RIGHT TO HEALTH BENCH BOOK

Select Decisions, Issues and Themes

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ABBREVIATIONS

AAAQ	- Availability, Accessibility, Acceptability, and Good Quality
ACE	- Affordable Clean Energy
ACERWC	- The African Committee of Experts on the Rights and Welfare of the Child
ACHPR	- African Charter on Human and Peoples' Rights
AI	- Artificial Intelligence
CAS	- Court of Arbitration for Sport
CAT	- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	- Convention on the Elimination of all Forms of Discrimination Against Women
CEHURD	- Center for Health, Human Rights and Development
CESCR	- Committee on Economic, Social and Cultural Rights
CRC	- Committee on the Rights of the Child
DMS	- Director of Medical Services
DNACPR	-D o Not Attempt Cardio-Pulmonary Resuscitation
ECtHR	- European Court of Human Rights
GHG	- Greenhouse Gas
GMO	- Genetically Modified Organisms
HRH	- Human Resources for Health
ICCPR	- International Covenant on Civil and Political Rights
ICESCR	- International Covenant on Economic Social and Cultural Rights
ICPD	- International Conference on Population and Development
ICU	- Intensive Care Unit
IOT	- Internet of Things
IT	- Information Technology
KDHS	- Kenya Demographic Health Survey
KEMS	- Kenya Medical Supplies Authority
KHFA	- Kenya Harmonized Health Facility Assessment
KMPDC	- Kenya Medical Practitioners and Dentists Council
KNH	- Kenyatta National Hospital
KOGS	- Kenya Obstetrical and Gynaecological Society

KQMH - Kenya Quality Model for Health
MEPA - Montana Environmental Policy Act
OHCHR - Office of the High Commissioner for Human Rights
PLWH - Persons Living With HIV

RBDA - Registration of Births and Deaths Act
SDGs - Sustainable Development Goals
SRHR - Sexual and Reproductive Health Rights
TB - Tuberculosis
TCIDT - Torture, Cruel, Inhuman, and Degrading Treatment or Punishment
UDHR - Universal Declaration of Human Rights
UHC - Universal Health Coverage
UKV&I - The United Kingdom Visa & Immigration Service
UNCRC - Convention on the Rights of the Child
WHO - World Health Organization
WHO - World Health Organisation

FOREWORD

The Constitution of Kenya enshrines the right to health under the Bill of Rights. Specifically, Article 43 (1) (a) provides that every person has the right to the highest attainable standard of health, including the right to health care services and reproductive health care, and sub-Article 2 provides that a person shall not be denied emergency medical treatment.

Further, Articles 23 and 165 of the Constitution grant the High Court jurisdiction to determine applications for redress of denial, violation, infringement of, or threat to a right or fundamental freedom in the Bill of Rights. Similarly, Article 22 gives every person the right to institute Court proceedings for the enforcement of fundamental rights and freedoms. Importantly, Article 20 (3) (b) requires the Court to adopt an interpretation that most favours the enforcement of a right or fundamental freedom. To remedy a violation, a court of law may declare rights, issue an injunction to stop the violation of rights, issue an order for compensation, and declare the invalidity of any laws. Therefore, the Judiciary plays a critical role in enforcing the right to health and defining critical aspects on the right to health.

Notably, before the promulgation of the Constitution of Kenya 2010, social and economic rights were not justiciable. However, with the promulgation of the Constitution of Kenya 2010, jurisprudence on the right to health is rapidly developing, with several cases instituted based on claims of violation or infringement on the right to health. These claims have presented an opportunity for the courts to interpret and apply the Constitution, giving meaning to the right to health as guaranteed in the Bill of Rights.

This Health Bench Book examines and analyses emerging courts' jurisprudence on the right to health. It is also a guide for judicial officers in adjudicating the right to health, as well as being useful to all players in the legal and justice sector, be it legal practitioners, academia, civil society, and members of the public. The book examines the legal and policy frameworks and authorities on health rights. Finally, it is a tool for continued engagement with the Judiciary in the dispensation of justice and development of jurisprudence on the right to health.

Hon. Justice (Dr.) Smokin Wanjala

Supreme Court Judge and Director, Kenya Judiciary Academy

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Protas Saende
Chairman, ICJ Kenya Council

ABOUT THE BENCH BOOK

This Bench Book is organized in the following sections:

Section 1: Introduction

The right to health is a fundamental human right that is enshrined in the Constitution of Kenya, 2010. The government has an obligation to ensure that all Kenyans have access to quality and affordable healthcare.

The introductory section of this Bench Book sets the context for the exploration of the right to health. It unpacks the multifaceted concept of the right to health and highlights obligations that fall upon the State in the realization of this fundamental right within the Kenyan context. This section also explores the principles of progressive realization of the right to health.

Section 2: Case Law

Section two constitutes the core of the document, dissecting various facets of healthcare through the lens of case law. It covers an array of critical issues including:

- Access to Healthcare Services
- Quality of Healthcare, Patient Safety & Professional Accountability
- Public Health, Public Health Emergencies and Security
- Sexual and Reproductive Health Rights
- Health Financing and Financial Protection
- Autonomy and Consent to Treatment
- Health Information, Health Products and Health Technologies
- Human Resources for Health
- Social Determinants of Health
- Mental Health
- Leadership and Governance in Health
- Traditional, Alternative and Complementary Medicine

Each area is enriched with case law that offer insights into the complexities of healthcare rights.

Section 3: Judicial Interventions

This section highlights the pivotal role played by the Judiciary in safeguarding healthcare rights. It provides an overview of how the Judiciary actively intervenes in cases pertaining to the right to health. This section underscores the Judiciary's critical function as the guardian of constitutional health-related rights, ensuring that justice prevails in matters of public health and individual well-being.

SECTION ONE: INTRODUCTION

BACKGROUND

The right to health has been firmly enshrined in the Bill of Rights of the Constitution of Kenya 2010. Article 43(1)(a) of the Constitution entitles every person to the right to the highest attainable standard of health which includes health services including reproductive health care. The right is also found in various international and regional human rights instruments and Covenants, many of which Kenya is a signatory and has ratified. By virtue of Articles 2(5) and (6) of the Constitution, these ratified instruments and general principles of international law, become part of Kenya's domestic law which Courts can use to interpret and enforce the right to health.

The Right to Health Bench Book: Select Decisions, Issues, and Themes arising from the right to health serves as a comprehensive guide for judges, magistrates, legal practitioners, academics, paralegals, legal researchers, civil society actors and the general public in understanding the right to health within the domestic, regional and international legal framework. This Bench Book aims to provide an invaluable resource that examines select decisions, explores critical issues, and delves into emerging themes related to the right to health.

This Bench Book recognizes the significant and promising role that the Judiciary plays in defining the scope of the right to health and ensuring its realisation and implementation, particularly in a resource restrained setting such as that of Kenya. The Courts are useful in translating the rights that are contained in the Constitution and the various legislative and policy documents into tangible entitlements that citizens can enjoy. This can be done through a deliberative process that recognises and respects the roles of the other arms of government in the realisation of the right to health.

The presumption that constitutionalizing and legislating the right to health, as well as placing it within policy and programmatic government activities, would enhance its realisation, has proved a weak assumption especially in the wake of various violations of the right, both from a medical and non – medical perspective. Courts provide the link between what is contained on paper and what is translated into actual entitlements. They evaluate government decisions based on its constitutional and legislative obligations. They also assess the reasonableness of executive and parliamentary actions and grant effective remedies for the various forms of violations of the right to health.

As an independent and impartial institution mandated to deliver fair, effective and efficient administration of justice, the Judiciary in Kenya thus has been developing knowledge products

for the continuous capacity building of judicial officers. One of these products is this Bench Book, that provides a comprehensive guide and informational source in this area of law. This Bench Book is a collaboration between ICJ Kenya, the Kenya Judiciary Academy and the Center for Reproductive Rights as a legal resource guide on right to health issues.

UNPACKING THE CONTENT OF THE RIGHT TO HEALTH

Health has been recognized in various international documents as a fundamental entitlement of every human being, the attainment of which should be prioritised. By virtue of Articles 2(5) and 2(6) of the Constitution of Kenya, 2010, the general rules of international law and treaties and conventions ratified by Kenya form part of the laws of Kenya.

The term health has been defined by the Constitution of the World Health Organisation (WHO) as, "*A state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.*"

The Committee on Economic, Social and Cultural Rights (CESCR) also recognises that the notion of health has widened in scope and takes into account several factors such as resource distribution and even gender differences, and other social and politically related issues such as violence and armed conflict.[1]

The Preamble to the WHO Constitution goes on to provide that, "*The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.*" [2]

The 1978 Declaration of Alma – Ata on Primary Health Care stated, "*The attainment of the highest level of health is a most important world – wide social goal whose realisation requires the action of many other social and economic sectors in addition to the health sector.*" [3]

Health is also contained in the Universal Declaration of Human Rights (UDHR) as an important

[1] General Comment No 14, para 10.
[2] UNGA, 'The Constitution of the World Health Organisation' (entry into force 17 November 1947) A/RES/131, Preamble.
[3] WHO, 'Declaration of Alma – Ata' (International Conference on Primary Health Care, 12 September 1978), art. 1

and essential component of an adequate standard of living. [4] Article 25 states that, "*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*"

In 1966, the right to health was formulated as a stand-alone right within the International Covenant of Economic Social and Cultural Rights (ICESCR), which State Parties are obliged to respect, protect and fulfil. Article 12 (1) of the ICESCR provides that, "*The State Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*"

The right is contained in various other international and regional instruments, some of which protect the right to health generally, while others are more tailored to specific groups of people, such as children, women, etc. The main international and regional treaties applicable in Kenya are:

Article 24 (1) of the Convention of the Rights of the Child (CRC) provides that, "*State Parties recognise the right of the child to the enjoyment of the highest standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*"

Article 5 (e) (iv) of the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) provides that, "*In compliance with the fundamental obligations laid down in Article 2 of this Convention, State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin to equality before the law notably in the enjoyment of the following rights: The right to public health, medical care, social security and social services.*"

Article 11(1)(f) of the Convention on the Elimination of all Forms of Discrimination against

[4] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art. 25(1)

Women (CEDAW) states that, "*State parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights in particular: The right to protection of health and safety in working conditions, including the safeguarding of the function of reproduction.*"

Further, Article 12 (1) of the CEDAW provides that, *"State Parties shall take all appropriate measures to eliminate discrimination against women in the field of healthcare in order to ensure, on a basis of equality of men and women, access to healthcare services, including those related to family planning."*

Article 12(2) also provides that,*"Notwithstanding the provisions of paragraph 1 of this Article, State Parties shall ensure to women appropriate services in connection with pregnancy confinement and the post – natal period granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."*

The African Charter on Human and People's Rights (Banjul Charter) provides, at Article 16, that, "*Every individual shall have the right to enjoy the best attainable state of physical and mental health. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."*

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in Article 14 provides that, "*State Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted."*

