



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 352 OF 2018

EMMAH MUTHONI NJERI.....PETITIONER

-VERSUS-

THE NAIROBI WOMEN'S HOSPITAL.....RESPONDENT

JUDGMENT

1. The Petitioner, Emmah Muthoni Njeri, by way of the petition dated 15th October, 2018 claims that she was admitted at the Respondent, Nairobi Women's Hospital, on 23rd March, 2018 and discharged on 14th May, 2018 with an accumulated hospital bill of Kshs. 3,140,144.39.

2. The Petitioner states that she was able to pay the sum of Kshs. 1,351,510 and her proposals on how to pay the balance were rejected by the Respondent. Instead, she was unlawfully and illegally detained at the Hospital premises as the Respondent continued to levy unreasonable and unjustified charges. It is the Petitioner's averment that as of 10th October, 2018 her bill had risen to Kshs. 4,029,429.16.

3. The Petitioner avers that her constitutional rights and fundamental freedoms under Articles 27, 28, 29 and 39 of the Constitution, being the rights to equality and freedom from discrimination, human dignity, freedom and security of the person, and freedom of movement respectively were infringed by the actions of the Respondent.

4. The Petitioner therefore seek the following reliefs:

a) A declaration that the actions of the Respondent amount to an infringement of the rights under Articles 27, 28, 29 and 39 of the Constitution of Kenya (2010).

b) A permanent injunction to restrain the Respondent from continuing or proceeding with the unlawful detention and incarceration of the Petitioner.

c) An order compelling the Respondent to release the Petitioner from the unlawful detention.

d) An order for award of compensation for the violation of the Petitioner's fundamental human rights.

e) General damages for false imprisonment and loss of earning capacity during incarceration and unlawful detention.

f) Exemplary damages for false imprisonment.

g) Costs and interest at court rates from date of Judgment.

h) Any other relief that the court shall deem fit.

5. The petition is supported by an affidavit sworn by the Petitioner on 15th October, 2018.

6. By way of a response to the petition dated 5th March, 2019, the Respondent denies that it unlawfully detained the Petitioner and levied any illegal charges. It is asserted that the Petitioner was at the Hospital for unpaid bills and all charges accrued were for services rendered.

7. The Respondent contends that the Petitioner signed an undertaking at the time of her admission that she would cater for all medical services rendered once furnished with a medical bill. Further, that during her treatment, the Petitioner was updated on the status of the medical bill and continued to assure the Hospital that the bill would be settled in full.

8. The Respondent states that on 19th October, 2018 the Petitioner was released from the Hospital on a written agreement that she would pay Kshs. 10,000 per month until the entire debt of Kshs. 2,727,536.05 is paid in full. The Petitioner had allegedly failed to pay any amount and she was in arrears.

9. The allegation that the Respondent violated the Petitioner's constitutional rights is denied and the Petitioner is put to strict proof on the same. Additionally, the Respondent asserts that its right to compensation under Article 23(e) of the Constitution has been infringed upon by the Petitioner's failure to pay off her hospital bill.

10. The Respondent raises a cross-petition against the Petitioner for payment of the medical bill amounting to Kshs. 2,727,536.05. Through the cross-petition, the Respondent prays that the petition be struck out and the following orders be entered in its favour:

a) THAT the Petitioner does pay a sum of Kshs 2,727,536/05 to the Respondent being the outstanding medical bill.

b) THAT in the event and without prejudice to our Defence, any amounts awarded to the Petitioner be deducted from the outstanding medical bill and the balance thereof be paid to the Respondent.

c) Costs of the Cross Petition.

d) Any other reliefs this Honourable Court may deem fit to award.

11. The Respondent's cross-petition was met by the Petitioner's notice of motion application dated 15th May, 2019 in which she seeks the striking out of the cross-petition with costs.

12. The Petitioner claims that the Respondent's cross-petition does not disclose any violation or infringement of the Constitution, and does not raise any arguable, triable and or justifiable issues warranting the Court's intervention.

13. She further asserts that the cross-petition offends mandatory provisions of the law and procedure, and is frivolous, vexatious and a clear abuse of the court process. The Petitioner also contends that the cross-petition is intended to embarrass the expeditious disposal of the petition and frustrate her right to access justice.

