponding legal obligation for medical professionals to respect the decision of this adult, even if it is considered unreasonable. *Nicholas Okonkwo's case*,⁷ is a perfect illustration of the importance accorded to the right of autonomy in Nigeria, and the corresponding obligation placed on clinicians to always obey the decisions of competent adults. In this case, the patient belonged to a religious sect, known as Jehovah's Witnesses, that believes that blood transfusion is contrary to God's injunction. The patient, after delivering a child, was diagnosed with severe pain, for which a blood transfusion was recommended. The patient refused to give her consent for the transfusion. The doctor in charge of the hospital (Hospital A) consequently discharged her. Upon discharge, she was admitted to another hospital (Hospital B) under the management of Dr Okonkwo, the Respondent. It is, however, unclear if she was unconscious when she was admitted, which would have necessitated the hospital to request her husband's consent. Nevertheless, her husband gave the Respondent a card signed by the patient directing that no blood transfusion be given to her even when it was deemed to be vital to her health and life. Relying on this advance

refusing blood transfusion' (Laila's News.com, 21 July 2018) < <https://lailasnews.com/jehovah-witness-dies-after-refusing-blood-transfusion/> > accessed 22 May 2020.

² (2001) FWLR (Pt. 44) 542 SC.

³ (2002) 15 NWLR (Pt. 791) 657 SC.

⁴ (2019) LPELR-46961 SC.

⁵ Cap C 23, Laws of the Federation of Nigeria, 2004

⁶ Cap C 38, Laws of the Federation of Nigeria, 2004

⁷ Nicholas Okonkwo (n 2).

directive, the Respondent proceeded to treat the patient without the recommended blood transfusion. As the doctors predicted, the patient died. The Respondent was then charged before the Medical and Dental Practitioners Disciplinary Tribunal. The Appellant found him guilty and suspended him for six months. On his appeal to the Court of Appeal, the Court held that an adult of sound mind has a right to accept or refuse any available medical treatment. The Court of Appeal consequently set aside the Appellant's decision. Dissatisfied with this judgment, the Appellant appealed to the Supreme Court. The Supreme Court upheld the decision of the Court of Appeal.⁸

Consequently, for adults with the requisite mental capacity, where there is a conflict between the right to life and the right of autonomy, the latter prevails as medical practitioners who infringe on the latter will not only be liable for the tort of battery but also run the risk of been held liable for the offence of assault, contrary to section 252 of the Criminal Code.

3.0 Mental Incapacity and Informed Consent

Mental incapacity in clinical practice generally rests on the inability to scrutinise available information to make an informed decision. This inability can come from age, emergency, unconsciousness or illiteracy. Mental capacity is basically the ability of a patient to understand the information supplied by the clinician, to grasp the significances of acting or not acting on the necessary information and to make a choice based on the information.⁹ Without this ability, an individual cannot make an informed decision, such as whether or not to give or withhold consent for a proposed medical treatment. Having the requisite mental capacity is therefore of utmost importance since an adult who lacks this ability loses his or her right to give informed consent. In Nigeria, it is usual for the incapacitated patient's next of kin to act as the substitute decision-maker under Rule 19 of the Code of Ethics for Medical Doctors.¹⁰ It is also not uncommon for the next of kin to be a spouse or a sibling. An adult child can also discharge this obligation, especially when the patient (a parent) is either old or illiterate.

4.0 Rights of Mentally Incapacitated Patients in Nigeria

It is clear that a clinician has a legal obligation to obey the decisions of a mentally capable adult in Nigeria; however, it remains unclear if clinicians owe the same duty to mentally incapacitated patients. We must therefore interrogate the right action to take in the absence of a valid advance directive. The duty of medical professionals towards incapacitated patients was highlighted first in *Tega Esabunor's case*¹¹ in which the Supreme Court upheld the order of a Magistrate Court, that overruled the decision of a mother who withheld her consent for her child to be transfused. Prior decisions of the Supreme Court in *Nicholas Okonkwo's case*¹² and *Tanko's case*¹³ focused mainly on the inherent rights of mentally capable adults to withhold consent and the corresponding legal obligation of

⁸ *ibid* 588.

⁹ Edwin Etieyibo, 'The Case of Competency and Informed Consent' (2013) 12 *Journal of Clinical Research Bioethics* 1, 2.

