



Case Number:	Petition 5 of 2014
Date Delivered:	22 Mar 2018
Case Class:	Civil
Court:	High Court at Bungoma
Case Action:	Judgment
Judge:	Abida Ali-Aroni
Citation:	J O O (also known as J M) v Attorney General & 6 others [2018] eKLR
Advocates:	none mentioned
Case Summary:	<p><b>Court awards monetary compensation for violations of the right to reproductive healthcare.</b></p> <p><b>J O O aka J M v Attorney General &amp; 6 others</b></p> <p><b>Petition Case No 5 of 2014</b></p> <p><b>High Court at Bungoma</b></p> <p><b>Ali-Aroni, J</b></p> <p><b>March 22, 2018</b></p> <p><b>Reported by Beryl A Ikamari</b></p> <p><i>Constitutional Law-petition for the enforcement of fundamental rights and freedoms-form and content of the petition-particulars that need to be</i></p>

*pleaded when drafting the petition-precision with respect to the nature of the complaint, the rights said to have been violated and the manner in which they were violated-whether a petition was drafted in a clear and precise manner-Constitution of Kenya 2010, article 159.*

**Constitutional Law**-*fundamental rights and freedoms-enforcement of fundamental rights and freedoms-right to dignity, freedom from cruel, inhuman and degrading treatment, right to health and the right to access information-where it was alleged that a Petitioner delivered a baby on a concrete floor without assistance and was abused and shouted at by nurses-where it was alleged that information on how to channel a grievance against an institution was not availed-whether fundamental rights and freedoms were violated under the circumstances-Constitution of Kenya 2010, articles 43, 28, 29(j) & 35.*

**Constitutional Law**-*enforcement of fundamental rights and freedoms-remedies for violations of fundamental rights and freedoms-declarations and monetary compensation-considerations of the Court when determining the amount of monetary compensation to be awarded-Constitution of Kenya 2010, article 23(3).*

#### **Brief facts**

On August 8, 2013, the Petitioner visited the Bungoma County Referral Hospital, then known as Bungoma District Hospital for maternal healthcare. She consulted a doctor and she was advised that she would have to undergo induced labour due to delayed delivery. She was then advised to buy cotton wool and have the inducement drug administered. The drug was administered but nurses failed to monitor her progress even though she sought help for labour pains that she experienced. There was however an instance where a nurse checked on her and told her that she was not yet due for delivery.

When her labour pains intensified and she did not get assistance, the Petitioner made her way to the delivery room. She found that the 3 beds in the

room were occupied by other women who were in the process of delivery. When she attempted to walk back to the labour ward, she lost consciousness and apparently delivered her baby. When she woke up, there were shouts and abuses from nurses who asked her why she had delivered and soiled the floor. In a weak and vulnerable condition, she was ordered to carry her placenta and walk to the delivery room.

The Petitioner stated that there was no apology offered to her for the incident. She said that it showed failure by the National and County Governments to ensure quality maternal healthcare. She filed a petition in Court while stating that her right to healthcare, freedom from cruel, inhuman and degrading treatment, right to information, right to life and consumer rights were violated.

Generally the Respondents denied that there was a violation of the Petitioner's rights. It was also stated by the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents that the drafting of the petition was imprecise as regards the nature of rights concerning which violation was alleged.

### **Issues**

1. Whether the petition was drafted in a manner that revealed the nature of the Petitioner's claim with respect to the complaint, the fundamental rights and freedoms alleged to have been violated and the manner in which they were violated.
2. Whether the Petitioner's right to dignity, healthcare and information were violated.
3. Whether the National Government and County Governments failed to establish policy guidelines on how to effectively implement the national directives on free maternal healthcare.
4. What remedies were appropriate under the circumstances?

**Held**

1. The Petitioner was clear in her petition about her grievance and the alleged violation of her rights. If there were shortcomings in the drafting of the petition, article 159 of the Constitution would be applicable. The stated article 159 required Courts to be guided by various principles in exercising judicial authority and one of those principles was that justice ought to be administered without undue regard to technicalities.
2. The allegations on violation of rights to maternal healthcare were denied. However, there was an admission that facilities at the Bungoma County Referral Hospital were over stretched. The number of beds and healthcare providers were few compared to the number of patients seeking maternal healthcare. It was also admitted that the Petitioner gave birth on the concrete floor because the delivery room was occupied by other patients.
3. Article 43 of the Constitution provided for the right to health. Particularly, article 43(1)(a) provided that every person had the right to the highest attainable standard of health including the right to healthcare services and reproductive healthcare. The right to health was also recognized in other regional and international instruments. For example, that right was recognized under article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 16 of the African Charter on Human and People's Rights (the Banjul Charter).
4. The right to healthcare encompassed proper treatment at hospital, availability of necessary equipment, facilities and medication. The Petitioner did not receive that at the hospital. The Respondents failed to avail basics such as drugs and cotton wool. Requiring poor women to buy cotton wool at a public hospital, where healthcare was anchored on the Constitution and a presidential directive which was specific on the provision of free maternal healthcare, was a violation of

basic rights.