14. The Respondent filed a replying affidavit sworn by Dennis Ngira on 26th June, 2019 in response to the application to strike out the cross-petition. It is the Hospital's averment that the Petitioner has not shown how the cross-petition may prejudice, embarrass or delay the fair trial of the petition. Further, that the Petitioner has not shown that the cross-petition has been brought in bad faith or to embarrass her.

15. It is thus the Respondent's position that it is only just and fair that the cross-petition be allowed.

16. The Petitioner filed written submissions dated 22nd November, 2019 on the notice of motion application dated 15th May, 2019. The Petitioner submits that the Court does not have jurisdiction to dispose of the issues raised in the cross-petition as they are purely contractual and do not warrant the intervention of the constitutional court. The Petitioner supports her argument with the decisions in the cases of **Dock Workers Union Limited v Messina Kenya Limited [2019] eKLR**; and **Susan Kalondu Ondumwanzui v Pastor John Ngumi & 23 others [2018] eKLR**.

17. The Petitioner argues that the cross-petition offends the mandatory provisions of the law and procedure and does not disclose any provisions of the Constitution allegedly breached by the Petitioner. Reliance is placed on the decision in **Beeky Supplies Limited & another v Attorney General & another [2017] eKLR**. It is further submitted that the Respondent has elevated a contractual claim to a counter-claim in a constitutional matter which amounts to forum shopping. The Petitioner supports her assertion with the decision in **Republic v Managing Trustee of the National Social Security Fund & another Ex-Parte Tassia Plot Owners Association [2014] eKLR**.

18. The Petitioner additionally submits that the Respondent has not demonstrated that any efforts have been made to recover the contractual debt or that a demand for payment has been issued.

19. The Petitioner prays that the cross-petition be struck out with costs.

20. The Respondent's take on the Petitioner's application is found in the written submissions dated 10th February, 2020. The Respondent submits that the absence of a verifying affidavit to the cross-petition does not invalidate the same. Moreover, it is asserted that if the Respondent is not in compliance with the provisions of Rule 10(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the issues should be considered in accordance with Article 159(2)(d) of the Constitution which frowns on determination of matters based on procedural technicalities. Reliance is placed on the cases of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** and **Phoenix Global Kenya Limited v Kenya Revenue Authority & 6 others [2018] eKLR**.

21. The Respondent further asserts that the cross-petition does not violate the procedural rules and it is in the interest of justice that the Respondent's right for compensation should be considered.

22. The Respondent states that the Petitioner has come to this Court with unclean hands as she has not paid her hospital bill in full.

The Respondent urges that it also wishes to secure its rights under Article 23(e) for the unpaid sum.

23. The Petitioner filed written submissions dated 21st January, 2019 in support of her petition dated 15th October, 2018.

24. On the issue of false imprisonment and unlawful detention, the Petitioner relies on **Daniel Waweru Njoroge & 17 others v Attorney General [2015] eKLR** on the elements of false imprisonment. The Petitioner submits that she has proved on a balance of probabilities that she was detained by the Respondent against her will and without any reasonable cause or justification, and has therefore met the requirements for this Court to find that she was unlawfully or illegally detained.

25. It is further submitted that by detaining the Petitioner on account of failure to clear a hospital bill the Respondent has infringed Articles 27, 28, 29 and 39 of the Constitution, as well as Article 9(1) of the International Convention on Civil and Political Rights on human dignity, freedom and respect. Additionally, the Petitioner relies on Article 11 of the same Convention, which states that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. Further reliance is placed on the decision in **Gideon Kilundo & Daniel Kilundo Mwenga v Nairobi Women's Hospital [2018] eKLR**.

26. On the matter of the reliefs sought, the Petitioner submits that she is entitled to compensation under Article 23(3)(e) of the Constitution. She also relies on the decision in **Kajiado High Court Constitutional Petition No. 14 of 2017 (formerly Nairobi High Court Petition No. 533 of 2016) Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS Ongata Rongai Police Station & 7 others**.

