

J O O (also known as JM) v The Attorney General & 4 others [2017] eKLR, Petition No.5 of 2014, Kenya at High Court in Bungoma

Court Holding

The Court held that the Petitioner's right to maternal health care was infringed and that the actions of the nurses and those of the 5th respondent (Bungoma County Referral Hospital) denied, derogated and demeaned the Petitioner's worth. Hence the Court found a violation of her right to dignity contrary to the provisions of Article 28 and a violation of her freedom and security, including the right not to be treated in a cruel, inhuman and degrading manner contrary to Article 29 (j) of the Constitution of Kenya 2010. Additionally, the Court held that the national and county governments had failed to devote adequate resources to health care services and had not put in place effective measures to implement, monitor and provide minimum acceptable standards of healthcare. This is a violation of the Constitution and the international instruments that Kenya has ratified.

Summary of Facts

On 5 August, 2013, the Petitioner, who is from a low-income background, sought maternal care at the Hospital, which is a public health facility that ought to provide free maternal care services. The Petitioner had delayed labour and the doctor advised that the Petitioner would have to undergo induced labour. The Hospital asked the Petitioner to purchase cotton wool and the drug that was to be used to induce labour. The Petitioner had to share a bed with other expectant mothers and she averred that, even after the onset of labour, the nurses did not offer any help or conduct physical check on the progress. It is the Petitioner's case that when the labour pains intensified, she again sought help which was not forthcoming and on her way back from the delivery room, she lost consciousness and delivered her baby on the floor. The nurses on duty in the Hospital verbally abused her and shouted at her, questioning her as to why she had soiled the floor. Despite her vulnerable state, she was ordered to carry her placenta and walk to the delivery room.

The Petitioner filed a constitutional petition alleging various violations of her rights as stipulated in the Constitution of Kenya 2010 and she also made reference to rights recognized in international human rights treaties to which Kenya is a party.

Issues

The Court identified three issues for determination;

- i. Whether or not the matter before Court is competent.
- ii. Whether or not there was a violation of the Petitioner's rights under the Constitution of Kenya and international instruments as regards;
 - a.) Right to healthcare in particular maternal health care.
 - b.) Right to dignity
 - c.) Right to information
- iii. Whether there was failure by the National and County Governments to establish necessary policies, guidelines and other measures to implement and monitor healthcare services and to

allocate maximum available resources, and, if so, whether such failure resulted in the infringement of the Petitioner's rights.

Court's Analysis

The Court found that indeed the matter before the Court was competent, as the Petitioner's case was quite clear and precise in as far as the alleged violations are concerned. The Court proceeded to determine other matters. The right to sexual and reproductive health is provided for in Article 43(1) (a) of the Constitution of Kenya. Various regional and international instruments like the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights equally provides for this right. This right is comprehensive and the Court found that this right includes proper treatment at the hospital, availability of the necessary equipment, facilities and medication. During her hospital stay, the Petitioner did not receive any of these services. She was made to purchase cotton wool and drugs. For a public health institution with services anchored in the Constitution, this is a disservice to all women who seek this service at their institutions. Provision of cotton wool and medicine is the least that such an institution can do. The Court therefore found that this was a violation of the petitioner's right to health care.

On the right to dignity, which is enshrined in the Constitution, the facts were that the Petitioner gave birth on the concrete floor in an open area in view of others. The nurses had shouted at her for soiling the floor and she was made to carry her placenta. It is the Court's view that this was a derogation of her dignity and worth as a human being. That the Petitioner delivered her baby in the full glare of third parties, to the extent that one of them was in a position to videotape the occurrence was degrading to the Petitioner.

The Court cited the case in *Republic Vs Minister for Home Affairs and 2 Others Ex-parte Leonard Sitanize* (2005) eKLR where the Court held that human dignity is of fundamental value and a foundational value that informs the interpretation of most or all other fundamental rights. The right to dignity is therefore at the core of other rights and failure to protect this right puts the rest of the rights in jeopardy. It was the Court's view that the actions of the nurses were inexcusable regardless of how overstretched they might have been. The Court also emphasized the duty of care that nurses have toward the patients whom they serve.

The Court agreed with the principle set out in *Srs Makwanyane & Another* (CCT3/94)(1995) ZACC 3 where a South African court underscored that the right to dignity as the foundation of many other rights as entrenched in the South African Constitution. The Court also found that the conduct of the nurses was demeaning, hence it infringed on her dignity as a woman.

Regarding the violation of Article 35 on access to information, the Court found that in the prevailing circumstances, it is not applicable. During her hospital stay, the Petitioner had not shown any indication of making a complaint against the Hospital and there were no facts that the information was not disclosed to her. The Court however noted that the 5th respondent ought to make the complaints mechanism accessible and transparent.

The Court also looked into whether both the National and County Governments had failed to establish policy guidelines to implement the directives on free maternal care. The Court stated that the failure to devote adequate resources to health care services and effective measures to implement, monitor and provide acceptable standards of healthcare is a violation of the Constitution and the various international instruments that Kenya is party to.

Conclusion

The Court found that the actions and inactions of the respondents violated various fundamental rights and freedoms of the petitioners that are guaranteed in the Constitution of Kenya and other laws including international laws that Kenya is party to. The Court ordered that the Bungoma County Cabinet Secretary for Health (3rd Respondent), the Hospital, and the three nurses to make a formal apology to the Petitioner for violating her rights.

Significance

It is quite unfortunate that even after the promulgation of the Kenyan Constitution of 2010 that has an expansive Bill of Rights including the right to sexual and reproductive health, women in Kenya cannot access maternal care in a dignified manner. One of the tenets of devolving the health services was to increase accessibility of better health care services to all citizenry. The treatment the Petitioner received at the Hospital leaves a lot of questions on whether the County Governments are keen on realization of the right to health and sexual and reproductive health rights.

This case highlights how deep-rooted and systemic the violation of the rights to maternal health care in Kenya are. It also paints a picture of the many obstacles and humiliations that women face whenever they seek maternal health care from public health institutions. It reinforces the decision in *Millicent Awuor Omuya alias Maimuna Awuor & Another v. The Attorney General & 4 Others* (2015), Petition No. 562 of 2012, where it was held that the National and County Governments do not require resources to at the very least accord respect and treatment worthy of human beings to women whenever they seek services in public institutions such as the Hospital.

The reliance by the Court on various provisions of international legal instruments ensured that the Court interpreted this issue from a wide spectrum of human rights provisions, hence this is a very progressive ruling that sets the standards high. The Court found that the actions and omissions of the respondents were in violation of numerous rights as provided in the international treaties that Kenya has ratified. This signifies that it is not enough to just ratify conventions; states must equally ensure realization of the rights in these conventions. It was also an indication that Kenya cannot ratify conventions and fail to effect what these provisions stipulate.

Summarized by:

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