

Millicent Awuor Omuya alias Maimuna Awuor & Another v. The Attorney General & 4 Others
(2015), Petition No. 562 of 2012
Kenya, High Court, Constitutional and Human Rights Division

COURT HOLDING

The detention of the petitioners by Pumwani Maternity Hospital (Pumwani Hospital) because of their inability to pay their medical bills was arbitrary, unlawful, and unconstitutional. Nothing in the law mandated or authorised health institutions to detain patients or clients for non-payment of medical bills.

Detaining the petitioners under poor conditions including making them sleep on the floor, and with poor sanitary conditions amounted to cruel, inhuman, and degrading treatment.

By refusing to treat the petitioners and/or subjecting them to ill-treatment on account of their inability to pay for maternal health services, the state had failed to implement its obligation to provide maternal health services to women in a manner that was non-discriminatory and respectful of their dignity.

Summary of Facts

The two petitioners were women who at various times were admitted and treated at Pumwani Maternity Hospital, a respondent in the matter. Pumwani was previously run by the City Council of Nairobi (City Council), another respondent, but was now managed by the county government of Nairobi. The petitioners alleged that they had been detained at Pumwani Hospital for several days, and treated in a cruel, inhuman and degrading manner by staff, for failing to pay the medical bills incurred for receiving maternal health services. This detention included restricted movement, being made to sleep on the floor, deliberate lack of attention including failure to provide medical treatment, and verbal abuse. They claimed violation of various rights guaranteed under the Constitution of Kenya, 2010 (Constitution). They also referred to rights recognised in international human rights treaties to which Kenya is party, including the International Covenant on Civil and Political Rights (ICCPR).

Issues

The Court isolated three issues for its determination:

1. Whether the petition failed to state with a reasonable degree of precision, the manner in which the petitioner's rights were violated;
2. Whether the respondents violated the petitioners' rights to liberty and security of the person; freedom of movement; freedom from torture, cruel and degrading treatment; dignity; health; and non-discrimination; and
3. Whether the petitioners were entitled to the remedies they sought.

Court's Analysis

The Court agreed with the petitioners that the Constitution guarantees the right to health, including reproductive health care, under Article 43, and the right to non-discrimination and equality before the

law under Article 27. The Court added that Article 21(2) of the Constitution imposes on the state the obligation to take appropriate measures to achieve progressive realization of the rights, as guaranteed under Article 43.

The Court found the respondents in violation of Article 29 of the Constitution, which protects the right to freedom and security of the person, for detaining and preventing the petitioners from leaving the Pumwani Hospital for failing to pay hospital bills. It also referenced Article 9(1) of the ICCPR which provides that “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

The Court referred to General Comment No. 35 of the UN Human Rights Committee (HRC) which indicates that states are obligated under the ICCPR to protect persons against violations of the right to liberty by third parties including lawful organizations, such as employers, schools, and hospitals.

Following a review of several decisions including *Isaac Ngugi v. Nairobi Hospital and Three Others* (Petition No 407 of 2012, High Court, Kenya), *Sonia Kwamboka Rasugu v. Sandalwood Hotel and Resort and Another* ([2013] eKLR (Petition No. 156 of 2011, High Court, Kenya), and *Malachi v. Cape Dance Academy International and Others* ((2010) CCT 05/10 ZACC 13 (South Africa Constitutional Court)), the Court found that there was nothing in the law that mandated or authorised health institutions to detain patients or clients for non-payment of bills. It therefore held that the detention of the petitioners by Pumwani Hospital because of their inability to pay their medical bill was arbitrary, unlawful, and unconstitutional.

The Court also held that the petitioners were treated in a manner that was cruel and degrading. It referenced the decision of the Inter-American Court of Human Rights in *Miguel Castro-Castro Prison v. Peru*, ((2006) ser. C, No. 160) and also *RR v. Poland*, ((2011) No. 27617/04), in which the European Court of Human Rights held that the denial of essential reproductive health services to a woman caused mental suffering amounting to ill-treatment.

The Court also referred to the case of *Institute for Human Rights and Development in Africa v. Angola* ((2008) AHRLR 43 (ACHPR 2008)), wherein the African Commission on Human and Peoples’ Rights (African Commission) stated that conditions of detention where food was not regularly provided and detainees had no access to medical treatment was tantamount to cruel, inhuman, and degrading treatment and was a violation of Article 5 of the African Charter on Human and Peoples’ Rights (Banjul Charter).

The Court reiterated that the right to health and the right to dignity are inextricably linked, and that health care institutions ought to provide services and care that respect human dignity. The Court also said that even where detention would be lawful, the right to dignity would still have to be respected (Article 10(1) of the ICCPR). The Court therefore found that the petitioners had been treated in a manner that violated their right to dignity.