¹⁰ Rule 19 provides *inter alia* that "...Where the patient is under age, (below eighteen years (18) by Nigerian law), or is unconscious, or is in a state of mind constituting a mental impairment, a next-of-kin should stand in...".

¹¹ *Tega Esabunor* (n 4).

¹² *Nicholas Okonkwo* (n 2) (*Ayoola JSC*) 571.

¹³ *Tanko* (n 3)

medical professionals to respect this decision. In *Tega Esabunor's case*, A, a minor, sued the defendants through his mother, B. C, a medical doctor, diagnosed A with a severe infection, leading to a shortage of blood, and believed that without a blood transfusion, A would die. B withheld her consent on the grounds that her faith prohibits blood transfusion. Relying on the provisions of sections 27(1) and 30, the Children and Young Persons Law of Lagos State, C sought the order of the Chief Magistrate Court to override B's decision. Consequently, the Chief Magistrate authorised the medical authorities to do everything necessary to preserve the life of A. In compliance with this order, C transfused A and the patient recovered. Following this event, B asked the Magistrate Court to set aside the order that authorised the lifesaving medical treatment because it was fraudulently obtained. When the Magistrate Court declined, B appealed to the High Court. The application to the High Court was also declined. On a further appeal to the Court of Appeal,¹⁴ the Court upheld the order of the Magistrate Court. According to Galinje, Justice of the Court of Appeal (JCA), B's absolute right to choose a course for her life does not correspond to a right to determine whether her son should live or die on account of her belief.¹⁵ The learned justice relied on the decision in *Nicholas Okonkwo's case*¹⁶ where the Supreme Court held that although an adult has the right to choose what medical treatment he or she could accept or refuse, such right was not absolute as it can be derogated in certain circumstances.¹⁷ Relying on this case, the Court of Appeal held that the doctor acted within his powers by transfusing the child and, thus, cannot be liable for battery.

Nevertheless, the Appellants were dissatisfied with the judgement of the Court of Appeal, and they appealed to the Supreme Court. The Supreme Court upheld the decision of the Court of Appeal and highlighted the duty of the Court to always protect the best interest of a child whenever a parent or person standing in loco parentis refuses blood transfusion or a lifesaving medical procedure. The Court reasoned that since children are incapable of making decisions for them, the Court has an obligation to protect them until they are capable of making decisions for themselves, given that it is possible and indeed within a child's right to abandon their parent's religious beliefs when they grow up.¹⁸

This is the first time the Court was faced with this issue and, in line with the current trends, the Court rightfully placed a limit on the right of parents to give and withhold their consent on behalf of their minor children. It is, however, uncertain if the decision of the Court will be the same if the proposed medical treatment is not lifesaving. Nevertheless, the judgment appears to be limited to lifesaving treatment without a medically verifiable alternative. In this case, the doctor believed that the child would have died without the blood transfusion. If there was another medically verifiable medical procedure, of which the parents approve and would have the same effect as the blood transfusion, then the decision should have differed. A counter argument means that parents have totally lost

¹⁴ The decision of the Court of Appeal was reported in *Tega Esabunor v Tunder Faweya* [2009] All FWLR 380, 395 CA.

¹⁵ *ibid* 396.

¹⁶ *Nicholas Okonkwo* (n 2).

¹⁷ *ibid* 244-245.

¹⁸ David Hundeyin, 'The Jehovah's Witnesses cult tears families apart. Here's how it tore mine' (the Scoop, 25 April 2019) < <https://thescoopng.com/2019/04/25/the-jehovahs-witnesses-cult-tears-families-apart-heres-how-it-tore-mine/> > accessed 18 April 2020. Mr. Hundeyin was born a Jehovah's Witnesses but detested the religion and currently does not live as a Jehovah's witness.

their rights to determine the medical treatment which their minor children should accept or refuse which is not a reasonable interpretation of the judgement. Consequently, it is submitted that the Supreme Court did not strip parents of their rights to give and refuse consent on behalf of their minor children but merely limited them to protect vulnerable children

It is surprising that the Chief Magistrate in *Tega Esabunor's case*¹⁹ anchored the order on the provisions of the Criminal Code. Interestingly, the order was granted to prevent Mrs Esabunor from breaching the provisions of sections 339, 341 and 311 of the Criminal Code.²⁰ Section 339 of the Criminal Code prohibits the failure to provide necessities of life.