27. As to the quantum of compensation, the Petitioner asserts that the Court should have regard to the duration and circumstances of the detention. The Petitioner once again relies on the just cited case where each petitioner was awarded Kshs. 200,000 for unlawful detention for three hours. Also cited is the decision of **Akusala A. Boniface v OCS Langata Police Station & 4 others [2018] eKLR** where the petitioner was awarded Kshs. 2 million as compensation for being detained for about 24 hours.

28. The Petitioner submits that she was detained from 14th May, 2018 to 19th October, 2018, a period of not less than six months, for failure to settle an outstanding bill. It is the Petitioner's case that the Respondent failed to make a complaint to the police or lodge a civil claim for a refund of what was due and instead unlawfully detained her.

29. The Petitioner urges the Court to compensate her as follows:

- i. Ten million Kenyan shillings as general damages for unlawful detention and false imprisonment;
- ii. Five million Kenyan shillings as exemplary damages for unlawful detention and violation of her fundamental rights and freedoms;
- iii. Costs and interest on the above awards at court rates from the date of judgment till payment in full.

30. The Respondent filed submissions dated 8th April, 2019 and denies detaining the Petitioner. According to the Respondent, the Petitioner was justifiably in hospital for the unpaid bill for fear that she would fail to pay the fees incurred. The Respondent contends that the Petitioner has not proved on a balance of probability that she was illegally detained at its facility.

31. The Respondent submits that prayers 2 and 3 of the petition are spent as the Petitioner had already been released by the time she filed the petition.

32. It is the Respondent's submission that the Petitioner's rights under Article 27 have not been infringed as she was admitted to the Hospital without discrimination, and she received medical care in line with Article 43(1)(a) of the Constitution.

33. The Respondent denies violating the Petitioner's right to dignity protected under Article 28 and submits she has not specifically proven how that right was violated. Reliance is placed on the holding in **Stephen Wanjau Karanja v The Nairobi Women's Hospital, Petition 484 of 2017** where it was stated that a party alleging violation of constitutional rights must particularize the rights alleged to have been violated with sufficient clarity.

34. In response to the claim of violation of the rights under Article 29(a) and 39(b), the Respondent contends that the Petitioner was not arbitrarily or unjustifiably held and was immediately released upon furnishing an undertaking. Additionally, the Respondent submits that there exists a justification for its actions in terms of Article 29 of the Constitution and herein the justification is that the Petitioner has not contested the medical bill in any way and the Respondent did not ignore the undertaking or payment plan offered.

35. The Respondent urges that its right to property under Article 40 of the Constitution will be denied if the Petitioner does not pay the hospital bill as agreed.

36. On the issue as to whether the Petitioner is entitled to compensation, the Respondent submits that she would only be entitled to damages if all outstanding bills had been paid. It is the Respondent's view that since the Petitioner has not paid her bills, the award of damages amounts to unjust enrichment and therefore she should not be entitled to general damages. This is supported by the decisions in **Veronicah Nyangai v Nairobi West Hospital Ltd [2017] eKLR**; **Gideon Kilundo & Daniel Kilundo Mwenga v Nairobi Hospital [2018] eKLR**; and **Daniel Waweru Njoroge & 17 others v Attorney-General [2015] eKLR**.

37. On the Petitioner's claim for exemplary damages, the Respondent relies on the decision in **Benedict Munene Kariuki & 14 others v the Attorney General, High Court Petition No. 722 of 2009**, as cited in **Dick Joel Omondi v Hon Attorney General [2013] eKLR**, where the Court held that no exemplary damages should be awarded in addition to general damages in respect of violation of constitutional rights. The Respondent further relies on the case of **Standard Newspaper Limited & another v**

Attorney General & 4 others [2013] eKLR.

38. Turning to its cross-petition, the Respondent submits that in accordance with Article 24 of the Constitution, the enjoyment of rights and freedoms by an individual should not prejudice the rights and fundamental freedoms of others. It is submitted that in this matter, the Respondent has proprietary rights, protected under Article 40(1)&(2)(e) of the Constitution, over the medical fees incurred by the Petitioner.

39. On the question of the costs for the proceedings, the Respondent argues that the Petitioner should bear the costs as she has approached the Court with unclean hands and breached the contract she had with the Respondent.

40. I will start by considering the petition. The first question is whether the Petitioner was unlawfully detained by the Respondent for failure to pay her medical fees.

