

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

defendant, the nursing staff at the clinic, and the doctor and nursing staff at the hospital, respectively, were in breach of their duty of care for having failed to provide the requisite medical attention and care the mother required during the delivery of her child.

The mother maintained that the defendant's employees failed to execute their statutory duty pursuant to Section 27 of the Constitution of the Republic of South Africa, Act 108 of 1996 (the "Constitution"), which mandated them to provide reproductive health care to her and her child with reasonable skill and diligence, as a result of which her child sustained brain damage due to deprivation of oxygen during the process of birth.

The plaintiff's evidence revealed that the mother had endured prolonged labour due to the failure of the clinic and hospital staff to take the necessary measures to assist her in the delivery. The plaintiff submitted that the brain damage was a consequence of the defendant's employees' breach of the duty of care, because they failed to monitor the progress of the pregnancy, as well as the health of the foetus in the process of birth.

The defendants responded that negligence had not been proven and asked the Court to dismiss the matter. The defendant submitted that the plaintiff had not shown that the defendant's employees had failed to take reasonable steps to prevent the injury. The defendant further argued that the plaintiff had not shown that the plaintiff's brain damage was foreseeable and due to the defendant's employees' negligence.

Issue

The issue before the Court was whether the defendant ought to be held liable in negligence for the damage to the brain sustained by the plaintiff child during birth, when under the care of the employees of the defendant.

Court's Analysis

The Court reminded the defendant that once the plaintiff had established a *prima facie* case of negligence, it was up to the defendant to disprove that the brain damage of the child was due to the negligence of the defendant's employees.

The Court agreed with the plaintiff that the circumstantial evidence regarding the nature of the brain damage justified drawing an inference that it was caused by the negligence of the defendant's employees. It further said that in the absence of evidence disproving the probability of negligence, the Court would conclude that the defendant's employees had failed to accord the plaintiff the treatment to which she was lawfully entitled.

The Court also considered whether the doctrine of *res ipsa loquitur* could apply. The Court could draw an inference of negligence if the defendant had within its grasp the means of knowing the crucial facts of how the clinic and hospital staff administered treatment to the plaintiff, but failed to explain why they should not be held liable.

Following the review of the evidence before it, the Court was of the view that the brain damage suffered by the plaintiff justified inference on the balance of probabilities that it was due to the

defendant's employees' negligence. In the absence of evidence to rebut this, the Court would draw the conclusion that the defendant was negligent. The Court found that the defendant was not able to explain how the damage to the child's brain could have occurred if not for the employees' negligence.

The Court also noted that the clinic and hospital records regarding the treatment procedures accorded to the mother and her child were missing, despite a legal duty for the Clinic and Hospital staff to ensure that hospital records were kept safe pursuant to Sections 13 and 17 of the National Health Act No. 61 of 2003. Further, there was no explanation from the defendant about the missing records. The Court's view was that the defendant's failure to explain the missing records would justify an adverse inference of negligence. In the absence of any evidence to explain how the child suffered brain damage, which could only result from oxygen deprivation during the process of birth, the Court held that the maxim of *res ipsa loquitur* could apply. The defendant would be presumed negligent because its employees were in control of and were completely knowledgeable of the circumstances under which the child sustained the brain damage. In the absence of any evidence disproving negligence, the only plausible explanation of the injury that occurred to the child would be that the defendant's employees caused it.

The Court agreed with the plaintiff that the obligations of the defendant also had a basis in the constitutional right to the highest attainable standard of health, recognised in Section 27 of the Constitution. The plaintiff had the right to receive adequate reproductive health care, and the defendants had the reciprocal duty to provide reproductive health care with the skill and diligence expected of the medical profession. The Court reiterated that the maxim of *res ipsa loquitur* was applicable where the plaintiff established a *prima facie* case of negligence and the defendant, under whose care the child had been placed, failed to explain why they should not be held liable. The Court therefore held that the defendant had failed to discharge the evidential burden to disprove the causal connection between the negligence of its employees and the brain damage suffered by the plaintiff.

Conclusion

The Court ordered the defendant to compensate 100% of the damages that the plaintiff proved.

Significance

The unfortunate event of women not receiving adequate reproductive health care, with adverse consequences to neonatal health is, sadly, a common occurrence on the African continent. In some countries, the issue is systemic. Poor and indigent women and their babies face a high risk of sustaining injury because of the inability of governments to ensure equitable access to quality reproductive health care. Poor quality reproductive health care, especially for women, is not an inevitability of nature. It is rather a result of socio-economic choices governments have made. Over time, these choices have deepened a sense of disenfranchisement especially amongst poor women.

In its judgment the South African Court perfunctorily paid attention to the issue of reproductive rights. However, the case was essentially decided on the private law of tort or delict. In order to address the challenges that women face in Africa, there is need to build strong jurisprudence to hold governments accountable for respect, protection and fulfilment of the reproductive rights of women in Africa.