5. The Petitioner gave birth on a concrete floor between the delivery room and the labour ward without assistance. That was a violation of her right to dignity. Third parties were able to watch and video tape the delivery and the shouting and abuse she experienced after giving birth. The shouting and abuse were denied but the video clip was clear about that. There was no denial concerning the Petitioner being ordered to walk while carrying the placenta which had not been expended. That action was cruel, humiliating and demeaning.
6. Under article 28 of the Constitution every person had inherent dignity and the right to have that dignity respected and protected. Further, article 29(j) of the Constitution provided for every person's right to freedom and security of the person including the right not to be treated or punished in a cruel, inhuman and degrading manner. The African Charter on Human and Peoples' Rights (Banjul Charter) also provided for the right to dignity.
7. No matter how overstretched the facilities were, the nurses' actions were inexcusable. They were not available to offer the Petitioner the care and attention that she needed. The Petitioner did not deserve the cruelty and abuse which she experienced. Nurses owed a duty of care to patients. The nurses' actions were an infringement of the Petitioner's right to dignity.
8. In the era of transparency and accountability, it was important for complaint mechanisms in institutions, such as public institutions, to be made public by being conspicuously displayed. That would enable aggrieved persons to know how to channel their grievances. The Petitioner did not complain against anyone before being discharged from hospital and she did not testify that necessary information was not disclosed to her. The right of access to information provided for under article 35 of the Constitution was not applicable to the circumstances.

9. The measures and policies on the implementation of the national directive of free maternal healthcare would go a long way in ensuring effective implementation of the healthcare services. The National and County Governments had not devoted adequate resources to healthcare services and had not put in place effective measures to implement, monitor and provide minimum acceptable standards of healthcare. In failing to do so, there was a violation of the Constitution and international instruments.

10. For a violation, denial or infringement of a right or fundamental freedom, under article 23(3) of the Constitution, the Court could grant various remedies including a declaration and compensation. In addressing the Petitioner's injuries, the Court would have due regard to the fact that no amount of monetary compensation would redress the pain and suffering that the Petitioner went through. Compensation was a mere attempt at acknowledgement of the infringement of rights and an attempt at reparation.

*Petition allowed.*

*Orders: -*

- 1. The Court declared that the physical and verbal abuse meted out to the Petitioner at the 5<sup>th</sup> Respondent facility amounted to violation of her right to dignity and right not to be subjected to cruel, inhuman and degrading treatment.*
- 2. The Court declared that the neglect the Petitioner suffered was as a result of the National and County Government's failure to ensure healthcare services were of quality and were available.*
- 3. The Court declared that the National Government & County Government of Bungoma failed to develop and/or implement policy guidelines on healthcare thus denying the Petitioner her right to basic healthcare.*
- 4. The Court declared that the National Government & the County Government of*

	<p><i>Bungoma failed to implement and/or monitor the standards of free maternal healthcare and services thus resulting in the mistreatment of the Petitioner and violation of her right to dignity, and treatment that was cruel, inhuman or degrading.</i></p> <p>5. <i>The Court directed and ordered that a formal apology be made to the Petitioner by the 3<sup>rd</sup> Respondent, the 5<sup>th</sup> Respondent and the three nurses who violated the rights of the Petitioner.</i></p> <p>6. <i>The Court awarded damages of Kshs. 2,500,000 to the Petitioner as a result of the infringement of her rights.</i></p> <p>7. <i>The Court awarded costs of the suit to the Petitioner.</i></p> <p>8. <i>The award and costs were against the 2<sup>nd</sup> and 4<sup>th</sup> Respondents in equal shares.</i></p>
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Bungoma
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition allowed, Petitioner awarded Kshs. 2,500,000/= as damages
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	Kshs. 2,500,000/=
<p>The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.</p>	

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**PETITION CASE NO. 5 OF 2014**

**IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2(1), 2(5), 2(6), 10(1), 10(2)(b), 25(a), 26(1), 27(4)&(5), 28, 29(c) & (f), 35(1)(b), 43(1)(a), 43(2), 46(1)(a)(b),(c)&(d), 46(3) and 48 OF THE CONSITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 4,5,9(1), 16(1), 18(3) AND 28 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (BANJUL CHAPTER)**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2(1), 3(4), 4(1), 4(2)(b), (c) &(i), 5, 14(1) AND 2(2)(a) & (b) OF THE PROTOCLOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICAN (MAPUTO PROTOCOL)**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLE 16 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2, 4, 6(1), 7, 10, 19(2) AND 26 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2(2), 10(2) AND 12(1) & (2) (d) OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 19(h), 12(2) AND 14(2) OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN**

**BETWEEN**

J O O.....PETITIONER

(also known as J M)