41. Both parties agree that the Petitioner was admitted on 23rd

March, 2018 and released on 19th October, 2018. The Petitioner has produced the breakdown of her treatment bill as at 7th October, 2018, which has not been contested by the Respondent. This document will assist me in determining the duration that the Petitioner was unlawfully held and the correct amount that she should have been billed by the Respondent.

42. According to the annexure provided, the Petitioner began to accrue charges on 23rd March, 2018 and the charges stopped running on 7th October, 2018. As of 7th October, 2018, the Petitioner's bill stood at Kshs. 4,019,364.76. The Petitioner managed to pay Kshs. 1,351,510.00 which brought the final balance to Kshs. 2,667,854.76. This amount differs from the Kshs 4,029,429.16 which the Petitioner claims had accrued against her by 10th October, 2018, and the Kshs. 2,727,536.05 which the Respondent claims is owed to it.

43. The Petitioner has also attached to her petition a letter dated 10th October, 2018 from the credit officer at the Nairobi Women's Hospital admitting that the Petitioner was discharged on 14th May, 2018 with a total accumulated interim bill of Kshs. 4,029,429.16 and that her family had paid Kshs. 1,351,510. It is further admitted that the Petitioner had an outstanding bill of Kshs 2, 677,919.16. However, according to the official medical bill provided by the Petitioner, her bill as of 14th May, 2018 stood at Kshs. 3,136,144.39 and therefore any other charges after this date were unfairly and unlawfully levied upon her.

44. According to the dates in the breakdown of the Petitioner's medical bill, the Petitioner was billed until 7th October, 2018, however, the Petitioner claims that she was discharged on 14th May, 2018 and was arbitrarily detained until 19th October, 2018. The Petitioner was therefore held within the Respondent's premises for over six months after her official discharge.

45. The Respondent claims that the Petitioner was released on a written agreement and payment plan for her medical bill. However, the Respondent has not produced evidence of this written agreement and therefore the Petitioner's allegation that they were unable to come to an agreement stands.

46. The question of whether the Respondent illegally held the Petitioner on the basis of her debt can be answered by reference to the holding in **Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort & Leon Muriithi Ndubai 2013] eKLR** that:

"28. ...Any form of detention not sanctioned by the law that seeks to procure performance of contractual debt is a violation of the right to liberty. It is also an affront to human dignity to detain someone on account of a debt that cannot be enforced against them."

47. The Respondent herein is not empowered under the law to hold any person within the hospital for failure to pay medical bills.

The Respondent's action of holding the Petitioner over an unpaid medical bill makes it culpable for illegally detaining the Petitioner. Although the Petitioner was in breach of her contractual obligation to pay her bill, the Respondent had other options open

to it to recover the debt and should not have detained the Petitioner.

48. I, therefore, agree with the Petitioner that the Respondent unlawfully detained her for six months for failure to meet her medical expenses.

49. The Petitioner claims that her rights under Article 27 (equality and freedom from discrimination), Article 28 (human dignity), Article 29 (freedom and security of the person), and Article 39 (freedom of movement) were infringed by her unlawful detention for failure to pay her medical bills.

50. In the case of **Sonia Kwamboka Rasugu (supra)**, the Court held that:

“28. What emerges from the decisions I have cited above is the centrality of the liberty of the person and the protection from illegal and false imprisonment as one of the fundamental rights and freedoms enshrined in our Bill of Rights.”

51. I also rely on the decision in the case of **Tryphosa Jebet Kosgey v Elgon View Hospital [2016] eKLR** that:

“16. From my analysis, I cannot say that the petitioner’s rights were violated until after 14th May 2015. The petitioner was held against her will for about seven days until 22nd May 2015. The hospital could have released her and recovered the debt in the manner provided by the law. But it chose the easier and perilous route of detaining the patient. That was a violation of her constitutional rights enshrined in article 29 (a) of the Constitution.”

52. Furthermore, in the case of **M A O & another v Attorney General & 4 others [2015] eKLR** it was pronounced that:

“I have found as a fact that the petitioners were detained at the 5th respondent for failure to pay the bill for medical services rendered during the delivery of their children...Such detention, in deplorable conditions, violated the petitioners’ right to liberty and freedom of movement, right to dignity, and right to health.”