However, these instruments do little, if at all, to provide an interpretation on the normative content of the right.[5] The Committee on Economic Social and Cultural Rights (CESCR), created in 1985[6] to monitor the implementation of the ICESCR, has provided the most comprehensive interpretation of the right to health. In its famed General Comment, No.14, the Committee has unpacked the content of the right to health in this way:

[5] Stephen P. Marks, 'Normative Expansion of the Right to Health and the Proliferation of Human Rights' (2016) 49 The George Washington International Law Review 101, 106-107

[6] Economic and Social Council Res. 1985/17 (May 28, 1985)

a. The right to health is INCLUSIVE – it is a right that not only takes into account timely and appropriate healthcare services but also includes and integrates other interrelated rights in the international Bill of Rights such as the right to food, housing, work, education, human dignity, life, non – discrimination, equality, privacy, access to information, freedom of association, assembly and movement. It also takes into account the social and underlying determinants of health. These are the socio-economic factors and conditions that enable people to live a healthy life. These include safe and potable water, adequate supply of safe food, nutrition, housing, healthy occupational and environmental conditions, access to health-related information including on sexual and reproductive health, adequate sanitation, etc.

b. The right to health entails FREEDOMS and ENTITLEMENTS – This means that people have the right to control their own health and bodies. They should be free from interference such as torture or non – consensual medical treatment and experimentation. People are also entitled to health protection and the opportunity to enjoy the highest attainable level of health. They are also entitled to the facilities, goods, services and conditions that are necessary for the realisation of the highest attainable standard of health.

c. The right to health entails the attainment of the Availability, Accessibility, Acceptability, and Quality (AAAQ) Framework. See Figure 1 below.

Figure 1: AAAQ Framework

Availability	Accessibility	Acceptability	Quality
Adequate facilities, goods, services, commodities, drugs, infrastructure and personnel Availability of underlying determinants of health e.g. safe water, adequate sanitation, etc.	Non-discrimination Physical accessibility Economical accessibility (affordability) Information accessibility	Medical Ethics Cultural Appropriateness Standards Responsive	Safe Timely Efficient Equitable Effective Patient Centred Integrated

First, this means that healthcare facilities, commodities, goods, services, personnel, infrastructure and programmes must be AVAILABLE in sufficient quantity in a particular State. The sufficiency of these resources will vary depending on the developmental level of the State. The availability of resources also extends to the underlying determinants of health such as water, sanitation facilities, etc.

Second, healthcare must be ACCESSIBLE. Health facilities, goods and services must be accessible in terms of equality of access, physical accessibility, economic/cost accessibility and information accessibility.

Third, the right to health entails ACCEPTABILITY. This means that there must be respect for medical ethics as well as cultural norms and ethics. Medical services and products must be respectful and sensitive of the culture of the communities in which they are being operationalized. They must be sensitive to various issues including gender. Confidentiality and privacy when dealing with various consumers of health services also must be maintained.

QUALITY health care entails effectiveness – providing evidence-based healthcare services to those who need them; Safety – avoiding harm to people for whom the care is intended; and People-centeredness – providing care that responds to individual preferences, needs and values.[7] The quality imperative for the right to health implies that healthcare services must also be scientifically and medically appropriate and of good quality.[8] To realize the benefits of quality health care, health services must be timely; equitable, leaving no one behind; integrated, making available the full range of health services throughout the life course; and efficient, maximizing the benefit of available resources and avoiding waste.[9] Ensuring quality of care requires skilled medical personnel, availability of scientifically proven and efficacious drugs, commodities and equipment, appropriate health facilities and infrastructure, safe and potable water, and adequate sanitation. [10]

[7] https://www.who.int/health-topics/quality-of-care#tab=tab_1
[8] General Comment 14 para 12 (d).
[9] https://www.who.int/health-topics/quality-of-care#tab=tab_1
[10] Mbazira C, (2009) Litigating Socio-Economic Rights in South Africa: A choice between Corrective and Distributive Justice (Pretoria University Law Press 2009) (n 14).

The Obligations of the State in the Realisation of the Right to Health in Kenya

The obligations of the State in the realisation of the right to health are spelt out in Article 21(1) of the Constitution of Kenya, which states that, "*It is the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms of the Bill of Rights.*"

The Constitution goes on to provide that, "*The State shall take legislative, policy and other measures including the setting of standard, to achieve the progressive realisation of the rights guaranteed under Article 43.*"

These obligations under the Constitution of Kenya are buttressed by the obligations of State Parties under Article 2(1) of the ICESCR where, "*Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*"

General Comment No 3 of the Committee on Economic Social and Cultural Rights gives further guidance on the nature of State Parties' obligations under the ICESCR.

The obligation to ***respect*** [11] means that the State should refrain from doing anything that would directly or indirectly interfere with the enjoyment of the right to health. The obligation to protect [12] requires States to ensure that third parties do not interfere with the right to health of its citizens. While the obligation to ***fulfil*** [13] contains the obligations to facilitate, provide and promote the right to health and requires the State to adopt appropriate legislation and budgetary, promotional, judicial, administrative and other measures to ensure the realisation of the right to health.

[11] CESCR General Comment No 14 para 34
[12] CESCR General Comment No 14, para 35
[13] CESCR General Comment No 14, para 36 and 37

Progressive Realisation of the Right to Health

The concept of progressive realisation is seen as a facilitative 'tool' that takes into account the economic and developmental realities that member States face in meeting their obligations under the International Covenant of Economic Social and Cultural Rights.[14] However, even with this facilitation, progressive realisation should not be seen as depriving the economic and social right of all meaningful content.[15] This Bench Book focuses on this particular obligation because the government in Kenya has often used progressive realisation as an excuse for not fulfilling its mandate in implementing or protecting socio-economic rights in the country.

The ICESCR places an obligation on member States to 'take steps....to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means.'[16] With respect to the right to health, these steps must be 'deliberate, concrete and targeted towards the full realisation of the right to health.' [17]

The term 'progressive' denotes that the State must make concerted efforts and to 'move as expeditiously and effectively as possible' to put in place measures (policy, legislative, judicial and other appropriate measures) that realise and not hamper the right in question.[18] Resource restraints are often raised as a reason why many developing countries are not making progress in the meaningful realisation of this right. However, as Noriega rightly points out, "*It is worth observing that often the obstacles to improving health protection have more to do with poor allocation, distribution or efficiency in the management of available resources than lack of resources.*" [19]

[14] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 3' on 'The Nature of State Parties' Obligations (Art. 2, Para. 1 of the Covenant)' (14 December 1990) UN Doc. E/1991/23, para 9 available at https://www.refworld.org/docid/4538838e10.html date of access

[15] CESCR General Comment No. 3, para 9.

[16] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, Article 2(1)

[17] UN Committee on Economic Social and Cultural Rights (CESCR) 'General Comment No. 14' on 'The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant' (11 August 2000) UN Doc E/C. 12/2000/4, para 30 available at https://www.refworld.org/docid/4538838d0.html

[18] UN Committee on Economic Social and Cultural Rights, 'General Comment No 9' on 'the Domestic Application of the ICESCR' (19th Session, 1998) UN Doc E/C.12/1998/24 para 10.

[19] Illari Aragon Noriega, 'Judicial Review of the Right to Health and its Progressive Realisation' UCL Journal of Law and Jurisprudence year of publication? Vol/issue number? 166 at 171; see also International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, para 10 available at https://www.refworld.org/docid/48abd5730.html

In addition to this, Article 20 (5) (a) of the Constitution of Kenya 2010, provides that, "*In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a Court, tribunal or other authority shall be guided by the following principles –*

a) It is the responsibility of the State to show that the resources are not available"

Certain points need to be noted about applying the principle of progressive realisation of the right to health:

a. Progressive realisation does not alter the legal obligations of States....Therefore the burden is on the State to demonstrate that it is making measurable progress towards full realisation of the rights in question. [20] It means that despite progressive realisation being a flexibility device, States cannot use it as an excuse for not complying with or diminishing their obligations.

b. Progressive realisation is not to be measured only in terms of the time it takes to realise the socio-economic right, (e.g., the right to health), but also in terms of the nature of measures that are adopted. Specific positive measures need to be taken and not merely restraint from negative actions. They should be measures that lead to tangible, sustainable and beneficial results that can be enjoyed by the people.

c. In spite of the limited resources that developing countries like Kenya face, there are immediate measures that should be taken in order to ensure that progressive realisation is taking place. For example, 'the elimination of discrimination and improvements in the legal and juridical systems do not necessarily pose a burdensome drain on resources.' [21]

d. Progressive realisation does not necessarily entail an increase in resources, but the efficient use and management of already existing ones. It is not the speed of realisation that matters; rather, it is the concrete and deliberate forward interpretation, development, application, and enforcement of the right to health that is important.

[20] Maastricht Guidelines, para 8.
[21] see https://www.escr-net.org/resources/progressive-realisation-and-non-regression

e. Progressive realisation entails meaningful participation of the different stakeholders and sectors in the formulation of appropriate measures to realise the right to health. It involves the use of a multi-sectoral and interdisciplinary approach to the right to health. Courts should be able to integrate evidence from relevant experts and stakeholders in the relevant sectors represented in the cases before them for determination. For example, the Court can require economic experts to speak to the implications of an increase in remuneration for health workers on the economy. [22]

Measuring Progressive Realisation

One of the controversies of the principle of progressive is knowing how progressive realisation is to be measured. There are several judicial pronouncements on the concept of progressive realisation, even by the highest Court of the land in Kenya– the Supreme Court which stated that:

We believe that the expression "progressive realisation" is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, a certain set of supportive measures are taken by the State. The exact shape of such measures will vary, depending on the nature of the right in question, as well as the prevailing social, economic, cultural and political environment. Such supportive measures may involve legislative, policy or programme initiatives including affirmative action. [23]

The Courts seem well aware of the temptation by the State to use the concept as an excuse not to take concrete measures. However, as Lenaola, J states in the case of MMM v Permanent Secretary, Ministry of Education & 2 Others, [24] it is not enough for the State to argue that it is 'doing its best'. Concrete measures and guidelines need to be put in place. They should not be 'mere paper policies but deliberate concrete steps taken...for all on a non – discriminatory basis, deployment of maximum available resources to ensure realisation, avoid retrogressive measures and monitor enjoyment of the right.'[25]

[22] An example can be drawn from the education sector in Kenya in the case of *Teacher Service Commission v Kenya National Union of Teachers & 3 others* [2015] eKLR. In this case, which followed a nationwide strike that had been called by the teachers' unions, the Court required evidence from the Salaries and Remuneration Commission and the Central Planning and Monitoring Unit to determine whether and what the teachers could be paid in a sustainable manner.

[23] *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate Advisory Opinion* No. 2 of 2012 [2012] eKLR, at para 53.

[24] MMM v Permanent Secretary Ministry of Education & 2 Others [2013]eKLR, paras 18 to 20

[25] Per D.S. Majanja, J in Gabriel Nyabola v Attorney General and 2 others [2014] eKLR, at para 40.