The Court then delved into the right to health specifically as guaranteed under Article 43 of the Constitution, but also recognised in Article 16 of the Banjul Charter and Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It referred to its previous decision in *PAO and Two Others v. Attorney General* (High Court Petition No 409 of 2009) where the

Court affirmed that the right to health is indispensable to the enjoyment of other rights, and that it encompassed the positive obligation to ensure that services are provided, and the negative duty not to do anything that would affect access to health care services.

The Court noted that in the same General Comment No. 14, the Committee on Economic, Social and Cultural Rights (CESCR) said that in order to realise rights under Article 12(2)(d), which requires states to take the necessary steps to achieve the full realization of the right to health, states must ensure that health providers are trained to recognise and respond to the specific needs of vulnerable or marginalised groups. The Court further noted that the CESCR said that the state has a duty to fulfil a specific right when it was beyond the means of persons to realise the right. The Court said that this was the case with the petitioners, who could not afford the health services. The Court stated that the state had the obligation to provide affordable reproductive health services.

The Court observed that despite Kenya's obligation, stemming from national and international law, to provide reproductive health services, this is not realised for a large number of women in Kenya. Having taken into account the arguments that the right to health could only be realised progressively, and that there were minimum core obligations that needed instantaneous implementation, the Court noted that although the government had taken measures toward making reproductive health care accessible and affordable, it had also taken retrogressive steps by requiring user-fees for health services. The Court had regard to a publication by Alfred Anagwe where the author showed that user-fees disproportionately impeded women's access to reproductive health care.⁴¹

The Court also considered whether the petitioners' right not be discriminated against, protected under Article 27(4) and (5) of the Constitution, was infringed. It also had regard to Article 2 of the Banjul Charter protecting the right to non-discrimination, and Article 18 requiring states to ensure the realisation of women's right to non-discrimination. It referenced Article 1 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, also known as the Maputo Protocol, which defines discrimination against women and Article 2, which requires states to combat all forms of discrimination against women through appropriate legislative, institutional, and other measures. The Court affirmed that these provisions obligate states to take corrective and positive action including reform of existing discriminatory laws and practices. The Court referred to the definition of discrimination in Article 1 of CEDAW, and Article 2's obligation that States take steps without delay to eliminate discrimination against women and ensure that the state and public authorities and institutions shall not engage in any practice or act that discriminates against women. It cited the African Commission's *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* where the African Commission said that:

States should recognise and take steps to combat intersectional discrimination based on a combination of (but not limited to) the following grounds: sex/gender, race, ethnicity, language, religion, political and other opinion, sexuality, national or social origin, property, birth, age, disability, marital, refugee, migrant and/or other status.⁴²

In conclusion, the Court found that the health system practised systemic discrimination against women by denying services to those who could not afford them. It therefore held that the state had

failed to implement its obligation to provide maternal health services to women in a manner that was non-discriminatory and respected their dignity, and the ultimate consequence was failure of poor women to realise the right to the highest attainable standard of health.

Conclusion

The petition succeeded. The petitioners were awarded global damages taking in account the conditions in which each petitioner was detained. The first petitioner was awarded Kshs 1,500,000 (equivalent to 15,000 USD) and the second petitioner Kshs 500,000 (equivalent to 5,000 USD)

Significance

This very important and revealing judgment is quite comprehensive in addressing the rights that are violated when health systems deny maternal health services to women or treat them badly because they do not have the means or resources to pay for services. Indeed, while maternity is generally thought to be a celebrated status for women in Africa, women who are indigent have a great deal more to worry about when they encounter the modern health system. One of the greatest barriers to sexual and reproductive health care may be the attitudes of health care workers, coupled with health care systems that are inaccessible to those who cannot afford their services.

In this case, the state raised the argument that resources are a challenge. But the way in which the women were treated was not just about resources. Actually, the hospital utilised its resources to keep the women detained there. Secondly, the ill-treatment and the verbal abuse were not about resources. They were indicative of a bias against women of a lower socio-economic status or class. The Court in its judgement emphasised that it was not all about lack of resources. It was also in a very significant way about discrimination. It did not require allocation of resources to address this discrimination. It required the staff to treat every person in a manner worthy of their dignity, and human dignity, one of the core values of human rights, does not depend on one's social location or economic status.

Ntsele v. MEC for Health, Gauteng Provincial Government
[2012] ZAGPJHC 208
South Africa, High Court

COURT HOLDING

The defendant health clinic and hospital was liable for the brain damage suffered by the plaintiff during birth and while in their care, and therefore for infringement of the plaintiff's right to the highest attainable standard of health protected under Section 27 of South Africa's Constitution.

Summary of Facts

The mother sued, on behalf of her minor child plaintiff, for brain damage suffered by the child allegedly arising from negligent medical treatment provided by the defendant's employees. The mother alleged that when she was giving birth to the child at a clinic and hospital run by the