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CASE BRIEF: RIGHT TO MATERNAL HEALTH CARE

The County Government of Bungoma & 3 Others Versus J O O (also known as J M) & 2 Others¹

Civil Appeal No. 61 of 2018 | In the Court of Appeal at Kisumu |

Judgement Delivered on 23rd February 2024 by (Coram: Kiage, Tuiyott & Joel Ngugi, JJ.A)

1. Statement of Facts

In August 2013, a woman named J O O (hereinafter, Josephine) was admitted for childbirth at the Bungoma County Referral Hospital, then known as Bungoma District Hospital. The hospital was so full that she had to share a bed with another patient. She also had to buy medicine and cotton wool despite the Presidential directive that maternity services should be free in public health facilities. She was not properly attended to by the nurses and ended up giving birth on the floor in the hospital corridor without any help.

Josphine filed a lawsuit against the Bungoma County Government, the County Cabinet Secretary for Health, and the hospital for violating her right to maternal healthcare, dignity, and information as enshrined in the Constitution of Kenya and international instruments. In March 2018, the High Court at Bungoma delivered a judgement awarding Josphine Kshs. 2,500,000 compensation as a result of the infringement of her rights. Additionally, the Court held that the neglect Josphine suffered was as a result of the National and County Government's failure to ensure the availability of quality healthcare services, failure to develop and implement healthcare policy guidelines and failure to implement and monitor the standards of free maternal health care and services, resulting to mistreatment and violation of the right to dignity, and treatment that is devoid of cruelty, inhuman and not degrading.

Aggrieved by the High Court decision, the Bungoma County Government, County Cabinet Secretary for Health and the hospital filed an appeal at the Court of Appeal.

2. Issues

Below were issues for determination in the appeal and the Court's judgement and holding.

2.1 Whether there was sufficient evidence on record to warrant the findings that the Josephine's various rights had been violated as the trial court did.

The Court found that Josephine provided enough evidence to demonstrate on a balance of probabilities that the hospital failed to give the basic respectful care that a woman should get when giving birth. *"She was slapped by the two nurses who accused her of "soiling" the corridor when she gave birth in the corridor. She was verbally assaulted and shouted at. She was denied care in the first instance when she informed the nurse that she was going into labour. She was subjected to utmost indignity and disrespect by being forced to give birth on the floor, in the corridor and in full view of other people.*

¹ The County Government of Bungoma & 2 Others Versus Josephine Oundo Ongwen and 2 Others https://drive.google.com/file/d/1Dv6syz0yC_o48o5eCWs-Sbk4YTt9xUtKH/view

She was further humiliated by being forced to walk back to the delivery room while carrying her un-expelled placenta. While back in the delivery room, she was left unattended to, neglected, and was not given any pain or other medication.”

2.2 Whether, as a matter of law, the findings of constitutional and human rights violations were sound in view of the progressive nature of the right to health on which the petition was, in the main, premised on.

The Court held that *“Every woman is entitled to respectful maternal care during childbirth as part of their social and economic rights enshrined in Article 43 of the Constitution. That aspect of the right to health is not subject to progressive realization. It is part of the minimum core of the right that must be realizable immediately and not progressively. The minimum core of a woman’s right to respectful maternal care during childbirth must, as the trial court expounded, include:*

- a. The right to be free from physical violence and verbal abuse during labour and childbirth;*
- b. The right to be free from discrimination during labour and childbirth;*
- c. The right to a dignified and respectful care – including being granted acceptable levels of privacy and confidentiality during labour and childbirth.”*

2.3 Whether the damages awarded were excessive in the circumstances.

The Court held that the damages awarded were not excessive because *“the mistreatment and indignity that Josephine went through in the hands of the agents of the appellants was simply depraved, malevolent and outrageous. The amount awarded must signal to the appellants and other duty bearers the society’s sense of indignant and righteous outrage at the conduct.*

The award of Kshs. 2.5 Million to Josephine for all the depravity and indignity she suffered at the hands of the agents of the appellants is hardly sufficient to atone for the emotional trauma and scarring she suffered.”

3. Rule of Law and Legal Principles Applied

3.1 Constitution Article 43(1)(a) provides that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

3.2 Constitution Articles 2 (5) and (6) - The general rules of international law shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution. These include: Article 12 of the Convention Against the Elimination and Discrimination Against Women; Article 10 of the International Covenant on the Economic, Social and Cultural Rights; and Article 24 of the Protocol to the African Charter on Human and People’s Rights of Women.

4. Reasoning

In its reasoning, the Court states that, *“whereas the appellants could plausibly make the plea of progressive realization respecting the availability of drugs, hospital beds and even shortage of medical personnel, human rights-based maternity care commanded by a purposive reading of Article 43 of the Constitution includes not only clinical components, but also ensuring positive and affirming care experiences for women during childbirth. All women have the right to dignified, respectful health care throughout pregnancy and childbirth as well as freedom from violence and discrimination. Josephine’s rights in this regard were outrageously and grossly violated.*

At the systemic level, the appellants are also liable for the eminently clear failure to establish a human rights-based clinical protocols for women during child birth. Such protocols, if available, includes not only clinical components but outline measures to ensure all women are accorded the right to dignified, respectful health care throughout pregnancy and childbirth as well as freedom from violence and discrimination. This includes the provision of respectful maternity care that maintains women’s dignity, privacy and confidentiality, enables informed choice and continuous support throughout labour and childbirth, and ensures freedom from mistreatment.

Health systems, such as the appellants', must be held accountable for the mistreatment of women during childbirth, and for failure to effectively prevent and respond to these harmful practices. Beyond providing resources to ensure quality, accessible maternal health care, the appellants were obligated to provide clear policies to ensure dignified, respectful health care throughout pregnancy and childbirth for all women."

In the present case, the appellants violated Josephine's right to dignified, respectful health care during her childbirth, as well as her right to be free from violence and discrimination. Josephine was subjected to abuse, neglect and disrespect during childbirth. Additionally, she was denied her right to be equal in dignity; to be free to seek; and receive information; and to be free from discrimination. In short, Josephine was denied the right to enjoy the highest attainable standard of physical and mental health, including her sexual and reproductive health. While the appellants are vicariously liable to the direct abuse suffered by Josephine in the hands of the hospital, they are, additionally, directly liable for the failure to put in place specific policies to promote respectful maternal care and to ensure that those policies translated into meaningful action through implementation."

5. Significance of this case

This case emphasizes the need for organizing and managing health systems that respect women's sexual and reproductive health and other human rights, such as their right to dignity. This entails adopting policies promoting respectful maternal care and ensuring their meaningful implementation.