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

THE COUNTY GOVERNMENT OF BUNGOMA.....2<sup>ND</sup> RESPONDENT

THE BUNGOMA COUNTY CABINET SECRETARY FOR HEALTH.....3<sup>RD</sup> RESPONDENT

THE CABINET SECRETARY MINISTRY OF HEALTH.....4<sup>TH</sup> RESPONDENT

BUNGOMA COUNTY REFERRAL HOSPITAL.....5<sup>TH</sup> RESPONDENT

AND

WOMEN'S LINK WORLDWIDE.....AMICUS CURIAE

AND

AFRICAN GENDER AND MEDIA TRUST.....INTERESTED PARTY

### JUDGEMENT

1. With the Promulgation of the Constitution of Kenya 2010, the citizenry in Kenya continue to exert their rights under various Articles of the Constitution. Such is the case before Court where the Petitioner **J O O** also known as **J M** moved this Court by way of a Constitutional Petition in a bid to enforce the Bill of Rights under Article 22(1) of the Constitution, the Petitioner alleged contravention of several Articles of the Constitution in particular Articles 25, 27(4) & (5), 28, 29(a) & (f), 35(1)(b) & 43(1)(g), contravention of various articles of the African Charter on Human and People's Rights (Banjul Charter), The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, The International Covenant on Economic, Social and Cultural Rights(ICESCR), The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).

2. The Petitioner sued the **Attorney General** as the Principal legal advisor to the Government as the 1<sup>st</sup> Respondent, the **County Government of Bungoma** as the 2<sup>nd</sup> Respondent, **The County Cabinet Secretary of Health** was sued as the 3<sup>rd</sup> Respondent, sued as the 4<sup>th</sup> Respondent is the **Cabinet Secretary Ministry of Health** in the National Government, sued as the 5<sup>th</sup> Respondent is the **Bungoma County Referral hospital**.

3. **Women's Link World Wide**, an International non-governmental organization based in Bogota (Colombia) and Madrid (Spain) and working to uphold women's right was enjoined to the suit as Amicus Curiae.

4. **African Gender and Media Initiative Trust**, a registered research organization that works toward advancement of gender equality and on women rights applied to be enjoined as an Interested Party which application was granted by consent of all parties.

## **The Petitioner's Case**

5. It is the Petitioner's case that she is a woman from a low-income background and while in need of Maternal care, as she could not afford the services of a private hospital, she visited the Bungoma County Referral Hospital, then known as Bungoma District Hospital on 5<sup>th</sup> August, 2013, a public health care facility that ought to provide free maternal health care following a Presidential directive that was issued on 1<sup>st</sup> June, 2013.

6. That upon seeing a doctor she was advised that due to a delayed delivery, she would have to undergo induced labour. Upon admission in the hospital she was asked to purchase cotton wool and the inducement drug to be administered on her. And since the number of beds available in the ward were not adequate, she was forced to share a bed with another patient. The expectant mothers including the Petitioners were informed by the nurses then on duty that at the onset of labour pains they would have to walk to the delivery room. It was also her case that the inducement drug was administered, the nurses failed physically check and monitor her progress and on the onset of labour pains she sought for help that was not forth coming and when the nurse appeared without physical check, she told her that she was not yet due for delivery. That when her labour pains intensified she again sought for help which was not forthcoming and as earlier instructed, she walked to the delivery room where she found the 3 beds in the said room were occupied by other women who were in the process of delivery; left with no choice, she attempted to walk back to the labour ward, however she did not make it to the said ward as she lost consciousness along the way, apparently delivered her baby and woke up to shouts and abuses from two nurses who questioned her as to why she had delivered and had soiled the floor, without any assistance she was ordered to carry her placenta and walk to the delivery room to have the same expended, despite her weak and vulnerable condition.

7. The Petitioner further contended that due to her state at the time she did not comprehend the mistreatment meted out upon her until she watched a clip aired by KTN over her predicament the same having been captured by a fellow patient at the hospital.

8. Further, despite knowledge of the incident, neither the nurses, the hospital nor any Government official have tender any apology to her.

9. The Petitioner stated that due to the physical, verbal abuse and neglect, infringement of her dignity, failure by the National and County Governments to ensure quality maternal care, failure by the hospital to public display its internal complaint mechanisms, likewise the National and County Government, her fundamental rights as enshrined in the Constitution, Regional and International Human Rights Instruments were grossly violated and she has seeks for the following remedies,

***a. An order for general damages for physical and emotional trauma.***

***b. A declaration that the physical and verbal abuse amounted to violation of her right to health care.***

***c. A declaration that the neglect she suffered was as a result of the National and County Government's failure to ensure healthcare services are of quality and available.***

***d. A declaration that the National and County Governments failure to develop and implement a policy guideline on the Presidential directive resulted in the violation of the Petitioner's right to health care.***

***e. A declaration that the National and County Government's failure to implement and monitor the standards of free maternal care and services caused the mistreatment and violation of the Petitioner's right to dignity, right to free from cruel, inhuman and degrading treatment.***