Political and financial commitment needs to be demonstrated. However, the challenge of assessing whether the measures taken by the State are acceptable remains.

Lenaola, J further states that, "*Measuring a State's performance in the implementation of the right to [education] is an onerous task in the absence of generally accepted criteria, benchmarks and methodology for evaluating the adequacy and effectiveness of steps taken towards its realisation. Developing the core competence for measuring implementation is decidedly crucial considering all variables involved and the different spheres of Government involved in this determination."* [26]

He goes on, "*The Respondents can avoid an avalanche of litigation by setting out clear policies that are indicative of their appreciation that socio-economic rights are here to stay. The defence of progressive realisation may not be here for too long."* [27]

The obligation to fulfil seeks to ensure State accountability for resource allocation and the measures that are adopted for progressive realisation of the right to health. It is not sufficient to put in legislative measures alone. Evident and measurable steps have to be put in place to ensure the meaningful implementation of the statutory obligations.

The Prohibition on Retrogression

A specific component of the notion of progressive realisation is the prohibition of retrogressive measures, as well as limitation of the rights in question. Any limitations that a State places must respond to a pressing public and social need, pursue a legitimate aim and be proportionate to that aim. Retrogressive measures have been particularly prohibited. The burden of proving that retrogressive measures are necessary lies on the State, and this is after 'the most careful consideration of all the alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources.' [28] The criteria for justifying any retrogressive measures are that they must be temporary, necessary and proportionate, non – discriminatory and protect the minimum core content of the right in question.

[26] Ibid, at para 20.

[27] The case concerned the right to education, but the approach and principles can be equally applied to the right to health.

[28] See General Comment No. 3, para 9 and General Comment No. 13, para 45. See also para 9 of the CESCR Statement on 'An Evaluation of the Obligation to take steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant' CESCR E/C.12/2007/1 10 May 2007.

SECTION TWO: CASE LAW

ACCESS TO HEALTH CARE

Access to healthcare services is one of the components of the AAAQ Framework of the interpretation of the right to health as set out by the Committee of Economic Social and Cultural Rights (CESCR). Accessibility entails access to not only healthcare facilities, but also to services and products and particularly to the most vulnerable and marginalised in society. CESCR envisages that accessibility also entails the social determinants of health such as safe and potable water and adequate sanitation services. CESCR explains accessibility as entailing information accessibility which includes the right to seek, receive and impart information and ideas concerning health issues.

Accessibility also entails physical accessibility of health facilities, goods and services. These facilities should be within reach of those who need them, especially the most vulnerable and marginalised. There should be economic accessibility, meaning that services and products should be affordable for citizens, whether they are publicly or privately provided.

Privatisation of healthcare services is arguably a barrier to access to healthcare services due to the high costs of treatment and inadequate regulation of the sector. The privatisation of healthcare services has also elicited debates on whether private healthcare facilities are subject to the constitutional duty to uphold the right to the highest attainable standard of health, including healthcare services to patients. The debate is exacerbated by the conflicting rights that occur in private healthcare settings – the right of the patient to healthcare services versus the right of the facility to property and payment. The cases in this section will demonstrate how Courts have dealt with this dilemma.

Another important aspect of access to healthcare services is access to emergency medical care or treatment. Emergency medical care/treatment is an important component of the right to the highest attainable standard of health. Article 43(2) of the Constitution of Kenya 2010 provides that, *"A person shall not be denied emergency medical treatment."*

To this end and to implement this Constitutional provision, the Ministry of Health has formulated the Kenya Emergency Medical Care Policy and the Emergency Medical Care Strategy. [29]

Emergency treatment has been defined in the Health Act 2017, as *"necessary immediate healthcare that must be administered to prevent death or worsening of a medical situation"* [30] Section 7 (2) of the Health Act 2017 provides the crucial components of emergency medical treatment as including:

a) Pre – hospital care

b) Stabilising the health status of the individual or

c) Arranging for the referral in cases, where the health provider of first call does not have facilities or capability to stabilise the health status of the victim

The Kenya Health Policy (2014 – 2030) also defines a health emergency as, "*Health threats that are of sudden onset in nature, are beyond the capacity of the individual/community to manage and are life threatening or will lead to irreversible damage to the health of the individual/ community if not addressed."*

Further, the Kenya Health Policy defines emergency treatment as,*"Healthcare services necessary to prevent and manage the damaging health effects due to an emergency situation. It involves services across all aspects of healthcare services."*

Other documents that make provision for the right to emergency medical treatment are the Kenya National Patient's Charter[31] and the Code of Professional Conduct and Discipline.[32] The National Patient's Charter provides that every person, patient or client has a right to access healthcare and a right to receive emergency treatment in any health facility in emergency situations, irrespective of the patient's ability to pay.

[29] Ministry of Health, 'Kenya Emergency Medical Care Policy 2020-2030' available at https://www.emergencymedicinekenya.org/wp-content/uploads/2020/11/KENYA-EMERGENCY-MEDICAL-CARE-POLICY.pdf and Ministry of Health, 'Emergency Medical Care Strategy 2020 – 2025' available at https://www.emergencymedicinekenya.org/wp-content/uploads/2020/11/KENYA-EMERGENCY-MEDICAL-EMERGNCY-STRATEGY_2020-2025.pdf

[30] Health Act No. 21 of 2017, sec 2.

[31] Ministry of Health, 'The Kenya National Patients' Rights Charter' (1st edition, October 2013) available at https://kmpdc.go.ke/resources/PATIENTS_CHARTER_2013.pdf

[32] Kenya Medical Practitioners and Dentists Council, 'The Code of Professional Conduct and Discipline' (6th edition, January 2012) available at https://kmpdc.go.ke/resources/Code-of-Professional-Conduct-and-Discipline-6th-Edition.pdf

The Alex Madaga case[33] ruling by the Medical Practitioners and Dentist Board Professional Conduct Committee brought to the fore the need for the enforcement and implementation of the right to access emergency medical treatment as part of the right to the highest attainable standard of health. Alex Madaga was a casual labourer who died in an ambulance after eighteen (18) hours of waiting for medical attention. Some of the private hospitals where he sought emergency medical care refused to admit him until he deposited at least two hundred thousand Kenya shillings (Kshs. 200,000). Others did not have the necessary facilities (Intensive Care Unit (ICU) facilities and beds). Even Kenyatta National Hospital (KNH) did not have ICU bed space at first. When he was finally rerouted to KNH, after seeking assistance in other private hospitals in vain, and after pushing for him to be admitted, Madaga was admitted to the ICU. He had been in an ambulance for eighteen hours without being attended to by a physician. He succumbed to his injuries a few days later.

A complaint was made to the Medical Practitioners and Dentists Board and a ruling was delivered in favour of his widow.[34] The KNH was reprimanded for failing to ensure that Madaga was appropriately assessed by a consultant with a specific prognosis explained to his relatives. With regard to Coptic Hospital, the Committee found that the hospital had violated the Constitution by failing to provide emergency medical treatment to Madaga.

One key feature of the Ruling of the Committee is the observation that, "*...private hospitals are expected under the Constitution of the Republic of Kenya and the law to offer emergency treatment to patients but there are no guidelines on payment for such services in the event affected patients are unable to pay. In that regard the Committee directs the Medical Practitioners and Dentists Board to take immediate steps to liaise with the Ministry of Health to facilitate the creation of guidelines for payment of emergency treatment.*" [35]

[33] Inquiry by the Professional Conduct Committee between Jessica Moraa on Behalf of the Late Alex Madaga Matini and the Kenyatta National Hospital and Coptic Hospital Professional Conduct Committee Care No. 2 of 2016. See https://www.kelinkenya.org/wp-content/uploads/2017/11/PCC-ALEX-MADAGA-RULING.pdf

[34] Inquiry by the Professional Conduct Committee between Jessica Moraa on Behalf of the Late Alex Madaga Matini and the Kenyatta National Hospital and Coptic Hospital Professional Conduct Committee Care No. 2 of 2016. https://www.kelinkenya.org/wp-content/uploads/2017/11/PCC-ALEX-MADAGA-RULING.pdf

[35] Para 97 of the Committee Ruling

The Madaga case also triggered a critique of the referral and transfer practice of public hospitals, particularly the KNH which was one of the Respondents in the complaint. There was a lack of timely and effective referral measures which violated both the Constitution and the Kenya Health Sector Referral Implementation Guidelines.[36] The Madaga case was also tried in the Chief Magistrate's Court, [37] where compensation of Kshs. 2.5 million was awarded to his widow as his personal representative. [38]

There are several challenges that have been identified in implementing the right to access emergency health services in Kenya.[39] The challenge for the Judiciary in this area is to reconcile the right to access emergency medical treatment with the duty of the State to fulfil this right amidst resource constraints.

Cost of Access to HealthCare and Adequacy, Availability and Access to Healthcare Services

The jurisprudence in this section highlights the delicate balancing act the Courts have had to carry out between upholding the right to health and not infringing on the mandate given to the Executive to determine how to make the best use of scarce resources in the health sector vis-a-vis other essential sectors of the economy. The Courts, upholding the separation of powers doctrine, have asserted that decisions on how to use scarce resources are policy decisions, and it is not within the province of the Courts' jurisdiction to venture in these.

Luco Njagi & 21 Others v Ministry of Health & 2 others Petition No. 218 of 2013 Consolidated with Petition No 451 of 2013 [2015] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Ngugi, J

28 January 2015

Right to the highest attainable standard of health – Cost of medical dialysis – Lack of financial access to medical dialysis – Restriction on payments under National Health Insurance Fund – Inadequate machines and facilities – Prioritisation policy of medical dialysis services -

[36] Ministry of Health, 'Kenya Health Sector Referral Implementation Guidelines' (2014, 1st edition) available at

[37] Bainito Mateny Ichemi and Jesca Moraa Maosa v Josephine Mbuthia and Zacheus Kuria Mungai (CMCC No. 6426 of 2016 at Chief Magistrates Court in Nairobi (Unreported))

[38] Bainito Mateny Ichemi and Jesca Moraa Maosa v Josephine Mbuthia and Zacheus Kuria Munga CMCC No. 6426 of 2016 at the Chief Magistrates Court in Nairobi (Unreported).

[39] Kenya National Commission on Human Rights 'The Right to Emergency Care in Health Systems in Kenya: A Case Study of Laikipia and Nyandarua Counties' (2018) available at https://www.knchr.org/Portals/0/EcosocReports/Right%20to%20Emergency%20Health%20Care.pdf?ver=2019-04-29-163956-390

Obligation of the State – Progressive realisation of the right to health - Violation of right to health – Link between right to health and rights to dignity and life

Summary of the facts

The Petitioners had been undergoing renal treatment at the Kenyatta National Hospital (KNH) which only had six (6) working machines that serviced all patients. Since preference was given to in – patients, many times, the outpatients could not receive the service which was required at least three times a week. They were therefore unable to access treatment at KNH due to the inadequate machines or the failure of those that were there. It was also the case that failure to include the cost of dialysis treatment and terminal illnesses was a violation of the constitutional right to health. The Petitioners therefore sought declaratory orders that, inter alia, the failure of the 1st and 2nd Respondents to provide adequate dialysis equipment was a violation of their right to health. They also sought in order that that 1st Respondent would fully pay, or in the alternative, subsidise their access to the compulsory medical analysis treatment at designated (8) private healthcare facilities.