Although, the Court did not rely on any foreign cases, the Queensland decision of *R v Nielson*²¹ depicts the fate that would have befallen Mrs. Esabunor if the necessary Court order was not obtained. In this case, L was diagnosed with schizophrenia at the age of 19, for which she needed anti-psychotic medications. However, the evidence indicated that her mother believed that L did not need the required medication, which led to a deterioration of her health. Her mother and stepfather were convicted upon a charge of failure to provide the necessities of life, without lawful excuse. Consequently, L's health was likely permanently injured, contrary to section 324 and 285 of the Queensland Criminal Code Act 1899 (similar to sections 339 and 300 of the Nigeria Criminal Code Act respectively). The Court had to consider whether medical assessment, treatment and medication were 'necessaries of life.' According to the trial Court, necessities of life include:

Such things as tend to preserve one's life or one's health... What this section deals with are those matters which have a serious long-lasting effect upon one's state of health, one's state of wellbeing with permanent consequences or with likely permanent consequences if they are not provided and if of course as I have mentioned to you a moment ago, the crown here suggests that the serious lack of sustenance, the lack of medication when this young woman had a very serious psychiatric disease were such matters²²

Since it was found that in the absence of treatment, L's schizophrenia would have certainly relapsed, the Court of Appeal upheld the decision of the trial court and held that 'without that medication...[L's] health was likely to be permanently injured in the sense that her mental health would deteriorate to an extent that it became... If that state of affairs had continued then ...[L's] health would have been permanently injured.'²³ This case indicates that medical treatment is a 'necessary of life' and parents can be convicted if they fail to ensure that their children receive essential medical treatment. Therefore, if Tega Esabunor did not get the required blood transfusion, it is likely that Mrs. Esabunor would be convicted for failure to provide the required 'necessary of life' contrary to section 339 of the Criminal Code. Nigerian Courts are not bound by this decision; however, it is not uncommon for them to be inspired by the decision of foreign Courts when a novel issue is

¹⁹ Tega Esabunor (n 4).

²⁰ Tega Esabunor (n 14) 395.

²¹ [2001] QCA 85.

²² *ibid* [29].

²³ *ibid* [3].

in dispute.²⁴ If the Courts looked to this foreign decision, then any parent who refuses to allow a minor under his or her care to have access to medical treatment such as blood transfusion will be guilty of an offence under section 339 of the Criminal Code.

5.0 The Legal Limits of the Next of Kin in Nigeria

It remains unclear how medical practitioners should deal with an adult who has lost the requisite capacity to give informed consent. In other words, there is no set process if the next of kin refuses to give the requisite consent for a life-sustaining medical treatment. As previously indicated, the medical practitioner has the legal obligation to obey the decision of a patient who has the requisite mental capacity. It is also clear that in the case of a minor, the right of parents is subject to the Criminal Code and the best interest of the child. Therefore, it is not clear if the medical practitioner should align with the next of kin if the adult patient cannot give the required consent. It is submitted that the available legislation indicates that even in the face of this unsafe lacunae, a next of kin is bound by the provisions of the Criminal Code. First, section 33 of the Constitution guarantees the right to life and prohibits the intentional deprivation of a person's life, except in the execution of the sentence of a Court with respect to a criminal offence of which he or she has been found guilty in Nigeria. However, a person shall not be regarded as having been deprived of his or her life in contravention of this section if he or she dies as a result of the use, to such extent and in such circumstances as are permitted by law of such force as is reasonably necessary:

- For the defence of any person from unlawful violence or the defence of property,
- In order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or
- For the purpose of suppressing a riot, insurrection or mutiny.²⁵