***f. A declaration that the poor quality of obstetric care was a risk to the Petitioner's right to life.***

***g. Failure by the 5<sup>th</sup> Respondent to publicly display its internal complainant lodging process contravened the Petitioner's right to access to information and her right as a consumer of goods and services.***

***h. An order compelling the 2<sup>nd</sup> to 5<sup>th</sup> Respondents to effectively monitor the implementation and enforcement of the Ministry of Health's 2002 maternal care standards at the National and County level health Institutions.***

***i. An order compelling the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to monitor quality of care standards in County health facilities within its jurisdiction to promote maternal health care.***

***j. An order requiring the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent to conduct awareness programs to educate the public on patient's rights and more specially disseminate the Kenya National Patients' Rights Charter 2013.***

***k. An order requiring that the Kenya National Patients' Rights Charter shall be conspicuously displayed in every health facility in both English and Kiswahili.***

***l. An order requiring the National Government to establish a Policy guideline on the Presidential directive and to take steps to effective improvement laws that protect women's rights during child birth.***

***m. An order requiring the Respondent's through the Nursing Council of Kenya to take up disciplinary action against the nurses who violated the Petitioner's rights at Bungoma County Referral Hospital and the Court be appraised of such disciplinary measures taken within a specified period as deemed fit.***

***n. An order requiring the nurses at Bungoma County Referral and more specifically the nurses who violated the Petitioner's rights be compelled to undertake continuous patients' rights training / human rights training by the Nursing Council of Kenya and Nursing Council to give periodic progress of such training.***

***o. A formal apology to the Petitioner from the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents.***

***p. Any other or further orders or directive the Court may deem fit.***

### **The 1<sup>st</sup> and 4<sup>th</sup> Respondent's Case**

**10.** The 1<sup>st</sup> and 4<sup>th</sup> respondents who are; The Honourable the Attorney General and the Cabinet Secretary Ministry of Health jointly filed grounds of opposition to the Petition stating that the Ministry of Health has executed its mandate which includes; to create an enabling environment, regulate and set standards and policy for health services. It has further ensured non-discriminatory access to quality material health care services to women seeking free maternal care in public hospital including at the Bungoma County Referral Hospital, it has also availed internal and external complain mechanisms in all

public institutions and it is not a breach of any Law.

11. Further that the 4<sup>th</sup> respondent is aware of its obligation under the Kenyan Constitution and International instruments, in particular the right to health and reproductive rights and has not contravened any of such obligation.

12. Further they contended that they are aware that the Nursing Council of Kenya investigated the alleged complaint in question and upon investigation it absolved the nurses who allegedly mistreated the petitioner of any blame.

**2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondent's Case.**

13. The County Government of Bungoma, the Bungoma Cabinet Secretary of Health and the Bungoma County Referral hospital on their part responded to the Petition by filing affidavits sworn by the County Secretary of the County Government of Bungoma Murumba Chiuli, Dr. Wekesa Kubasu, the then Medical Superintendent of the 5<sup>th</sup> respondent, Razia Inzula, Catherine Makokha and Mary Agnes Nyongesa nurses at the 5<sup>th</sup> Respondent, who allegedly mistreated the Petitioner.

14. Murumba Chiuli in his affidavit deposed that the Petitioner did not indicate the legal obligation the 2<sup>nd</sup> respondent had breached and therefore she has no cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents respectively.

15. Further he stated that the Petitioner and her child were discharged from the 5<sup>th</sup> Respondent without having suffered any ailment and therefore the allegation by the Petitioner are far-fetched, wild and aimed to taint and malign the image of the County Government of Bungoma and the Bungoma County Referral hospital.

16. It is the 2<sup>nd</sup> and 3<sup>rd</sup> respondent's case also that the failure to have adequate beds in the labour and delivery rooms does not amount to negligence. The 2<sup>nd</sup> respondent came into being in March 2013 hence structuralizing the 5<sup>th</sup> respondent, including availing and providing adequate medical facilities was in progress.

17. As regards the video clip being relied upon by the Petitioner it was submitted that the source of the same is questionable and its authenticity had not been established.

18. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents also contended that they embrace and uphold Human Rights and the right to dignity as contained in the Constitution and do not condone mistreatment of any kind, abate torture, mishandling or abuse of any person including in hospitals.

19. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent have a programme to expand medical facilities, including creating awareness to the patients of their rights in addition to existing channels.

20. **Dr. Wekesa Kubasu** the Medical Superintendent of the 5<sup>th</sup> respondent in his affidavit confirmed that the Petitioner was admitted to the facility on 9/8/2013 and he attended to her and advised her to undergo induced labour.

He also admitted that the 5<sup>th</sup> respondent was over stretched due to the demand for services sought for at the facility, however he stated that this notwithstanding all patients were attended to.