Issues for determination

Among the issues for determination was whether there was a violation of the Petitioners' right to health due to their inability to access essential medical dialysis at KNH.

Determination

The Court recognised that there was a need to balance between the needs of the Petitioners on the one hand and a public health insurance system that is contribution based. However, the Court could not interfere with matters of policy, which under Article 20(5) of the Constitution ought to be left to the State. The Court did not have the requisite information to make a determination on how to make the best use of scarce resources in the health sector vis-a-vis other essential sectors of the economy. The Court found that there was no violation of the right to health and that the measures taken by the Respondents to ensure access to haemodialysis by the Petitioners were reasonable in the circumstances.

Significance of the case

The case brought out the dilemma that Courts face when presented with litigation challenging the manner in which the use of scarce resources has been prioritised by the State. When Courts

are called upon to examine the constitutionality of the policies of the State or State departments, they have to be careful not to infringe upon the doctrine of separation of powers. Decisions about how these scarce resources are to be allocated are policy decisions, which the Courts should not venture into. Heavy reliance was placed on the sentiments of the Constitutional Court in the South African case of *Soobramoney v Minister of Health, KwaZulu Natal* **1997 (12) BCLR 1696,** [40] where the Court stated that: *"What is apparent from these provisions is that the obligations imposed on the State by Sections 26 and 27 in regard to access to housing, healthcare, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which Section 27(3) must be construed."* [41]

The Court went on to note that, "*A Court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."* [42]

Article 20(5) (b) of the Constitution of Kenya provides that: "*In allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to the prevailing circumstances, including the vulnerability of particular groups or individuals."*

In light of this provision, the Court in the ***Luco Njagi*** case decided that the best placed persons to make a determination with regard to whom, between chronically ill renal patients such as the Petitioners and the in – patients with acute renal failure, it should give priority of provision of dialysis, would be the Respondents.

[40] http://www.saflii.org/za/cases/ZACC/1997/17.html
[41] Ibid para 11
[42] Ibid para 29

Matthew Okwanda v Minister of Health and Medical Services & Others Petition No. 94 of 2012 [2013] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Majanja, J

17 May 2013

Right to the highest attainable standard of health - access to medicines – elderly patients – cost of management of health – poor and marginalised patients-progressive realisation of the right to health – accuracy of pleadings for a violation of a fundamental right

Summary of facts

The Petitioner was a 68-year-old man suffering from diabetes and also a terminal illness known as Benign Hypertrophy, both of which required specialised treatment especially in light of his advanced age. The Petitioner sought the intervention of the Court to enforce his right to the highest attainable standard of health by seeking medicines and drugs for his condition as well as free treatment at any government – run hospital.

Issues for determination

Among the issues for determination was whether in the circumstances, the Respondents have fulfilled their obligation under Article 43(1) of the Constitution to observe, respect, promote and fulfil the right to health.

Determination

In declining to grant the Petitioner the relief he sought for, the Court found that the Petitioner had not proved that the State had breached its constitutional obligations with respect to provision of health services in a manner that violated the right to the highest attainable standard of health. Such violations had to be pleaded with such a level of accuracy that the other party could respond to the issues raised.

The Court also noted that the right to the highest attainable standard of health was based on a standard which had to be considered holistically bearing in mind the requirement for progressive realisation of the right. The Court also emphasised that matters to do with policy decisions were beyond the Court's mandate.

Significance of the case

This case was among the first cases testing the interpretation and implementation of Article

43 (1)(a) of the Constitution on the right to the highest attainable standard of health. The case demonstrates the caution with which Courts tread when faced with litigation on violation of fundamental rights – particularly socio – economic rights like the right to health. The caution is seen in their reluctance to challenge the policy decisions that the Executive has to make on how scarce resources are to be utilised and distributed.

Karen Hospital v Michael Omusula (Being sued as next of Kin, Representative and Husband/Spouse of Jackyline Nelimamutaki) Miscellaneous Application No. E010 of 2020 [2021] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Makau, J

3 June 2021

Right to health – Cost of healthcare – Inability to pay – Access to healthcare services in private health facilities

Summary of the facts

The applicant hospital admitted the Respondent's wife who after complications developed during her elective caesarean section, had to undergo expensive post – operative treatment, physiotherapy and occupational therapy. This caused the hospital bill to go up to the tune of about Kshs. 23 million. This was an amount that the patient and the family were unable to pay. The applicant hospital therefore sought orders that it be allowed to discharge the Respondent's wife and for her to either continue being attended through home-based care or to be referred and transferred to Kenyatta National Hospital for further treatment and care.

Issue for determination

Among the issues for determination were whether the applicant had followed the law in seeking to discharge the patient from its facility and whether the applicant had a right and/or should be allowed to transfer the patient to Kenyatta National Hospital or Home-Based Care.

Determination

The Court granted the order allowing the applicant hospital to discharge the Respondent's wife in order that she be attended to through home-based care, or at a facility that the husband would indicate or in the alternative, for the applicant hospital to refer the patient to Kenyatta National Hospital for further treatment.

Significance of the case

The case brought out the dilemma that Courts face when it comes to enforcing the right to health in private healthcare settings. The Court in this case was faced with the dilemma of upholding the right of the patient to receive the specialised treatment from a private hospital, and the right of the private hospital to receive payment for the services it rendered. The costs of treating the patient in this case had reached unsustainable levels for the hospital to continue treating the patient. The Court had to ensure that the patient continues to receive healthcare at a facility which was affordable for them, without compromising the right of the private healthcare facility to recover the monies that were owed to it.

Non – Discrimination and Access to Healthcare Services

This section reviews decisions of the Court where discrimination in accessing healthcare services was alleged. In appraising whether there have been violations to the right to health under the Constitution, the Courts have required that for a favourable decision, Petitioners prove that there was a factual basis for finding that there was discrimination in access to healthcare services.

The Courts have also held that constitutional guarantees are not absolute and may be limited in one way or another. Nevertheless, as can be gleaned from the comparative jurisprudence from India, the right to life can be broadened to include an obligation to provide timely medical treatment necessary to preserve human life. Where government hospitals are concerned, there is an obligation to provide timely emergency treatment to someone who is seriously in need of such services and financial constraints cannot be accepted as a basis for a State to avoid its constitutional obligations.

EG & 7 Others v Attorney General; DKM & 9 Others (Interested Parties); Katiba Institute & Another (Amicus Curiae) Petition No. 150 & 234 (consolidated) of 2016

High Court of Kenya at Nairobi (Constitutional and Human Rights Division)

Aburili, Mwita, & Mativo, JJJ

24 May 2019

Right to health - Sexual and gender minorities - Discrimination - Access to health services - Violation of the right to health – Burden of proof

Summary of facts

In this consolidated petition, the Petitioners sought a declaration that sexual and gender minorities are entitled to the right to the highest attainable standard of health, including the provision of healthcare services as guaranteed in Article 43(1)(a) of the Constitution. They also sought an order that the State be directed to develop policies and adopt practices that prohibit discrimination on grounds of sexual orientation and gender identity or expression in the health sector.

The Petitioners argued that as a result of the criminalisation of same sex relations in the Penal Code, they faced stigma and discrimination in various arenas, including in the access to health services. They argued that Men who have sex with Men (MSM) were particularly vulnerable to HIV infections, and they needed access to health services and medication. Expert evidence was adduced demonstrating that the criminalisation of same sex relations was a critical barrier to HIV prevention, treatment and care efforts. The Petitioners themselves testified of being afraid to seek medical treatment due to the risk of prosecution and the stigma they faced from various healthcare professionals.

Issues for determination

One of the issues that the Court had to make a determination on was whether Sections 162(a) and (c) and Section 165 of the Penal Code of Kenya which criminalised same-sex relations, were unconstitutional for violating, among other rights, the right to the highest attainable standard of health contained in Article 43(1)(a).

Determination

The petition was dismissed.

Significance of the Case

The case raised pertinent issues regarding the barriers that sexual minorities face in accessing health services, particularly the barrier of discrimination. However, the case also demonstrates the difficulty in attaining the constitutional threshold of proving violations of constitutional rights, including the right to health.

The Court emphasised that a party who alleges a violation must prove every element constituting the cause of action. This includes adducing sufficient facts that justify a finding that the right has been violated. Decisions on the violation of constitutional rights, including the right to health, cannot be made in factual vacuums and unsupported hypotheses.

Thiagraj Soobramoney v Minister of Health (Kwazulu-Natal) 1997 (12) BCLR 1696

Constitutional Court of South Africa

Chaskalson, Madala, Sachs, JJJ

27 November 1997

Right to health – Right to life – Access to healthcare - Cost of health care - Scarce resources – Prioritisation - Progressive realisation of the right to health - Emergency medical treatment

Summary of the facts

The appellant was a 41-year-old who was diabetic and suffered from ischaemic heart disease and cerebro-vascular disease which caused him to have a stroke in 1996. His kidneys also failed in the same year and his condition was prognosed as being irreversible. Having run out of personal funds to continue treatment in a private facility, he sought admission to the dialysis programme of the Addington hospital in Durban (a state-run hospital). The hospital had a limited number of dialysis machines and trained health personnel. It therefore adopted a policy of admitting patients who could be cured within a short time and those with chronic renal failure who were eligible for a kidney transplant. Mr Soobramoney did not meet either of these criteria and was therefore denied admission.

Issues for determination

1. Whether the provision of renal dialysis constituted emergency medical treatment and whether the appellant had a right to this treatment.
2. Whether the appellant was entitled to receive dialysis treatment at a state hospital as part of the right to access health services.
3. Whether the State, in failing to provide renal dialysis facilities for all persons suffering from chronic renal failure, in the face of scarce resources, constituted a breach of its constitutional obligations to upholding the right to health.

Determination

The Constitutional Court upheld the commitment reflected in various provisions of the South African Bill of Rights to ensure access to health care. Even so, it was alive to the reality of limited resources. The learned Judge Chaskalson asserted that the State has to manage its limited resources in order to address such claims. Conversely, this would necessitate adoption of a holistic approach to the larger needs of society rather than focusing on the specific needs of particular individuals within society. The presiding judges acknowledged that the circumstances in the present case brought into sharp focus the dichotomy that a changing society finds itself in, and in particular, the problems attendant upon trying to distribute scarce resources on the one hand and satisfying the designs of the Constitution with regard to the provision of health services on the other. Nonetheless, the Constitutional Court elucidated that the guarantees of the Constitution are not absolute, but may be limited in one way or another.