To reinforce the sanctity of life as protected by the Constitution, section 306 of the Criminal Code prohibits the killing of anybody except in circumstances authorised or justified by law. Section 308 of the Criminal Code then goes on to define killing as the act of causing 'the death of another, directly or indirectly by any means whatsoever.' The simple meaning that can be ascribed to these provisions of the Constitution and the Criminal Code is that the law protects the right to life and will not permit the death of another except in the circumstances sanctioned by the law. This may mean that there are circumstances where the law will permit the death of an individual even though it is outside of the legally sanctioned circumstances. For example, death is permitted if it occurs in the exercise of a person's right of autonomy and self-determination. If this circumstance were to be a crime, then the doctor in *Nicholas Okonkwo's case*²⁶ would have been held liable for the death of his patient who refused to be transfused. However, this is not applicable if the patient does not have the mental capacity to give the requisite consent. This argument is predicated on the fact that the Criminal Code imposes a legal obligation on the next of kin to preserve the life of the patient at the time when he or she cannot give the required consent. Failure to discharge this obligation would lead to criminal liability as section 339 of the Criminal Code criminalises the failure to provide necessities of life. Furthermore, there is a legal duty for any person in charge of another to provide the

²⁴ As a matter of fact, in *Nicholas Okonkwo* (n 2) 601, the Supreme Court relied on the English case of *Sideway v Board of Governors, Bethlehem Royal Hospital* (1985) 1AC 871.

²⁵ Constitution of the Federal Republic of Nigeria 1999, s. 33(2) a-c.

²⁶ *Nicholas Okonkwo* (n 2).

necessaries of life. In this regard, section 300 of the Criminal Code provides that

It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention or any other cause to withdraw himself from such charge, and who is unable to provide himself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and he [or she] is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.

A combined reading of section 339 and section 300 of the Criminal Code reveals that any person having charge of a sick person has a legal obligation to provide that sick person with necessaries of life. Although, this author is not aware of any judicial interpretation of the aforementioned sections in Nigeria, the decision in *R v. Nielson*²⁷ indicates that medical treatment is a necessary of life and consequently, a person who prevents someone from receiving the required medical treatment has failed to discharge a lawful obligation. It is also worth noting that in *Tega Esabunor's case*²⁸ the Magistrate granted the order sought by the Commissioner of Police to enforce the legal duties under section 339 and 341 of the Criminal Code. Galinje JCA also noted that from 'the proceedings of the Chief Magistrates' Court, it is very clear that the intention of the Commissioner of Police was solely to prevent commission of crime.'²⁹ Having granted an order to enforce the provisions of section 339 and 341 of the Criminal Code, the Court has plainly stated that parents have a legal obligation to provide the necessaries for their children, which include medical treatment.

We must then understand if a next of kin has the same legal duty as a parent. If they do have the same legal duty, this indicates that the next of kin must always make decisions that will preserve the life of the patient who has lost the mental capacity to give the required consent. The Criminal Code does not provide a list of persons who are charged with the responsibility of providing necessaries; however, a careful reading of section 300 of the Criminal Code will reveal that in addition to parents, anybody has the obligation to provide necessaries of life if the duty is imposed by contract, law or arises by reason of any act, whether lawful or unlawful. Although, the duty of the next of kin to provide necessaries of life cannot be traced to any law, his or her duty certainly emanates from the fact he or she did not reject the responsibility when he or she was informed that the patient has chosen him or her as the next of kin. It, thus, follows that as long as a person accepts the role of next of kin, he or she assumes the responsibility to provide the sick person with the necessaries of life for the duration of the sickness and, thus, comes under the provisions section 300 of the Criminal Code.

Therefore, when a next of kin is faced with two decisions one of which will preserve the life of the patient and the other, which will not, the next of kin is obliged, under the aforementioned sections of the Criminal Code, to make a decision that will preserve the life

²⁷ Nielson (n 38).

²⁸ Tega Esabunor (n 4).

²⁹ *Ibid* 395.

of the patient. It is pertinent to note that this duty as imposed by the Criminal Code will be triggered only when the patient does not have a valid advance directive. If there is a valid advance directive, then medical practitioners have the obligation to respect the decision of the patient as reflected in the advance directive.

The provisions of section 311 of the Criminal Code cannot be overlooked in this issue under discourse given that in *Tega Esabunor's case*,³⁰ the Chief Magistrate made reference to it. This section provides that

A person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person.