21. That due to the clip aired by KTN on 4<sup>th</sup> September, 2013 a meeting was held by the deponent and

one Dr. Ekesa Mulianga the then hospital superintendent at the time and nurses who were on duty on the material night, and as a result the nurses were suspended to allow investigations.

22. He further deposed that, after the reported incident the head of the nurses looked for the petitioner who gave an interview to a local station where she controverted the allegations. She also voluntarily recorded a statement and was not forced to give any statement as alleged in the Petition.

23. He contended that the allegations by the Petitioner were false, as the Petitioner was professionally attended to and indeed the Nursing Council having done investigations due to the same allegations, absolved the nurses of any misconduct.

24. Razia, Mary and Catherine in their respective affidavits confirmed that the Petitioner was admitted at the facility and she gave birth on the floor at about 10p.m. on the material day. They however deny abusing or mistreating the Petitioner as alleged. It is their case that when they found the Petitioner giving birth on the floor, they helped her deliver, and thereafter she was then taken to the delivery room to expend her placenta.

### **Petitioner's Submissions.**

25. Briefly it was submitted on behalf of the Petitioner that the Petitioner's right to health was violated by the National and County Government as they failed to ensure that there was minimum standard of health care at the 5<sup>th</sup> Respondent and as a consequence there were no drugs, necessary facilities, no equipment, and there was understaffing resulting into neglect and abuse of the Petitioner contrary to the Constitution and a host of International Instruments that place an obligation upon the Kenyan Government to provide for health care to its citizens.

26. Secondly that though the Government is permitted to engage in progressive realization to the right to health, it is required to devote "maximum of its available resources" to improve health care facilities, which both the County and National Governments have failed to do. In urging this point Counsel for the Petitioner amongst other authorities cited **Alyne V Brazil Commc No.17/2008** and **Centre for Health, Human Rights and Development (CEHRD) & 3 Others Vs A.G. Uganda High Civil Suit No.111 of 2012.**

27. Further it was submitted that the Petitioner did not receive acceptable minimum standard of treatment and care as her condition while after the administration of the inducement drug was not physically checked and monitored, she was unable to access assistance, was forced to walk to the delivery room where the facility was unavailable to her and with no alternative she was forced to walk back to the labour ward unaided, she fell, was unconscious and delivered her baby on a concrete floor and after delivery was mistreated shouted at and forced to walk to the delivery room for expending of the placenta.

28. It was also contended that the National and County Governments failed to effectively legislate and put in place policies that would ensure progressive realization of maternal health care, as they are under obligation to "***observe, respect, protect promote and fulfil***" the right to health under Article 21(1) and 43(1) of the Constitution.

29. Further it was submitted that the action of the two nurses who shouted at and abused the Petitioner was inhuman and degrading. It caused her both physical and mental pain and suffering and was in violation of Article 29(d) and (f) of the Constitution which guarantees "***freedom and security of the person***" including not to be subjected to torture in any manner and not to be treated or punished in a

cruel, inhuman and degrading manner that derogates one's dignity.

30. There was infringement to the Petitioners right to information as the hospital failed to display the procedure for lodging a complaint in cases of dissatisfaction, a right enshrined in Article 35(1)(b) of the Constitution; the Maputo Protocol, Banjul Charter, CEDAW etc.

31. It was also urged that the Petitioner has a right to be receive remedy for the violation of her rights as recognized by the Constitution and International instrument.

#### **The 1<sup>st</sup> and 4<sup>th</sup> Respondent's submissions**

32. In their submissions the 1<sup>st</sup> and 4<sup>th</sup> respondents denied the alleged violation of the Petitioners rights under Article 43(1)(a) of the Constitution, however it was contended that the resources made available to provide for Staffing, equipment and basic maternal care at the 5<sup>th</sup> respondent are limited and depend on Budgetary allocations.

33. Further it was stated that there was no discrimination in the Petitioner's access to quality maternal services as the services are open to all women.

34. It was denied that the Petitioner's dignity was violated as alleged and urged that the weakness and pain experienced by the Petitioner was a natural consequence in the process of child birth.

35. The allegation of neglect, physical and verbal abuse was denied and it was stated that the allegation was found to be baseless by the Nursing Council of Kenya upon investigations done. And further the Petitioner's right to life was not violated as there were no injuries neither did she die at child birth.

36. In terms of compensation Counsel proposed an award of Kshs.200,000/-. He cited the cases of **Marete Vs Attorney General (1987) KLR 690**, **Peter Ngari Kagume & 7 Others Vs Attorney General (2009)eKLR** and **James Mwangi Wanyoike & 9 Others Vs Attorney General 2012 eKLR**.

#### **The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondent's submission**

37. It was submitted that the Petition was incompetent as it did not demonstrate the rights that were allegedly violated. The Petitioner's pleadings including the affidavit were contradictory. The Petitioner left the hospital without a complaint and wrote a statement to that effect contrary to paragraph 13 of her Petition.