Significance of the case

This decision was founded on the progressive realisation of the right to health care. This requires the State to take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of rights, health care included. The bench elucidated that whereas the Constitution was well meaning, it cannot solve all of the society's woes overnight. This takes into consideration resource constraints that arise in realisation of constitutionally-guaranteed socio-economic rights such as the right to health. In the present case, the limited haemodialysis facilities, inclusive of haemodialysis machines, beds and trained staff constituted the limited or scarce facilities, thus inhibiting the full realisation of the right to access health care and thus this welcomed the efforts by the State which set out how to manage the available scarce resources.

Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal and Others Supreme Court of India Civil Case No. 796 of 1992

Supreme Court of India

Agrawal & Nanavati, JJ

6 May 1996

Right to health – Access to emergency medical treatment – Non – availability of medical facilities in government run hospitals – Right to life – Constitutional obligation of State when there are financial constraints

Summary of facts

The Petitioner sustained serious injuries after falling off a train. He was denied treatment at six successive State hospitals because the hospitals either had inadequate medical facilities or unavailability of vacant beds.

Determination

The Court declared that the right to life enshrined in the Indian Constitution (Article 21) imposed an obligation on the State to safeguard the right to life of every person and that preservation of human life was of paramount importance. This obligation on the State persisted irrespective of constraints in financial resources. The Court stated that denial of timely medical treatment necessary to preserve human life in government-owned hospitals was a violation of this right. The Court asked the Government of West Bengal to pay the Petitioner compensation for the loss suffered. It also directed the Government to formulate a blueprint for primary healthcare with particular reference to treatment of patients during an emergency.

Significance of the case

The case was the first in which the Supreme Court held that the right to life included an obligation to provide timely medical treatment necessary to preserve human life. The case reaffirmed the Constitutional duty of government-owned hospitals to provide timely emergency treatment to someone seriously in need of such services. The Court was categorical that the State could not avoid its constitutional obligations on account of financial constraints.

QUALITY OF CARE, PATIENT SAFETY AND PROFESSIONAL ACCOUNTABILITY

Quality of healthcare services, patient safety and professional competence are core aspects of the interpretation of the right to health. The Committee on Economic Social and Cultural Rights in General Comment No. 14 has specifically set out "Quality" as one of the components of the framework on the right to health under the International Covenant on Economic, Social and Cultural Rights.

The Committee on Economic Social and Cultural Rights has stated that, "*As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.*" [43]

The World Health Organisation (WHO) has stated that, "*Quality of care is the degree to which health services for individuals and populations increase the likelihood of desired health outcomes.*"

Quality health services should be effective, and evidence-based,[44] safe, people-centred, timely, equitable, integrated and efficient.[45] It is the assurance that healthcare systems are designed and implemented to meet the unique needs and preferences of patients, to prevent harm and errors, and to continuously improve in response to emerging challenges and needs.Figure 2 below provides a summary of the quality of healthcare context in Kenya.

[43] General Comment No 14 on the right to the highest attainable standard of health available at https://www.refworld.org/pdfid/4538838d0.pdf, para 12(d).
[44] Ministry of Health, 'Guidelines for Evidence Use in Policy Making' (May 2016)
[45] Institute of Medicine (IOM), 'Crossing the Quality Chasm: A New Health System for the 21st Century' (Washington DC National Academy Press, 2001)

Figure 2: Highlights on Quality of Health in Kenya

Highlights on quality of healthcare in Kenya

- The Kenya Quality Model for Health (KQMH) provides a national framework for strengthening quality of care in Kenya.
- Only fifty three percent (53%) of facilities countrywide have quality improvement (QI) teams.
- Only 42% of facilities had a dedicated budget line for QI activities.
- Only 44% of facilities had a system in place for regular (at least quarterly) continuous medical education to ensure professional development of key staff.
- Only 40% of health facilities with inpatient services countrywide had a system for identifying and monitoring adverse events.
- Only 38% of facilities had systems in place for measuring patient experiences.
- Almost half (49%) of facilities in Kenya routinely reviewed their performance based on facility data or patient feedback.

Source: MOH KHFA 2018/19; KQMH

Drawing from the Kenya Harmonized Health Facility Assessment (KHFA) 2018/2019,[46] the Kenyan healthcare landscape reveals disparities in health infrastructure, workforce distribution, and number of health workers, as well as service accessibility. Despite strides towards benchmarks in the number of health facilities and availability of services, persistent challenges in the quality-of-care stem from inadequate inpatient beds, understaffing, and limited access to essential medicines and diagnostics. The Ministry of Health has formulated a Quality-of-Care Certification Framework for the Healthcare Sector that lays a foundation for the assessment of quality of health services. [47]

Addressing these disparities to fulfil the aspirations of quality healthcare requires concerted efforts in empowering and supporting motivated healthcare workers, ensuring accessible and well-equipped facilities, ensuring that only skilled and competent professionals are providing health services, providing safe medicines and technologies, implementing robust information systems for continuous monitoring of care, establishing financing mechanisms that incentivize

[46] See Kenya Health Facility Assessment Report (2018) available at https://pdf.usaid.gov/pdf_docs/PA00W75R.pdf

[47] Ministry of Health, 'Quality of Care Certification Framework for the Kenyan Health Sector' (March 2020).

and enable high-quality care, and offering comprehensive support to ensure adherence to quality standards across the nation.

Professional Accountability in Healthcare in Kenya

Figure 3 below highlights professional accountability in the Kenya health ecosystem

Figure 3: Professional Accountability in the Kenyan Health Ecosystem

Professional Accountability in Healthcare in Kenya

Kenya has multiple cadres of health workers, most of which have respective regulatory bodies through which professional accountability is enforced. The core technical groups include, inter alia Medical Doctors, Dentists, Pharmacists and Pharmaceutical Technologists, Clinical Officers, Nurses, Laboratory Technologists and Technicians.

Prior to the enactment of the Health Act No.21 of 2017, not all the cadres were formally regulated; and regulation of the core cadres was significantly fragmented. Through the Kenya Health Professionals Oversight Authority (KHPOA), the government sought to streamline regulation of the health workers including the quasi-health cadres that were previously unregulated.

Source: Health Act No.21 of 2017

In the pursuit of the realisation of the right to health, and the provision of quality healthcare services, fostering professional accountability within the health sector is of paramount importance. The Judiciary plays a critical role not only in addressing punitive aspects through adjudicating cases related to medical malpractice and negligence but also in promoting positive measures that enhance patient safety and the overall quality of care.

By anchoring best practices in professional accountability, the Judiciary strengthens the foundation for achieving equitable and high-quality healthcare services, supporting the realisation of the right to health. The Judiciary's combination of punitive measures and positive interventions not only ensures accountability for past incidents but also encourages a proactive approach towards patient safety, continuous improvement, and enhanced healthcare quality for the benefit of the entire population.

The jurisprudence in this section highlights the Judiciary's role in promoting quality of health, patient safety and professional accountability within the healthcare system. Through setting precedents, ensuring accountability, balancing rights and responsibilities, supporting evidence-based practices, and advocating for policy reforms, the Judiciary contributes to the continuous improvement of healthcare delivery and the protection of patients' rights. Its active involvement in promoting quality measures fosters a healthcare system that places patient well-being at the forefront and ensures that the nation's healthcare services align with the highest standards of care.

Health professionals should be held accountable for their professional activities. Apart from the ethical codes that regulate the conduct of healthcare professionals,[48] there are other regulatory and legislative provisions that enhance professional accountability in the healthcare sector. For example, the Health Laws (Amendment) Act No. 5 of 2019 has amended the Medical Practitioners and Dentists Act (Cap 253, Laws of Kenya), to create the Medical Council. The Council replaces the Board. The Amendment Act provides the procedure for lodging complaints against any professional service offered by medical practitioners and dentists.[49] The Ministry of Health has also developed guidelines for the disciplinary process of healthcare workers in the public sector. [50]

The Judiciary plays a critical role not only in addressing punitive aspects through adjudicating cases related to medical malpractice and negligence, but also in promoting positive measures that enhance patient safety and the overall quality of care.

One of the major factors that compromises patient safety and quality of healthcare services is medical negligence by healthcare workers. Medical negligence is a barrier to the realisation of the right to health. Courts therefore have a role in deterring medical negligence through awards

[48] Different categories of healthcare professionals have their various codes of conduct and ethics. For example the Medical practitioners and dentists have their Code of Professional Conduct and Discipline (6th edition, 2012) available at https://kmpdc.go.ke/resources/Code-of-Professional-Conduct-and-Discipline-6th-Edition.pdf; the nurses are regulated by the National Nurses Association of Kenya, Code of Conduct and Ethics (2009) available at https://eacc.go.ke/default/wp-content/uploads/2018/08/nnak-code.pdf; Radiographers are regulated by the Code of Conduct and Ethics for Radiographers (2012) available at https://eacc.go.ke/default/wp-content/uploads/2018/08/code-SORK.pdf etc.

[49] See the amendment to Section 20 of the Kenya Medical Practitioners and Dentists Act

[50] Ministry of Health, 'User Guide to Discipline Process in Public Health Sector' (June, 2016)

of damages given in favour of patients who have suffered injuries at the hands of healthcare professionals. The nature of the orders would act as a deterrence to healthcare professionals and facilities to compromising the quality of care that patients receive.

In order to win a claim against a health care professional for negligence, one must prove that there is a duty of care, a breach of duty and resultant harm as a result of that duty. In the case of Jimmy Paul Semenye v Aga Khan Hospital & 2 Others Civil Case 807 of 2003 [2006] eKLR, the Court stated this concerning duty of care:

"There exists a duty of care between patient and the doctor, hospital or health provider. Once this relationship has been established, the doctor has the following duty: -

a. *Possess the medical knowledge required of a reasonably competent medical practitioner engaged in the same capacity*
b. *Possess the skills required of a reasonable competent healthcare practitioner engaged in the same specialty*
c. *Exercise the care in the application of the knowledge and skill to be expected of a reasonably competent healthcare practitioner in the same specialty*
d. *Use the medical judgement in the exercise of that care required of a reasonably competent practitioner in the same medical or health care specialty."*

The common law test of the standard of care that is required of a healthcare professional has been what is termed as the "Bolam" test emanating from the British case of Bolam v Friern Hospital Management Committee [1957] 1 WLR 583. The Bolam standard test of whether there has been negligence is not the test of the man on top of the Clapham omnibus because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill.

Health facilities may be held vicariously liable for the medical negligence of healthcare professionals who are employed by them.

This section gives some illustrations of how Courts can use medical negligence claims to try and influence the quality of care.