53. In reliance on the cited decisions, I find that the unlawful detention of the Petitioner for failure to pay the hospital charges violated her dignity, right to freedom and security of the person, and right to freedom of movement.

54. On the allegation that the Petitioner’s right to equality and freedom from discrimination was violated, I find that she has not clarified in what manner she was discriminated against. In **Jacqueline Okeyo Manani & 5 others v Attorney General & another [2018] eKLR** it was held that:

“28. From the above definition, discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups.”

55. The Court cited with approval the case of **Peter K Waweru v Republic [2006] eKLR** where it was stated that:

“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

56. In my opinion, the Petitioner has not shown that she was treated differently from other persons in the same situation with her.

The Petitioner’s claim that her Article 27 rights were violated is therefore not established.

57. The question that remains to be answered is the nature of the remedies to be granted to the Petitioner. Article 23(3) of the Constitution mandates this Court to grant various reliefs in proceedings brought under Article 22 on the enforcement of the Bill of Rights. The reliefs are a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; an order for compensation; and an order of judicial review.

58. I have already determined in my analysis above that the Petitioner was unlawfully detained by the Respondent for six months for failure to pay her medical bill. I have also determined that the unlawful detention of the Petitioner was a violation of her rights under Articles 28, 29 and 39 of the Constitution. This Court is therefore enjoined under Article 23(3) to grant the Petitioner appropriate relief.

59. In the circumstances, a declaration is hereby issued that the Respondent's actions amounts to an infringement of the Petitioner's rights under Articles 28, 29 and 39 of the Constitution.

60. Two of the prayers sought by the Petitioner have already been overtaken by events. I have in mind the prayers for the release of the Petitioner from the custody of the Respondent and an order restraining the Respondent from continuing to hold the Petitioner. The evidence placed before this Court confirm that the Petitioner was released from on 19th October, 2018.

61. The Petitioner prays for general and exemplary damages. There are several cases in which various judges of this Court have awarded damages for violation of constitutional rights and fundamental freedoms. In **Mohamed Feisal & 19 others (supra)**, it was held that:

“For a determination on what concerns to keep in mind in awarding damages for constitutional violations, I find solace in Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004 where the Privy Council held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense. Per Lord Nicholls at Paragraphs 18 & 19:

“When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.

All these elements have a place in this additional award. “Redress” in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions “punitive damages” or “exemplary damages” are better avoided as descriptions of this type of additional award.”

62. The Court further cited with approval the holding in **Daniel Waweru Njoroge & 17 Others v Attorney General [2015] eKLR** that:

“On quantum of damages the court has to bear in mind the following cardinal principles in the assessment of damages namely:-

i. Damages should not be inordinately too high or too low.

ii. Should be commensurate to the injury suffered.

iii. Should not be aimed at enriching the victim but should be aimed at trying to restore the victim to the position he was in before the damage was suffered.

iv. Awards in past decisions are mere guides and each case depends on its own facts.”

63. From the cited decisions, it is my conclusion that monetary compensation may be awarded where a petitioner's rights have been violated in order to vindicate the infringed constitutional right. Moreover, an additional award may be made which will serve to vindicate the public and act as a deterrence to a respondent from carrying out other breaches.

64. As already stated, the Petitioner is asking for Kshs. 10 million as general damages and Kshs. 5 million as exemplary damages.

65. In **Tryphosa Jebet Kosgey (supra)** the petitioner who was held in hospital for seven days was awarded Kshs. 100,000 as damages. The Court compared the awards of compensation in cases of unlawful detention and stated as follows:

“17. Article 23 (3) (e) of the Constitution empowers a court to make compensation in any action brought under Article 22. I am prepared to award the petitioner damages. I have considered recent trends. In Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort and another, supra, the petitioner was detained in a hotel to enforce payment of bills incurred during a conference. In a well-considered judgment, Majanja J. awarded general damages of Kshs 1,000,000.