38. That the alleged violation is indeed a creation of the media, the information is questionable as the source cannot be authenticated. In advancing this argument Counsel relied on **Trusted Society of Human Rights Vs Attorney General and others Petition No.229 of 2012**, **Anarita Karimi Njeru Vs Republic Petition No. 1 of (1979) KLR** and **Muimo Matemo Vs Trusted Society of Human rights Alliance & 5 Others (2013) eKLR**.

39. Further it was argued that the 5<sup>th</sup> respondent came in place in March 2013, and had not received funds to expand the 5<sup>th</sup> respondent. In any event the rights envisaged in Article 43 are progressive in nature and cannot be implemented immediately.

40. It was also stated that there are clear internal mechanisms to deal with complains arising from the public and patients and in this instance the alleged perpetrators were suspended pending investigations, were indeed investigated and absolved from the allegations.

### **Submissions by Amicus Curiae – Women’s Link Worldwide.**

41. The Amicus Curiae brought to the attention of the court various International instruments that placed obligation on Kenya to guarantee the right to health care and specifically International instruments that Kenya acceded. The court was informed that; -

Kenya acceded without any reservation to the Convention on the Elimination of all Forms of Discrimination (CEDAW) on 9<sup>th</sup> March, 1984

Article 12 of the same states that;

***“State parties should take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”***

The International Covenant on Economic, Social and Cultural Rights was acceded to on 1<sup>st</sup> May 1973

Article 10 of the same states that **“special protection should be accorded to mothers during a reasonable period before and after child birth”**.

42. Reference was also made to **Alyne da Silva V Brazil** (supra) which was presented to the CEDAW Committee on violation of the convention. In the said case Alyne lacked immediate treatment leading to her death. The Committee found that Article 12 of the convention had been violated.

43. The court was further informed that Courts have elsewhere enforced Social and economic rights even when resources are limited, South Africa, Columbia and India were cited as examples.

Reference was also made to several cases including the following; **Government of the Republic of South Africa Vs Grootboom and Others (2000) 1 SA 466, Minister for health and others V Treatment Actin campaign & Others (2002) (5) S A 721**

**Mullin V The administrator, Union Territory of Delhi (1981) A.I.R. 746 (India) & Paschim Banga Khet Mazdoor Samity Vs State of West Bengal (1996)4 S.C.C. 37(India)**

44. It was further submitted that violence against women in healthcare facilities in Kenya has been a topic of discussions by International Human Rights bodies and Kenya was called upon to **“strengthen its efforts to investigate ... harmful practices in connection with reproductive health and identity and punish those involved in such practices”**.

45. As relates to right of information it was submitted that the state is under an obligation not only to give access to information as a general rule but to be transparent more so when it relates to the right to reproductive right.

### **Interested Party’s Submission.**

46. It was submitted on behalf of the Interested Party, that there is need for safe, respectful and accessible maternal care to avoid death at child birth, as the quality of maternal care more specifically during labour and delivery is poor and there is use and neglect which is systemic and widespread.

47. It was further said that cases of physical, verbal abuse, stigmatization, discrimination and failure to

meet Professional standard of care were many.

48. The National and Bungoma County Governments have failed to prioritize maternal health care services giving dismal percentage of the budget to maternal healthcare, and that there is need for the two levels of Government to fund and expand the healthcare facilities.

49. Counsel reiterated the provisions on the right to healthcare in the Kenyan Constitution and International instruments most already cited by other parties in the case.

### **Analysis and determination**

50. In my considered opinion the issues for consideration are;

*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.*

*iv. If the answer to (ii) is in the affirmative in any of the three limbs what are the likely remedies.*

### **Whether the Petition before Court is competent.**

51. This issue was raised by the respondents, by the 1<sup>st</sup> and 4<sup>th</sup> in their grounds of opposition and the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> in their submissions. My view is that this ground cannot succeed as the Petitioner was clear and precise in her petition regarding her grievances and in detailing the alleged violation of her rights. Nonetheless even if there were shortcomings Article 159 of the Constitution demands that in exercising Judicial Authority Courts shall be guided by Principles that include justice being administered without due regard to technicalities in **Trusted Society of Human rights Alliance Vs A.G. & Others High Court Petition No.229 of 2012** the High Court stated;

*“... The test does not demand mathematical precision in drawing Constitutional Petitions. Neither does it demand talismanic formalism in identifying the specific Constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the respondents in a Constitutional Petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.*

**Whether there was a violation of the Petitioner's rights under the Constitution of Kenya under Articles 25, 27 (4) & (5), 28, 29(1) of 35(1)(b) and 43(1)(g) of the Constitution and other International instruments forming part of our Laws under Articles (2), (5) and (6) of Constitution.**

In her petition, affidavit in support and while testifying on oath the Petitioner informed the Court that she was admitted to the 5<sup>th</sup> respondent facility on the 8<sup>th</sup> of August, 2013 and advised that she required induced labour as her pregnancy was overdue by two months.

