

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

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

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

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

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

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

COURT HOLDING

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

Summary of Facts

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

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

Issues

The issues before the Court were the following:

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

Court's Analysis

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

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

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

Conclusion

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

Significance

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

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

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

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

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

COURT HOLDING

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

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

Summary of Facts

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