PKM (Suing on own behalf and as next friend of AJB) & GSM v Nairobi Women's Hospital & Mutinda Civil Case No. 186 of 2009 (2018) eKLR

High Court of Kenya at Nairobi, Civil Division

Msagha, J

16 May 2018

Medical Negligence – Quality of Health Care – Careless and Reckless Handling of Woman in Labour – Child Born with Cerebral Palsy – Duty of Care – Breach of Duty – Resultant Harm – Compensation

Summary of the facts

The 1st Plaintiff was admitted to the Defendant hospital's labour ward awaiting the inducement of labour. The first attempt at inducement was unsuccessful and, in the process, she was left unattended and unmonitored in the delivery room, causing her mental and psychological trauma. When her labour intensified and she asked to see a doctor, nobody was available to attend to her until that afternoon when the 2nd Defendant doctor arrived and rushed her into theatre for a Caesarean Section. However, due to the delay, the child had suffered severe birth asphyxia and was diagnosed with Cerebral Palsy. The Plaintiffs argued that the Defendants should be liable for medical negligence and failure to use reasonable care, skill and diligence in the manner in which the 1st Plaintiff's labour was handled.

Issues for determination

1. Whether the defendants were negligent in the handling of the 1st Plaintiff's labour process
2. Whether the resultant harm to the child was as a result of the negligence of the Defendants.

Determination

The Court found that the Defendants liable for negligence. The Court stated that, "*When one surrenders himself or herself into the hands, they believe to have the relevant facilities, expertise, knowledge and experience to undertake the expected services, their legitimate expectation should be met.*"

The compensation awarded was Kshs. 54,712,078. This amount was meant to send a message communicating the nature of the damage to the resultant child and how the negligence of the defendants would affect the child for life.

Significance of the case

By awarding hefty amounts in compensation, the Courts seek to send the message that quality of care in health facilities should be taken seriously. By enhancing quality of care for patients, their rights to access and enjoy healthcare services are enhanced. Patients would feel more confident in seeking and assured of receiving appropriate health services in facilities.

OZA (minor suing through mother and next friend) & 2 Others v David Oluoch Olunya & Another Civil Case No. E067 of 2020 [2021] eKLR

High Court of Kenya

Chitembwe, J

27 May 2021

Medical Negligence – Quality of Healthcare - Jurisdiction of the High Court - Jurisdiction of the Medical Practitioners and Dentists Council – Transfer of matters from Court to Council – Appropriate Forum for Complaints

Summary of facts

The issue in this case is on the forum for the determination of medical negligence cases. The 1st Defendant argued that the case should be transferred from Court to the Kenya Medical and Practitioner's Council as the Council had the technical expertise to peer review the issues raised by the Plaintiff and also has the jurisdiction under Section 20 of the Kenya Medical Practitioners and Dentists Act to investigate and determine any complaint on professional misconduct or malpractice.

Issues for determination

1. Whether the Court ought to refer the suit to the Kenya Medical Practitioners and Dentists Council for investigation and determination on the alleged medical negligence by the 1st Defendant.

Determination

The Court held that under Article 165(3) of the Constitution, it had unlimited, original jurisdiction over subordinate Courts and over any person, body or authority exercising a judicial or quasi – judicial function. The suit was therefore properly before the Court. The Court drew the distinction between the disciplinary proceedings that are brought before the Medical Practitioners and Dentists Council and legal proceedings brought before the Court.

It also emphasised that the decision of the Council was not binding on the Court. A victim of medical negligence was thus free to bring both a complaint before the Council and before the Court concurrently.

Significance of the case

This case is significant in clarifying the forums at which victims of medical negligence can seek justice. Access to medical or health justice is a significant aspect of the right to health. Citizens are entitled to health protection through access to tribunals, Courts and other ways of solving health disputes and obtaining compensatory justice for any injuries inflicted on them.[51]

Qualifications and Skills of Healthcare Professionals as part of Quality of Care and Patient Safety

The Courts have upheld the requirement of qualification and skills among healthcare professionals, by asserting that only qualified healthcare professionals can dispense medicines and drugs to patients. Moreover, the requirement that all foreign nationals applying to practice medicine or dentistry in Kenya are to present proof of registration from their country of origin and also satisfy the Kenya Medical Practitioners and Dentists Council (KMPDC) that they have acquired sufficient knowledge and experience in the practice, is justifiable in the best interest of patients and the general public.

Private Health Practitioners Mombasa Cluster v Pharmacy and Poisons Board Ex Parte Private Health Practitioners Mombasa Cluster Judicial Review No 84 of 2016 [2017] eKLR

High Court of Kenya at Mombasa

Ogola, J

18 May 2017

Right to health – Public Health – Regulation of the Pharmacy profession - Quality and safety of medical products and technologies – qualified persons to dispense essential medicines – Pharmacy and Poisons Act – Private health practitioners

Summary of the facts

The Applicant in this case argued that the Respondent, during one of its routine supervisory visits

[51] General Comment No 14 on the Right to the Highest Attainable Standard of Health (adopted at the twenty – second session of the Committee on Economic, Social and Cultural Rights on 11 August 2000: E/C.12/2000/4) para 8.

of private facilities, arrested some health practitioners who included nurses, clinical officers and medical officers who were charged with dispensing drugs contrary to the Pharmacy and Poisons Act Cap 244 of the Laws of Kenya. It was the case of the Applicant that the Respondent had acted ultra vires its mandate. The Respondent on the other hand argued that it had the mandate to protect the health of the public by regulating the profession of pharmacy and ensuring quality, safety and efficacy of medical products and technologies. Only licensed and qualified persons were allowed to dispense drugs under the Pharmacy and Poisons Act CAP 244.

Isues for determination

1. Whether the Respondent had acted ultra vires in conducting supervision over the Applicant.
2. Whether the Respondent had the mandate to inspect the suit premises.
3. Whether the Respondent was biased or unreasonable in its actions.

Determination

The Court held that it did not find any evidence of unreasonableness or bias on the part of the Respondent. It also found that the Respondent had the mandate to inspect the premises of members of the applicant and so the action by the Respondent was not ultra vires.

Significance of the Case

The significance of the case to the realisation of the right to health is on the question of quality. There is a need to ensure that only qualified healthcare professionals can dispense medicines and drugs to patients in order to ensure the well-being of citizens. A roll of qualified pharmaceutical technologists and other authorised health personnel should be maintained.

Rutaganda Viateur v Kenya Medical Practitioners and Dentists Council Petition No. E383 of 2020 [2021] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Makau, J

8 July 2021

Right to health – Licensing of Foreigner from East African county - Reciprocal registration – Protocol on Establishment of the East African Community – Fair Administrative Action – Public Interest

Summary of the facts

The Petitioner in this case was a Rwandese national who had undertaken dentistry in an institution in Rwanda. He practised in Rwanda for a little while before he moved to Kenya. When in Kenya he was employed as a dentist in a private health facility in Kisumu under a temporary licence issued to him by the Kenya Medical Practitioners and Dentists Council (KMPDC). He was advised by the Respondent Council to apply for a permanent licence. The Petitioner made the necessary application and paid the requisite fee. He sought permanent reciprocal registration in Kenya from the KMPDC (in accordance with the protocol for the Establishment of the East African Community) and the requisite licence and registration to practise as a dentist in Kenya. However, the Petitioner claimed that the Respondent failed to issue him with the licence and went ahead to remove his name from the list of registered dentists without furnishing him with any reasons.

The Respondent Council argued that it was mandated under the Medical Practitioners and Dentists Act to assess and licence foreign nationals as medical or dental practitioners in order to protect the health and well – being of citizens. One of the requirements for foreign nationals seeking registration and licensing in Kenya was to prove that they had registration from their country of origin – in this case the Rwanda Medical and Dental Council. Since the Petitioner failed to provide evidence of registration from the Rwanda Medical and Dental Council, the Medical Council's Training Assessment Registration and Human Resources Committee recommended that the Petitioner sits for the Medical Council's pre – registration examination. Moreover, the Petitioner, having failed to provide a certificate of registration from the Rwanda Medical and Dental Council, could not be issued with a temporary licence for foreign nations or reciprocal registration to allow him to practise dentistry in Kenya. In doing this, the Respondent Council argued that it was acting in the best interests of the country and patients in ensuring that quacks and practitioners who are barred from their own countries of origin are prevented from coming to practice in Kenya.

Issues for determination

1. Whether the denial of reciprocal registration and the removal of the Petitioner's name from the list of registered dentists was unprocedural, unreasonable and a violation of fair administrative action.

Determination

The Court found that the Respondent had acted lawfully and properly and reasonably in accordance with the provisions of the Act and in the best interests of patients and the general public in its consideration of the application by the Petitioner to practise dentistry in Kenya. The Court found that Section 6 (4) of the Act was meant to ensure that medical and dental practitioners from the region who had been debarred or suspended from their jurisdiction for diverse reasons or due to medical negligence did not use reciprocal recognition of the East African Community nationalities to seek licences to practice in Kenya as this would create a risk to patients or jeopardize lives of citizens of Kenya. All foreign nationals applying to practice medicine or dentistry in Kenya were required to present proof of registration from their country of origin and also satisfy the Medical Council that they had acquired sufficient knowledge and experience in the practice of medicine or dentistry. The Court was satisfied that the requirement was justified for the best interest of patients and the general public. The Petitioner had not explained sufficiently why he had failed to get evidence of registration in compliance with the provision of Section 6(4)(c) of the Act. The provision was framed in a mandatory manner and the Medical Council had no discretion to waive the said requirement.

The registration of foreign medical and dentist practitioners as per the Act required proof of registration from their country of origin. The Petitioner confirmed that he was not registered with the regulatory body in Rwanda i.e., the Rwanda Medical and Dental Council. The Respondent had therefore considered all factors objectively, and noting that the Petitioner had not provided proof of registration from the Rwanda Medical and Dental Council, it recommended that the Petitioner take a pre-registration exam. Therefore, the Respondent acted properly, legally and reasonably and in accordance with the provisions of the Act and in the best interest of patients and general public in considering the Petitioner's application not to be licensed to treat patients in Kenya. The Petition was thus dismissed as one without merit.

Significance of the Case

The case demonstrates the vigilance of Courts in ensuring that quality of healthcare services is maintained by upholding the standards and requirements of qualifications of healthcare practitioners, whether they are Kenyan or foreigners. One of the key tenets of the right to health is quality.

General Comment No. 14 by the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health, has explained that quality takes into account the competency and skills of healthcare professionals. [52]

Association of Kenya Medical Laboratory Scientific Officers v Ministry of Health & another Petition No. 282 of 2017 [2019] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Makau, J

29 April 2019

Right to health – Implementation of Task Sharing Policy Guidelines – Tests conducted by non – laboratory staff – Misdiagnosis – Discrimination – Public Participation – Violation of right to the highest attainable standard of health

Summary of the facts

The Petitioner claimed that the 1st Respondent spearheaded the development of the Task Sharing Policy Guidelines 2017-2030, without the involvement of the Petitioner. This violated the principle of public participation and further allowed non – laboratory staff to conduct tests that were meant to be conducted by skilled laboratory staff. The Petitioner argued that this violated the right to the highest attainable standard of health.