**52.** That upon admission she was made to share a bed with another patient and was asked to buy cotton wool and the drug to be used for the inducement. She was induced, however the nurses did not check or monitor her progress and when she sought for help she was told to wait without any physical check.

**53.** Further she said that she did not get any assistant as she went into labour and like all other expectant mothers' present, had been directed to walk to the delivery room at the opportune time. As per the directive as her labour pain intensified, she walked to the delivery room, despite the discomfort and on reaching she found the 3 beds in the said room occupied by women in the process of delivery, not having a choice, she started walking back to the labour ward.

**54.** She further said that she could not recall what transpired but got back to her senses to shouts and insults from two nurses as she found herself on a concrete floor having given birth. She was despite her condition ordered to walk to the delivery room so that her placenta could be expended.

**55.** Alongside the allegations on contravention of the Constitution and International instrument it was also alleged that the actions and omissions of the 5<sup>th</sup> respondent's employees went against the Presidential directive to free maternal care issued on 1<sup>st</sup> June 2013.

**56.** The allegations of violation of rights to maternal healthcare

While being denied by the respondents in general terms, there is an admission that the facilities at the Bungoma County Referral hospital were over stretched, the number of beds, and the healthcare providers were few compared to the number of patients who sought for maternal healthcare.

There is also an admission that the Petitioner gave birth on concrete floor as the delivery room was occupied by other patients.

**57. Article 43(1)(a)** provides;

*“Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care,”*

Apart from the Constitution Other Regional and International instruments also recognize the right to health.

**Article 12(1)** of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides as follows;

*“The state parties to the present covenant recognizes the right for everyone to the enjoyment of the highest attainable standard of physical and mental health.*

**Article 16** of the African charter on Human and People's Rights (The Banjul Charter) states; **“Every individual shall have the right to enjoy the best attainable state of physical and mental health”** and in the said Charter State parties are under an obligation to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

58. The above quoted are but a few of the International conventions that speak to the right to health care, which right encompasses proper treatment at hospital, availability of necessary equipment, facilities and medication. The Petitioner received none of the above at the 5<sup>th</sup> Respondent. The respondents failed to avail the basics; drugs and cotton wool are basic provisions in any healthcare and to require the Petitioner and other poor women to purchase basic necessities in a public facility where health care is anchored on the Constitution and where a Presidential directive was specific on the provision of free maternal care is nothing short of violation of a basic rights.

**Whether there was violation of the Petitioners Right to dignity.**

59. The Petitioner gave birth on a concrete floor, in an open area where others saw her, her image captured on video, she was shouted at and abused for giving birth in such a situation and for soiling the place.

60. There is an admission by the 5<sup>th</sup> respondent that indeed the Petitioner gave birth between the delivery room and the labour ward all by herself. This in itself, in my considered opinion is a derogation of her dignity. Giving birth in an open place where third parties watch and although with good intentions are able to video tape is degrading to say the least.

61. Although the Respondents deny the shouting, and use of abusive words that were allegedly uttered by the two nurses.

The video clip was clear that the nurses shouted at the Petition. Indeed, they do not deny the Petitioner to walk carrying the placenta having not been expended, their action was no doubt cruel, humiliating and demeaning in her words the Petitioner said;

*"I heard two nurses ask why I had delivered where I did saying the child could be affected and why I had soiled the place. They spoke to me harshly. They ordered me to carry my things; placenta and leso which were on the floor. I held my placenta with my leso as I walked against the wall to the delivery room".*

Article 28 of the Constitution provides that;

*"Every person has an inherent dignity and the right to have that dignity respected and protected.*

Article 29(j)

*"Every person has the right to freedom and security of the person which includes the right not to be treated or punished in a cruel, inhuman and degrading manner."*

The African whether on Human and Peoples' Right (Banjul Charter) on its part states; **"Every individual shall have the right to respect of the dignity inherent in human beings"**. Similarly, the Protocol to the African Charter on the Rights of Women in African (The Maputo protocol) recognizes that every woman has the right to dignity inherent in human beings.

**In Republic Vs Minister for Home Affairs and 2 Others Ex-parte Leonard Sitanize (2005) eKLR** the Court had this to say on the very subject.

*"Human dignity is of Fundamental importance to any Society including Kenya and is indeed a foundational value which informs the interpretation of many and perhaps all other fundamental rights."*

62. The action of the nurses is inexcusable no matter how overstretched they were. The petitioner was in a vulnerable state, what she needed was care and attention which they failed to offer, she could not have possibly delayed her labour processes so as to await a vacancy in the delivery room, they were not available for her either, in hour of need. The Petitioner certainly did not deserve cruelty and abuses meted on her. The nurses as healthcare providers owe a duty of care to their patients at all times, theirs is a calling to serve humanity in vulnerable circumstances. What the Petitioner required was understanding and compassion at the time.