18. In other cases of serious violations including torture, inhuman and degrading treatment, loss of liberty and so forth, the courts have made higher awards. For example, in Koigi Wamwere v Attorney General, Court of Appeal, Nairobi, Civil Appeal 86 of 2013 [2015] eKLR the damages awarded by the High Court were reviewed upwards to Kshs 12,000,000. In Wachira Weheire v Attorney General, High Court, Nairobi Misc. Civil Case 1184 of 2003 [2010] eKLR, general damages of Kshs 2,500,000 were awarded. In Cornelius Onyango & 8 others v Attorney General, High Court, Consolidated Petition 233 to 243 of 2009, the general damages awarded were between Kshs 500,000 and Kshs 2,500,000.

19. All those cases can be distinguished here. The claimants in some of the cases had been held by State organs for long periods in deplorable conditions. In majority of those cases there were serious violations including torture, inhuman and degrading treatment and loss of liberty. I have found that the petitioner here was held against her will in a private hospital for about seven days; and, that she still had a bill pending. I have found there was no evidence that she tendered security for payment which was declined by the respondent. General damages are not meant to enrich a party. Article 23 (3) (e) of the Constitution in fact uses the term compensation. Granted the circumstances, an award of Kshs 100,000 is more than sufficient in this case.”

66. In the case of **Sonia Kwamboka Rasugu (supra)** the Court determined that:

“34. Damages for false imprisonment are very much at large and I think the decision cited by the petitioner bears no relation to the local circumstances. I am aware that in cases of detention and torture the court has awarded the sums between Kshs. 1 million and Kshs. 5,000,000.00. In the case of Rumba Kinuthia & others v The AG Nairobi HCCC No. 1408 of 2004 (Unreported), seven claimants who were detained for long period of time and were subjected to torture, cruel and inhuman treatment were awarded Kshs.1.5 million each. In the cases of Nelson Akhahukwa Muyela v AG Nairobi Petition No. 783 of 2008 (Unreported) and Israel Okemo Agina v AG Nairobi Petition No. 1374 of 2003 (OS) (Unreported) the sum of Kshs. 2 million was awarded in similar circumstances.

35. In this case, the unlawful act was not accompanied by torture and it was for a period of four days. But it was a deliberate and intentional act designed to humiliate the petitioner to ensure that payment was made despite the fact that she was not liable for the debt and payment terms had already been agreed upon by the time the workshop began. KCDF had made a clear commitment to pay the debt. In the circumstances, I think a sum of Kshs.1,000,000.00 as general damages would be an appropriate award.”

67. Additionally, in **M A O & another (supra)** the Court held that:

“203. The petitioners have also sought an award in damages for the violations they suffered at the hands of the staff of the 5th respondent. The 1st petitioner was detained for a period of 24 days, between 21st September 2010 and 15th October 2010, and was subjected to ill treatment which has been detailed above. The 2nd petitioner was detained for a period of 6 days between 13th and 19th November 2010. She was also subjected to ill treatment and neglect. While I recognize that damages will not fully compensate them for the violation of their rights, it is the only remedy that the Court is able to grant. 204. The decisions relating to unlawful detention that the petitioners rely on arose out of the Nyayo House incarcerations of the 1980s and 1990s. I believe that the decision that comes close to the circumstances of the petitioners in this case is the case of Sonia Kwamboka Rasugu vs Sandalwood Hotel (supra) in which the Court awarded a sum of Kshs1,000,000. Bearing in mind the circumstances of this case, and the conditions in which the petitioners were confined, as well as the violation of their right to dignity and health, I grant the petitioners a global sum in damages as follows:

1) To the 1st petitioner, the sum of Kshs 1,500,000.00;

2) To the 2nd petitioner, the sum of Kshs 500,000.00.”

68. In the case before me, the Petitioner was unlawfully detained in a private hospital for more than six months. However, there is no evidence that she was subjected to torture or inhuman or degrading treatment during her detention. However, in this case the Petitioner is entitled to a larger sum than the petitioners in the cited cases as her detention ran for a longer duration.

69. There was nothing placed before this Court in support of the Petitioner's claim for exemplary damages. She has not met the conditions, as set in several cases including **Michael Rubia v Attorney General [2020] eKLR**, for award of exemplary damages. An award of general damages for violation of her rights will therefore be sufficient in circumstances.