Issues for determination

1. Whether the Task Sharing Policy Guidelines (2017-2030) met the constitutional parameters of public participation under Article 10 of the Constitution of Kenya.
2. Whether the implementation of the Task Sharing Guidelines, without the involvement of the Petitioner in their formulation, violated the right to the highest attainable standard of health.

[52] CESCR, General Comment No 14 on the Right to the Highest Attainable Standard of Health, para 12(d)

Determination

On the question of public participation, the Court found that though there was an element of public participation, it failed to meet the constitutional threshold as the Petitioner and other intended parties were not accorded a reasonable opportunity to know about the issue and to have adequate say and raise their concern. The Court noted that while personal hearing was not expected of every concerned party, there was lack of participation of various sectors of the public coupled with lack of notification of the members of the public save just a few. This could not qualify as an elaborate and extensive public participation. The Respondent therefore failed to demonstrate that the Task Sharing Policy Guidelines (2017-2030) were developed with public participation.

On the second issue, the Court observed that even though the intention of the Task Sharing Guidelines was noble, it was unconstitutional to allow unqualified non – laboratory staff to conduct tests which required skilled laboratory staff. The Guidelines violated the right to the highest attainable standard of health and the rights of consumers. The Guidelines were therefore quashed.

Significance of the Case

The case demonstrates that policies that would affect the quality of healthcare services should be subject to public participation by the relevant stakeholders. Legitimation of the policies would enhance the realisation of the right to health. Stakeholder participation in the crafting of policies enhances accountability of the decisions that policy makers and legislators make. [53]

[53] Regiane Garcia, 'Expanding the Debate: Citizen Participation for the Implementation of the Right to Health in Brazil' (2018) Health and Human Rights Journal available at https://www.hhrjournal.org/2018/06/expanding-the-debate-citizen-participation-for-the-implementation-of-the-right-to-health-in-brazil/

PUBLIC HEALTH, PUBLIC HEALTH EMERGENCIES AND SECURITY

Kenya continues to face numerous threats to public health, including infectious disease outbreaks, natural hazards, consequences of climate change, conflict within and beyond the country's borders with attendant displacement of populations and pollution by chemical, biological and radiation agents as a corollary to industrialization.

Most recently, the Corona Virus Disease (COVID 19) pandemic and threats of Ebola Virus Disease and Polio from the neighbouring countries demonstrate the significance of these public health threats and their potential to disrupt livelihoods, disrupt and strain health systems, interrupt economic activities and resultant diversion of resources to response activities. These remain a threat to the realisation of the nation's development aspirations in Vision 2030 as well as a determent to the attainment of the Sustainable Development Goals (SDGs).

Figure 4 below presents a brief context on COVID-19 emergency preparedness and response in Kenya.

Figure 4: Emergency Preparedness and Response in Kenya

Highlight on Emergency Preparedness and Response in Kenya

- Only 4% of facilities had outbreak preparedness plans pre-COVID.
- Approximately 343,000 COVID-19 cases reported between March 2020 and August 2023.
- Approximately 5700 COVID-19 related deaths from March 2020.
- Approximately 30% of the Kenyan population received at least one dose of the COVID-19 vaccine.

Source: MOH KHFA 2018/19[54] ; Our World in Data [55]

[54] See Kenya Health Facility Assessment Report (2018) available at https://pdf.usaid.gov/pdf_docs/PA00W75R.pdf

[55] See at https://ourworldindata.org/coronavirus/country/kenya

For such emergencies, a multi-agency, multi-jurisdictional, well-coordinated and timely health system response is required. This facilitates improved health system capacity for timely and effective detection of, and response to, high priority health emergencies with a view to mitigating the health threats and fostering health security.

While the health system response plays a crucial role in addressing these challenges, the Judiciary also plays a vital role in safeguarding public health and contributing to overall health security in the following ways:

a. **Enforcement of Public Health Regulations:** The Judiciary plays a critical role in interpreting and enforcing public health regulations and laws. During emergencies, such as the COVID-19 pandemic, the Judiciary had the power to ensure that government-imposed health measures, such as quarantine orders, travel restrictions, and social distancing mandates, were implemented effectively and fairly. By upholding these regulations, the Judiciary would be supporting the efforts to mitigate health threats and protect the well-being of the population.

b. **Protection of Individual and Community Rights:** Public health emergencies may necessitate restrictions on certain individual liberties to protect public health. The Judiciary plays a crucial role in balancing the need for public health measures with the protection of individual and community rights. It ensures that any limitations imposed on rights are necessary, proportionate, and in compliance with the law. This helps maintain public trust in health interventions and promotes adherence to necessary measures.

c. **Addressing Health-Related Disputes:** The Judiciary plays a role in resolving health-related disputes and issues that may arise during emergencies. This includes handling cases of medical malpractice, disputes related to access to healthcare resources, breaches of confidentiality and privacy and legal challenges to public health measures. Timely and fair resolution of such disputes is essential to maintaining stability and effectiveness in the responsiveness of the health system response.

d. **Ensuring Accountability and Transparency:** In times of public health crises, transparency and accountability are crucial to building public confidence in the government's response. The Judiciary can contribute to this by holding relevant parties

accountable for their actions and decisions during health emergencies. It helps ensure that resources are utilised effectively and that emergency responses are carried out in a transparent and responsible manner.

e. **Supporting Evidence-Based Decision-Making:** Judicial decisions can set important precedents and influence public health policies. The Judiciary can encourage evidence-based decision-making by considering scientific evidence and expert opinions in health-related cases. This can help shape the direction of public health policies and interventions for the greater benefit of the population.

The jurisprudence in this section highlights how the Judiciary's role in enforcing public health regulations, protecting individual and community rights, addressing health-related disputes, ensuring accountability and transparency, and supporting evidence-based decision-making contributes to the overall effectiveness of the health system responsiveness and the protection of public health and well-being.

Among the controversial issues that emerged at the height of the COVID – 19 pandemic and which were the subject of litigation include: mandatory vaccination,[56] curfews, isolation and quarantine, mandatory testing, police brutality and human rights violations in the enforcement of curfew and public health measures.

Public Health Emergencies

Public health emergencies are threats to health which result from natural and human-made hazards. They could be a result of epidemics such as SARS, Ebola, COVID-19 or conflicts,

[56] See: Winfred Clarkson Otieno Ochieng & 12 others v Cabinet Secretary, Ministry of Health & 9 others; Shanice Wanjiku & Ano (Interested Parties); Kenya Legal & Ethical Issues Network on HIV & AIDS (Kelin) (Amicus Curiae) (Constitutional Petition No E500 of 2021, Consolidated with Petition Nos. E505 of 2021, E518 of 2021 and E27 of 2021) [2022] eKLR – where the constitutionality of the directive issued by the Cabinet Secretary for Health, making it a requirement for all seeing Government services to show proof of vaccination, was challenged. The directive also made it a requirement for all drivers, conductors, boda boda riders, pilots, air hostesses, as well as those who are working in the hotel industry to be vaccinated and to have proof of that vaccination. The judgement in the case is yet to be delivered.

droughts and floods. Public health emergencies are the result of various complex factors, including, population growth, climate change, globalisation, urbanisation, human-wildlife interaction. [57]

The jurisprudence in this section highlights the power of the Court in holding the State accountable on the exercise of its powers in managing public health emergencies. While the State has the power to issue curfew orders under the Public Health Act to deal with emergencies, the National Police Service could be held responsible and accountable for violating the rights to life and dignity of citizens in the enforcement of the curfew order.

The High Court has also confirmed its power to issue orders to the State in the form of a structural interdict compelling the preparation and presentation to the Court for scrutiny of a contingency plan on prevention, surveillance, control and response system to a public health threat.

The High Court has also upheld the right to dignity in enforcing public health measures by requiring judicial sanction of quarantine measures (review by the Magistrate's Court in the case of measures taken under the Public Health Act) and the duty of the national and County Governments in ensuring that medical costs and upkeep of citizens who are forced into mandatory quarantine are met.

Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 Others; Kenya National Commission on Human Rights & 3 Others (Interested Parties) Petition No. 120 of 2020 (COVID 025) [2020] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Korir, J

16 April 2020

Right to the highest attainable standard of health – COVID – 19 – Curfew measures – Quarantine – Containment – Public Health Act – Public Health Emergencies - Unreasonable use of force in enforcing curfew

[57] AMREF 'Public Health Emergency' https://amref.org/kenya/our-work/pillar-2-innovative-health-services-solutions/public-health-emergency/ accessed 19 October 2023.

Summary of facts

The Petitioner in this case sought declaratory orders, that pursuant to the Article 43 of the Constitution that every person is entitled to the highest attainable standard of health, the Cabinet Secretary for Health be directed to issue proper guidelines for curfew, quarantine, and containment of COVID – 19, including guidelines on testing kits, healthcare workers, resources, among others.

The Petitioner also sought a declaration that the 1st Respondent's unreasonable use of force in enforcing the curfew was unconstitutional and that he ought to be held personally liable for the unreasonable force in the enforcement of the curfew order. The Petitioner also argued that the curfew order was ultra vires as it was established pursuant to the Public Order Act (Cap 56, Laws of Kenya), yet public health emergencies were governed by Section 36 of the Public Health Act. It was argued that the coronavirus issue was not a public order or criminal question but rather a public health issue. The Petitioner argued that issuing an indefinite curfew order under Section 8 of the Public Order Act, rather than issuing rules under Section 36 of the Public Health Act, had the effect of subjecting health care workers (as essential workers) to the direction and control of untrained police officers, at great risk to public health.

Issues for determination

Among the issues for determination were whether the curfew order was constitutional and legal and whether the Cabinet Secretary for Health should be ordered to issue guidelines under Section 36(m) of the Public Health Act.

Determination

The Court agreed with the Petitioner that the Public Order Act was a law specifically tailored for the combating of criminal activities in order to bring law and order to areas that were in an unusual situation of turmoil. However, the Public Health Act was not an all – sufficient law in governing matters to do with public health. Section 16 of the Public Health Act gives room for the application of other laws in health matters. Therefore, it was not illegal for the Public Order Act to have been used in the health emergency that was posed by COVID – 19. A curfew order could be used to address a public health emergency.

The Court also determined that the National Police Service could be held responsible and accountable for violating the rights to life and dignity of citizens in the enforcement of the

curfew order. The Court noted that the suppression of the virus could not be done by beating up people. It made a declaration that the 1st Respondent's unreasonable use of force in enforcing the Public Order (State Curfew) Order 2020, was unconstitutional.

On the prayer that the Court issue orders directing the Cabinet Secretary of Health to issue guidelines on the matters specified in the petition, the Court noted that it had no power to direct the Cabinet Secretary on how to exercise his power under Section 36 of the Public Health Act.