63. A South African case **Srs Makwanyane & Another (CCT3/94)(1995) ZACC 3** the cited in **Millicent Awuor Omiya alias Maimuna Awuor & Another Versus The Attorney General & Another Petition No.562 of 2012**, the South African Constitutional Court captured the significance and of safeguarding once dignity as follows;

*“The importance of dignity as a founding value of the new Constitution cannot be over emphasized. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many other rights that are specifically entrenched in the Constitution”.*

64. Certainly, the action of the nurses of the 5<sup>th</sup> respondent denied, derogated and demeaned the Petitioner’s worth, thus infringing on her dignity as a woman and as a member of the human race.

#### **Whether there was violation of the right to information.**

65. It was submitted on behalf of the Petitioner that the National and County Governments and the 5<sup>th</sup> respondent infringed on the Petitioner’s right to information. It was alleged that this right was violated because the Complainant mechanisms were neither displayed nor brought to the knowledge of the Petitioner.

66. The respondents maintained that complaint mechanisms are in place that indeed, the same allowed the suspension of the nurses, investigations and eventual decision on them being made.

67. From the facts on record, the Petitioner did not, during her admission and discharge from hospital anticipate complaining against anyone neither did she testify to the fact that necessary information was not disclosed to her. In my view Article 35, Access to information is not applicable in the circumstances of this case.

That notwithstanding in this era of transparency and accountability it is important that complaint mechanisms in Institutions much more public institutions such as the 5<sup>th</sup> Respondent are made public, including being conspicuously displayed to enable aggrieved parties know how to channel their grievances.

#### **Whether the National and County Governments failed to establish policy guidelines to effectively implement National directives on free maternal care, to establish policy guidelines and other measures, including allocation of maximum available resources to comply with the law and to implement the directive, or to establish and monitor standards of free maternity care services.**

68. The measures and policies alluded to above are important would go a long way in ensuring effective implementation of healthcare services.

It was submitted on behalf of the Petitioner, that the 5<sup>th</sup> Respondent was unable to meet the basic

standard of quality healthcare, and availability of this minimum standards, requires that both levels of Government to provide public health facilities with trained medical personnel, medication and other amenities and programs.

69. Though the 1<sup>st</sup> & 4<sup>th</sup> respondents submitted that the National Government had met its obligation and programs had been put in place, in my considered view this submissions were half-hearted as there was an admission of limited resources for the implementation of healthcare services.

On their part the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondent similarly cited lack of adequate resources.

70. From recent reports on healthcare services in the country, it cannot be gainsaid that the National and County Governments have not devoted adequate resources to healthcare services, have not put in place effective measures to implement, monitor and provide minimum acceptable standards of healthcare, thus violating our own very Constitution and International instrument that we have acceded to as a country.

#### **What are the available remedies.**

71. Where one seeks for redress, where there is denial, violation and infringement of a right or fundamental freedom the Court is empowered by Article 23(3) to grant various remedies including declaration of the right and compensation.

72. Based on the findings I find that the Petitioner's rights to maternal healthcare were infringed, there was equally a violation to her right to dignity as a woman and as a human being by the omission and commission of the nurses or the 5<sup>th</sup> Respondent facility.

And redressing the injuries suffered by the Petitioner, I bear in mind that no amount of monetary compensation may redress the pain and suffering that the petitioner had to go through. It is merely an acknowledgement of the infringement of rights, and an attempt to make reparation. In this regard I considered the following Cases;

**Marete Vs Attorney General (1987) KLR, Peter Ngari Kagwire & 7 others versus the Attorney General (2009) eKLR and Kisilu Mutua Vs Attorney General Petition No.91 of 2015.**

73. Consequently, therefore based on the above I hereby grant the following orders;

***a. I declare that the physical and verbal abuse meted out to the Petitioner at the 5<sup>th</sup> respondent facility amounted to violation of her right to dignity, right not to be subjected to cruel, inhuman and degrading treatment.***

***b. I declare that the neglect the Petitioner suffered was as a result of the National and County Government's failure to ensure healthcare services are of quality and are available.***

***c. I further declare that the National Government & County Government of Bungoma failed to develop and/or implement policy guidelines on healthcare thus denying the petitioner her right to basic healthcare.***

***d. I declare that the National Government & the County Government of Bungoma failed to implement and/or monitor the standards of free maternal health care and services thus resulting in the mistreatment of the Petitioner and violation of her right to dignity, and treatment that is***

*devoid of cruelty, inhuman and not degrading.*

*e. I direct and order that a formal apology be made to the Petitioner by the 3<sup>rd</sup> Respondent, the 5<sup>th</sup> Respondent and the three nurses herein named as having violated the rights of the Petitioner.*

*f. I award damages of Kshs. 2,500,000 to the Petitioner as a result of the infringement of her rights.*

*g. I also award costs of the suit to the Petitioner.*

*h. The award and costs are against the 2<sup>nd</sup> and 4<sup>th</sup> Respondents in equal shares.*

**DATED and DELIVERED at BUNGOMA this 22<sup>nd</sup> day of March, 2018**

**ALI-ARONI**

**JUDGE**



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