70. In conclusion, and based on the analysis above, I find that the Petitioner was unlawfully detained by the Respondent in violation of her constitutional rights, and that the Respondent had no right to detain her for non-payment of her medical bills.

71. I, therefore, enter judgment in favour of the Petitioner as follows:

i. A declaration is hereby issued that the Respondent by unlawfully detaining the Petitioner for failing to pay her medical bill, infringed upon her constitutional rights and fundamental freedoms under Articles 28, 29 and 39 of the Constitution; and

ii. The Petitioner is awarded a sum of Kshs. 3 million as general damages.

72. I now turned to the Respondent's cross-petition. I will straightaway observe that apart from the objection to the Respondent's claim on technical grounds, the Petitioner did not dispute the amount claimed as medical charges.

73. There is a suggestion by the Petitioner that collection of debts should not be pursued through constitutional petitions. She is right. Indeed, the cross-petition does not disclose any violation of the Respondent's constitutional rights. Nevertheless, the Respondent cannot be asked to go and file a civil claim for the unpaid medical bill. That would be a waste of precious judicial time and resources. The parties will also incur unnecessary litigation expenses. In line with the decision in **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR**, I find that all the issues raised in this matter should be addressed in this judgement.

74. In the cited case, the Court of Appeal held that:

“After hearing arguments in this appeal and finding that the appellant went to the wrong court, we wondered whether the High Court could have severed his “mixed grill” petition so that alleged breaches of rights could be handled by it while the employment claim went to the Industrial Court. We even considered whether the inelegant drafting of the claims of violations of rights could be amended and heard by the High Court. While Mr. Wetangula for the respondent thought that the whole appeal should fail with no directions regarding “severance” of the claim, Mr. Kipkorir pleaded with us to allow the appeal so that, if we quote him correctly:

“We should be heard on merit now that the Industrial Court is in place.”

The question now is whether the appellant should go back and “sever” the composite petition alleging violation of his fundamental rights and breach of contract of employment. Much as such a severance would entail time and resources to effect the necessary amendments and make due motions, we are of the view that with necessary amendments, which appear imperative to make out a clear use of breach of rights being effected, the appellant can and should be heard by the Industrial Court on the two claims i.e. violation of rights and breach of contract of employment. The position that the Industrial Court can and should entertain the claim as laid by the appellant, is in line with the decision of Majanja, J. in *Petition No.170 of 2012 – United States International University (USIU) Vs The Attorney General & Others.*”

75. It is important to point out that the Petitioner has an obligation to pay the balance of her medical bill. As was determined in the case of *Gideon Kilundo & Daniel Kilundo Mwenga v Nairobi Women's Hospital [2018] eKLR*:

“28. While it is true that the relationship between the petitioners and the respondent was a contractual one for which the respondent should pursue other lawful means of recovering the debt other than detaining their former patient, this court is of the view that it does not augur well for the dispensation of justice for persons to walk into private hospitals for treatment and expect to walk out without paying a single cent under the guise of the constitutional protection of liberty and freedom of movement.”

76. I have already determined that the amount owed to the Respondent on 14th May, 2018 when the Petitioner was discharged was Kshs. 3,136,144.39. There is also undisputed evidence that the Petitioner paid Kshs. 1,351,510.00 leaving a balance of Kshs. 1,784,634.39. The Petitioner has no obligation to pay any expenses that may have been incurred by the Respondent in connection with her unlawful detention. No person should be compensated for costs or expenses incurred in the commission and perpetuation of unconstitutional acts.

77. In the circumstances, I find merit in the cross-petition and enter judgement in favour of the Respondent and against the Petitioner for the sum of Kshs. 1, 784,634.39. The amount shall be set off against the Kshs. 3,000,000 awarded to the Petitioner as general damages. That translates to Kshs. 1,215,365.61.

78. In summary therefore, judgement is entered against the Respondent in favour of the Petitioner in the sum of Kshs. 1,215,365.61. That is the amount of money that the Petitioner will recover from the Respondent. The amount will attract interest at the court rate from the date of judgement until payment in full.

79. On the issue of costs, I find that both parties have succeeded in their claims. For that reason, I direct each party to meet own costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 4th day of March, 2021.

W. Korir,

Judge of the High Court



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