In addition to section 300 and 339, criminal liability for a next of kin can arise under section 311 of the Criminal Code. The circumstance under which the Court would hold that the decision of the next of kin accelerated the death of the patient remains a question given that death can occur from either a direct or indirect action of an individual.³¹ The implication of section 311 is that it is immaterial if the individual's direct or indirect action hastened the death of that other person. Hence, we must ask if the Court would regard the act of withholding consent by a next of kin as a cause of death. Take, for instance, the 50-year-old man who was brought into a hospital unconscious. After the medical examination, the doctor informed the man's son, who identified himself as the man's next of kin, that the man needed to be transfused and that in the absence of the blood transfusion, the man would die. Dissatisfied with this, the next of kin contacted another doctor for a second opinion. After conducting the necessary medical examination, the second doctor confirmed the initial diagnosis, prognosis, and the need for a blood transfusion. The next of kin still refused to give the requisite consent. After two days, the patient died. In this case, it is submitted that the next of kin caused the patient's death as his decision to refuse the blood transfusion hastened the death of the patient.

The law in Nigeria states that liability for homicide is incurred if the accused's action caused the unlawful death. In other words, there must be a causal link between the death and the accused's action. Therefore, had the next of kin not withheld consent on behalf of the patient, the patient may have lived. It is irrelevant that the patient's death was caused by several other factors. The evidence would be sufficient if the next of kin's action was the significant cause of the death. Specifically, it is also irrelevant that the death would have occurred regardless and that the next of kin's action merely accelerated or hastened the death. In *R v Dyson*,³² Lord Alverstone stated that

The proper question to have been submitted to the jury was whether the prisoner accelerated the child's death by the injuries which he [or she] inflicted ... for if he [or she] did the fact that the child was already suffering from

³⁰ *Tega Esabunor* (n 4).

³¹ Criminal Code Act, s. 308.

³² [1908] 2 KB 454.

meningitis from which it would, in any event, have died before long, would afford no answer to the charge of causing its death³³

Applying this analysis to *Nicholas Okonkwo's case*,³⁴ her husband's decision to withhold consent for the proposed death accelerated the patient's death. Thus, it is immaterial that she might have died from other causes.

The Criminal Code also requires proof of the intention to commit a crime. Therefore, we must understand if the refusal by next of kin for life-saving treatment comprises intent. In Nigeria, an individual is held to have the necessary intention for unlawful homicide if the death was an expected consequence of the individual's action. So, if medical experts are of the opinion that a particular medical treatment will save the life of the patient and the next of kin refuses to give the required consent, if death occurs, the next of kin would be deemed to have formed the required intention. In *Segun Akinlolu v. State*,³⁵ the Supreme Court confirmed the submission of Asogwa that:

Intent can be proved either positively where there is proof of the declared intent of the accused person or inferentially from the overt act by the accused. Therefore, in law an accused person is taken to intend the consequences of his voluntary act, when he [or she] foresees that it will probably happen, whether he [or she] desires it or not,...³⁶

In this case, the Appellant and other persons attacked some of the passengers on board a flying boat with knives, which resulted in the death of two persons. They were subsequently arraigned for the murder of the persons. The trial Court found them guilty. Dissatisfied with the decision of the trial Court and the Court of Appeal, the Appellant appealed to the Supreme Court. The Supreme Court, relying on the aforementioned quote by Asogwa, held that due to acts of the accused persons, the deceased was killed and the right inference to make is that they intended to kill the deceased. By this same principle, as long as it is found that the death of the patient was caused by the failure of the medical practitioner to administer a life-saving procedure because of the decision of the next of kin, then inter alia, the next of kin will be deemed to have formed the necessary intention to unlawfully kill the incapacitated patient. Furthermore, it is also worth noting that generally the intention to cause death is established if it is proved that the accused deliberately and intentionally did an act knowing that it may result in the death of the victim, even though he or she did not desire the result.³⁷

While some may regard it as impossible for the next of kin to desire the death of a patient, the possibility cannot be ruled out. If the next of kin refuses a clinically verifiable medical procedure for an incapacitated person, then he or she deliberately and intentionally carried out an act knowing that it was probable that it would result in the death of the patient,

³³ *ibid*

³⁴ Nicholas Okonkwo (n 2).

³⁵ (2016) All FWLR (pt. 1256) 1271.

³⁶ Frank I. Asogwa, 'Criminal Liability in "Accidental Discharge" in Murder Cases and the Right of the Police to Use Force' (2003) 2 *Port Harcourt Law Journal* 198.

