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.