

Uganda: preventable maternal deaths and constitutional right to health

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Centre for Health, Human Rights and Development (CEHURD) and others v. Attorney General, Constitutional Petition No. 16 of 2011 (Constitutional Court of Uganda) [2012] UGCC 4, 5 June 2012. [Decision online.](#)

Summary of facts

The petitioners filed this case against the government, claiming that it had failed to provide basic healthcare, maternal commodities and maternal healthcare to expectant mothers. They cited specific cases of maternal deaths that were the direct result of this failure. The petitioners asserted that the ultimate consequences included high maternal mortality and high infant mortality. The petitioners' gist was that the failure to provide basic maternal healthcare infringed constitutionally guaranteed rights under Articles 22, 24, 33, 34 and 44 of the Constitution of the Republic of Uganda, and also the right of access to health services under Objectives XX, XIV (b), XV and Article 8A. Further, the petitioners impugned the government for failing to uphold its international obligations, which included respect of the right to the highest attainable standard of health by virtue of Article 45 of the Constitution.

To this, the respondent raised the preliminary objection that the Court could not adjudicate on the issues raised by the petitioners because they involved political questions. The respondent contended that the Court would be interfering with political discretion, which by law was the preserve of the Executive and the Legislature.

Issues

The Court was therefore asked to determine the following issues:

1. Whether the right to the highest attainable standard of health is a constitutional right by virtue of Article 45 of the Constitution.
2. Whether the inadequate human resources for maternal health and lack of emergency obstetric care services at health centres are infringements of the right to health.
3. Whether non-provision of basic maternal healthcare services in health facilities contravenes Article 8A or Objectives XIV and XX of the Constitution.
4. Whether non-provision of basic maternal healthcare packages in government hospitals resulting in the deaths of pregnant women and their children is a violation of the right to life as guaranteed under Article 22 of the Constitution.

5. Whether health workers' failure to attend to pregnant women subjects women to degrading and inhuman treatment, in contravention of Articles 24 and 44(a) of the Constitution.
6. Whether the high rates of maternal mortality in Uganda contravene Articles 33(1), (2) and (3) of the Constitution.
7. Whether the families of Sylvia Nalubowa and Jennifer Anguko, who died in hospital due to non-availability of basic maternal commodities, are entitled to compensation.

Holding

The petition raised acts and omissions that fell under the doctrine of a 'political question', and the Court could not find any competent question requiring constitutional interpretation.

Court analysis

Pursuant to Article 137 of the Constitution, courts have jurisdiction on matters where the petition, on the face of it, shows that an interpretation of a provision of the constitution is required. However, if the issues fall under the doctrine of a 'political question,' as was argued by the respondent, the Court would not assume adjudication. The Court therefore inquired whether indeed the issues it was asked to determine were caught by this doctrine.

The Court said the doctrine of a 'political question' emanated from the concept of the separation of powers articulated in *Marbury v. Madison*, 5 US. 137, and is about the appropriateness of courts interfering in decisions of other branches of government. The doctrine therefore prevents courts from encroaching on decisions which are the purview of other branches of government, even if it could assume jurisdiction.

How do the courts determine what issues are political questions? Following the precedent in *Coleman v. Miller*, 307 U.S 433, the Court said that it would consider the appropriateness under the system of government of attributing finality to the actions of the political departments, and also look at the lack of satisfactory criteria for judicial determination. The Court went on to cite case law where the court had suggested that even in cases where courts felt obliged to intervene when Executive decisions are challenged on the grounds that the rights of the individual are clearly infringed or threatened, they do so sparingly.

Thereupon, the Court reviewed provisions of the Constitution that describe the role of each organ of government, and then applied this to the facts before it. The Court opined that much as it may have been true that government had not allocated enough resources to maternal healthcare services, the Court would be reluctant to determine the issues raised before it. It ruled that the issues concern policy matters that are the preserve of the Executive, and the courts would not interfere. While the Court acknowledged the importance of the issues raised by the petitioners, it refused to interfere in what it had determined involved the prerogative of the Executive. It further justified its stance by suggesting that the petitioners still had remedies available to them other than the route of constitutional interpretation.

Conclusion

The Court struck out the petition and did not consider the merits of the case.

Significance

Uganda, like many African countries, adopted a constitution that recognises social and economic rights including the right to health. Despite the fact that in some constitutions these rights are characterised as ‘policy’ rather than ‘rights’, and couched in language that connotes aspirations rather than immediately realisable rights, they nevertheless create legitimate expectations that the government would be held accountable for their realisation. For instance, Objective XIV (b) of the Ugandan Constitution says that “The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice ... and shall ... ensure that all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.” Further, the provisions of the constitutions are rarely read individually and in isolation. For instance, the provision stated above, read with Article 33 (3) -- which says that “The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society” -- creates legal obligations on the state to ensure that all expectant mothers receive basic maternal healthcare.

The petition brought before the Uganda Constitutional Court depicts a scenario that is perhaps all too common in Sub-Saharan Africa. Government-run health facilities are frequently if not chronically underfunded, understaffed, lack the basic commodities and fail to provide the requisite standard of care. Believing that the constitutional rights ought to mean something for the women of Uganda, the petitioners’ case arose out of a legitimate expectation that the state be held accountable to meet the obligations stipulated in the Constitution. Their case was not theoretical because they proffered evidence of two maternal deaths they argued could have been avoided if only the government had fulfilled its duty to provide basic maternal healthcare and services. However, while acknowledging the fact that there was government failure, the Court chose to rely on the ‘politics’ argument and avoided delving into the merits of the case.

Indeed this has been the trend in some jurisdictions in Africa where courts have avoided enforcement of social and economic rights, preferring to rely on the doctrine of the separation of powers, or outright refusal to adjudicate on such rights because they are regarded as principles of policy and therefore not justiciable nor enforceable; see *Kingaipe and Chookole v. Attorney General*, 2009/HL/86 (High Court of Zambia).

Other jurisdictions, however, have approached social and economic rights differently. In *Sandesh Bansal v. Union of India and others* (Writ Petition No. 9061/2008), the petitioner alleged that the government had failed to implement a program to reduce high maternal mortality. The High Court of Madhya Pradesh held that the shortage of infrastructure and personnel had resulted in the ineffective implementation of the program, resulting in

unnecessary deaths of mothers, and that this was a violation of the right to life as guaranteed in the Constitution of India.

In another case, the Delhi High Court (Writ Petition (C) 5913/2010) on its own motion took on a case about a destitute woman who died on the street while giving birth to a baby girl. The Court noted that the government provided inadequate medical services to destitute pregnant and lactating mothers, and ordered the government to review its funding of shelters for the destitute. This judicial reasoning contrasts glaringly with the Ugandan decision.

The Ugandan decision is an example of how courts have failed to advance realisation of human rights for many vulnerable persons in African countries, on the pretext that social and economic rights are merely aspirations or unduly resource-consuming to realise. Many people who rely upon the courts as the final vindicator of rights are let down because of this attitude. The Court did not even raise questions for the Executive to address on why the two women died in circumstances that were avoidable, or what steps the government was taking to realise its obligations to provide adequate healthcare. The significance of this decision therefore lies in its blatant failure to hold the government accountable to protect the right to healthcare of expectant mothers, while at the same time characterizing the government as an all-powerful and untouchable maker of maternal health policies, even though this right was guaranteed to the women of Uganda in the Constitution.

(case summarized by Godfrey Kangaude and Nthabiseng Lelisa, 2015)