³⁷ see *Hyam v D.P.P* [1974] 2 All ER 41; *Ameh Richard v the State* [2019] All FWLR (Pt. 1008) 992, 1010-1011.

since clinicians would have expressly informed the next of kin of the implication of withholding consent to the life-saving treatment. Using *Nicholas Okonkwo's case*³⁸ again as an example where doctors in Hospital A and Hospital B were of the opinion that a blood transfusion would have saved the patient's life, in the absence of a valid advance directive, if the patient died because of her husband's decision not to give the required consent, then based on the preceding analysis, the husband should be held liable for her death since her death was a probable consequence of his decision, even though he might not have desired his wife's death. It follows that in exercising this obligation, the next of kin has a legal obligation to ensure that his or her decision does not lead to the death of the patient.

It is worth noting that it is not necessary for the patient to die before the next of kin can be found guilty of murder, given that the Nigerian criminal law punishes not only the unlawful act but the attempt to commit the unlawful act. Accordingly, the position in *Okonkwo's* is that:

The interest of crime prevention would not be well served if a man intending to commit a crime were held to be innocent until he [or she] had actually committed the crime intended. Mere intention is not criminal; but a man who has begun to put that intention into effect may well be guilty of an offence before ever he [or she] achieved his aim.³⁹

Section 4 of the Criminal Code provides that when 'a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he or she is said to attempt to commit the offence.' This section further states that it will be immaterial if the 'offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he or she desists from his own motion from the further prosecution of his intention.' It is also irrelevant that by reason of circumstances not known to the offender, it is impossible in fact to commit the offence. The next of kin's decision need not lead to the death of the patient for him to be guilty under section 311. As soon as he or she informs the medical practitioners of his decision not to provide the necessary consent, he or she has put his or her intention into practice. When this intention is formed and manifested by an overt act, there becomes a legal duty to ensure that it is not executed. It, therefore, follows that in this circumstance, medical professionals must then ensure that the next of kin does not execute this intention by seeking the necessary Court order or filing a formal report to the police.

It is therefore submitted that for patients with the requisite mental capacity, whenever there is a conflict between the right of autonomy and the sanctity of life, the right of autonomy will prevail. However, for incapacitated patients, the aforementioned analysis shows that the sanctity of life would prevail; the only exception being when there is a valid advance directive. If a contrary argument is adopted and a next of kin is allowed to reject

³⁸ *Nicholas Okonkwo* (n 2).

³⁹ C. O. Okonkwo, *Okonkwo and Naish on Criminal Law in Nigeria* (2nd edn, Spectrum 2007) 184.

life-saving treatment on behalf of a mentally incapacitated patient, then the right to life as guaranteed by the Constitution has been unlawfully relegated to the background by the duty of a next of kin.

Even though, it can be argued that the right given to next of kin to make decisions protects the patient's right of autonomy and self-determination. This argument holds if the next of kin was acting based on an advance directive because in the absence of one, the next of kin would be acting based on his or her personal beliefs, values and convictions, which are unverifiable standard of what the patient would have wanted.

6.0 Conclusion

Section 33 of the Constitution and sections 300, 311 and 339 of the Criminal Code show that the next of kin does not have the right to withhold consent for a life-sustaining medical treatment on behalf of a mentally incapacitated adult since he or she has a legal obligation to provide 'necessaries of life' and to ensure that his or her decision does not accelerate the death of the mentally incapacitated adult. Even though the judgement of the Supreme Court in *Tega Esabunor's* case,⁴⁰ did not expressly mention the next of kin of a mentally incapacitated adult, this paper shows that just like a parent, the right of the next of kin is subject to the provisions of the Constitution and the Criminal Code.

This paper therefore concludes that the unrestricted right to give or withhold consent in Nigeria is only reserved for a mentally capable adult. Once the adult loses his or her mental capacity, the next of kin cannot exercise the right of autonomy in the same way the mentally capable adult would have done if he or she were still mentally capable. It is therefore submitted that the practice of allowing patients to die because their next of kin refused to give the required consent is illegal in Nigeria and should not be allowed to continue.

⁴⁰ Tega Esabunor (n 4).