Significance of the Case

This case demonstrated the interrelatedness of the right to health with other human rights such as the right to dignity, the right to life, the right to freedom of movement and the right to security of person. The violation of these human rights has an impact on the realisation of the right to health of citizens. Similarly, the case demonstrates that in a bid to protect the health of the public, the State may have to take paternalistic measures that limit the fundamental rights of citizens. However, a limitation of a right does not mean that there should be blatant violation of the right. Excessive and disproportionate force and enforcement of public health regulations is not permitted. [58] The case also demonstrates the strong link between public security and public health. [59]

Law Society of Kenya & 7 Others v Cabinet Secretary for Health & Others; China Southern Co. Airline Ltd (Interested Party) Petition No 78, 79, 80 & 81 of 2020 (Consolidated) [2020] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Makau, J

3 August 2020

Right to health – Public Health – COVID – 19 – Structural Interdict before the finalisation of a case – Obligations of the State during Public Health Emergency/Pandemic

Summary of facts

The Petitioners in this case, through an application, were granted orders that, inter alia, suspended

[58] UNAIDS, 'Rights in a Pandemic: Lockdowns, Rights and Lessons from HIV in the early response to COVID 19' (2020) available at https://www.unaids.org/sites/default/files/media_asset/rights-in-a-pandemic_en.pdf

[59] Leah Pope, 'Public Health and Public SDuring COVID – 19 Crisis' (April30, 2020) available at https://www.vera.org/news/covid-19-1/public-health-and-public-safety-the-critical-role-of-police-during-the-covid-19-crisis

the Respondents' decision to allow the resumption of non – essential flights from China to Kenya on the basis that the Kenyan population would continue to be exposed to the deadly Corona Virus Disease (COVID – 19). Conservatory orders were also issued preventing the Respondents from letting into the country by air, sea and land, any persons from China or other World Health Organisation (WHO) designated hot spot country, that were adversely affected by the (COVID – 19) outbreak pending the hearing and determination of the application.

The Court also issued a conservatory order in the form of a structural interdict compelling the 1st Respondent to prepare and present to the Court for scrutiny, a contingency plan on the prevention, surveillance, control and response systems to the COVID – 19 outbreak in Kenya. The Respondents filed an application, seeking inter alia, to stay the implementation of the order in the form of a structural interdict compelling the Respondents from preparing and presenting in Court the contingency plan for scrutiny.

Issues for determination

1. Whether the Court had jurisdiction to grant the remedy of structural interdict at an interlocutory stage of the case.
2. Whether the 1st Respondent had the obligation to prepare a contingency plan under the terms that had been directed by the Court.

Determination:

The Court declined to grant the Respondent's prayer for stay of implementation of and the prayer to set aside, vary and discharge the orders in the form of a structural interdict compelling the 1st Respondent to prepare and present to the Court for scrutiny a contingency plan on prevention, surveillance, control and response system to coronavirus (COVID – 19) in Kenya. The Court decided that the structural interdict was an appropriate relief, including at interlocutory stage, depending on the circumstances of the case.

Significance of the Case

The significance of this case is in the role of the Court in holding the State accountable for its obligations to its citizens in the face of a public health emergency/pandemic, so that the right to health of its citizens is upheld.

Okiya Omtatah Okoiti & 2 Others v Cabinet Secretary, Ministry of Health & 2 Others; Kenya National Commission on Human Rights (Interested Party) Petition No. 140 of 2020 consolidated with Petition No. 128 of 2020 [2020] eKLR

High Court of Kenya at Nairobi

Coram: Makau, J

3 December 2020

Right to health – COVID – 19 Pandemic – Mandatory quarantine and isolation – Compulsion to pay for medical and accommodation costs of quarantine and isolation – Duties of county and national government – Public Health

Summary of facts

The Petitioners were aggrieved that the Cabinet Secretary, Ministry of Health, forced people who were required to go into compulsory quarantine for public health purposes to pay for their upkeep and medical bills, yet some individuals had the period of their quarantine unfairly and unjustifiably extended. They also argued that the Inspector General, through his officers, were forcing those who were caught outside the curfew hours into mandatory quarantine. These people were unable to pay the daily rate in relation to medical and general expenses in government-designated quarantine/isolation centres. They argued that the directive by the Cabinet Secretary denied poor Kenyans the right to medical services and made quarantine a punitive rather than a medical measure.

Issues for determination

Among the issues for determination included the following:

1. Whether quarantine for members of the public at various facilities without an order of a magistrate and forcing them to pay for their upkeep was contrary to Section 27 of the Public Health Act and whether this contravened the Constitution.
2. Whether the government should refund the money that each person was quarantined and forced to pay for their upkeep.

Determination

The Court made a declaration that the decision to quarantine members of the public at various facilities without an order of magistrate and forcing them to pay for their upkeep was contrary to the Public Health Act and was also unconstitutional. However, since the Petitioners did not specifically plead the amounts that each person who was forced into quarantine was forced to pay for their medical costs and upkeep, and the County Governments were not joined as parties, the Court declined to make an order for refund of the money spent.

Significance of the Case

The case demonstrates the way health-related rights, such as the right to the dignity of citizens, should still be respected in enforcing public health measures. It also demonstrates the duties of the County and National governments in ensuring that medical costs and upkeep of citizens who are forced into mandatory quarantine are met.

Public Health

Apart from the control of infectious or communicable diseases, public health law is also concerned with the rising cases of non – communicable diseases which are caused by lifestyle and exposure to harmful diets and products. The Kenya Demographic Health Survey (KDHS) 2022 shows that 50 per cent of women aged between 20 and 49 with educational qualifications beyond secondary school are either obese or overweight. Kenya, through the Ministry of Health, has National Guidelines for Healthy Diets and Physical Activity,[60] which are meant to halt and reverse the rising burden of non – communicable diseases and minimise exposure to major health risk factors in the population.[61] This section reviews the decisions of the Court on public health.

Daniel Ng'etich & 2 Others v Attorney General & 3 Others Petition No. 329 of 2014 [2016] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Mumbi, J

24 March 2016

Right to health – Public Health – Confinement of persons suffering from Tuberculosis and other infectious diseases – Violation of Constitutional Rights

Summary of facts

The Petitioners were arrested by the 3rd Respondent and were charged before a magistrate for failure to take their Tuberculosis (TB) medication. The Court issued an order for their confinement in isolation at Kabete G.K. Prison for purposes of treatment. The confinement was

[60] Ministry of Health, National Guidelines for Healthy Diets and Physical Activity (2017) available at http://www.nutritionhealth.or.ke/wp-content/uploads/Downloads/National%20Guidelines%20for%20Healthy%20Diets%20and%20Physical%20Activity%202017.pdf

[61] See also the Food Safety Policy 2013; The Food, Drugs and Chemical Standards Act (Cap 254, Laws of Kenya) and the Food, Drugs and Chemical Substances (Food Labelling, Additives and Standards) (Amendment) Regulations, 2012 (L.N. No. 62 of 2012)

to be for 8 months, or such period as may be satisfactory for their treatment. Pursuant to an application that the Petitioners made to the High Court, Mwilu J (as she then was) ordered their release of the Petitioners back to their homes to continue treatment from there. She stated that their incarceration was both unconstitutional and not in compliance with the Public Health Act.

The matter was by consent transferred to the Constitutional and Human Rights Division of the Highest Court in Nairobi. One of the arguments made by the Petitioners was that the conditions they were subjected to in prison were not conducive to the treatment of TB patients. They were subjected to sleeping on a cold floor without bedding at night for a week, they were not fed a diet fitting for a TB patient, and they were confined in a small cell with other inmates with no precautionary measures taken to prevent the spread of the disease to other inmates. This was a violation of the rights of the Petitioners as well as other prisoners.

The Petitioners sought declarations that the confinement of the Petitioners for a period of eight months at the Kabete G.K. Prison, and indeed the confinement of patients who were suffering from infectious diseases in prison facilities was in violation of their Constitutional rights. They also petitioned for the Court to order the 4th Respondent (Minister for Public Health and Sanitation) to issue a circular within 14 days to all public and private medical facilities and public health officers clarifying that Section 27 of the Public Health Act did not authorise the confinement of persons suffering from infectious diseases in prison facilities for the purposes of treatment. It also sought orders that the 4th Respondent develop a policy within three months on the involuntary confinement of individuals suffering TB that was compliant with the Constitution of Kenya and that incorporated the principles from international instruments on the confinement of persons with TB.

Issues for determination

1. Whether the confinement of patients who are suffering from infectious diseases in prisons was a violation of their right to health, and if so, what were the appropriate remedies.

Determination

The Court determined, with respect to the involuntary confinement of patients with infectious diseases who default on their treatment that the 4th Respondent (The Minister of Public Health and Sanitation) would issue a circular within 30 days of the judgement, directed to all public and private health facilities and public officers clarifying that Section 27 of the Public Health

Act does not authorise the confinement of persons suffering from infectious diseases in prison facilities for purposes of treatment. The Court also ordered that the Minister, in consultation with County Governments, should within 90 days develop a policy on the involuntary confinement of persons with TB and other infectious diseases.

Significance of the case

The case demonstrates the importance of a rights – based approach in dealing with patients who have communicable diseases such as TB. In order to enhance access to health services for patients with infectious diseases, it is imperative that the State should put in place measures and policies for their treatment and management. It should be noted that in pursuance of this judgement, the Ministry of Health formulated the Tuberculosis (TB) Isolation Policy. A circular was also issued by the Principal Secretary for the Minister for Health, on 12th May 2016, to all County Executive Committee Members for Health seeking to implement the High Court judgment in this petition.

Mark Ndumia Ndung'u v Nairobi Bottlers Ltd & Another Petition No 325 of 2015 [2018] eKLR

High Court of Kenya, Constitutional and Human Rights Division

Onguto, J

30 June 2018

Health of consumers - Information on nutritional contents – Coca Cola bottles nutritional information – Difference between plastic and glass bottles – Constitutional rights of consumers

Summary of facts

The Petitioner was a regular consumer of one of the Respondent's drinks – Coca Cola. He had a specific preference for the one sold in the glass bottle. However, after he was diagnosed with stomach ulcers, he was advised by his doctor to stop consuming products with acidic content. He then proceeded to check for the ingredients and nutritional information on the products that he consumed including Coca Cola. He found that there was a difference between the information contained in the glass bottle, which he preferred to use, and the plastic bottle of the said Coca Cola. The glass bottle neither had any information on the nutritional content of the drink nor did it have any information on customer service, telephone or email address or even storage directions. He argued that this violated the rights of consumers under Article 46 of the Constitution of Kenya. The nutritional information was essential to the consumer's diet

and health and therefore omitting the information from the glass bottles was discriminatory to consumers of the beverage in the glass bottles. Among the declaratory orders that he sought were that the omission of nutritional value information on the glass bottles of Coca Cola prejudiced the health of consumers. He asked the Court to compel the Respondents to display the nutritional value, storage directions and customer care details on the glass bottles.

Issues for determination

Among the other issues for determination were the following:

1. Whether the Petitioner had a right to the nutritional and contact information sought in the petition.
2. Whether the difference in nutritional information contained on the packaging of the plastic and glass bottles was discriminatory.

Determination

The Court made a declaration that the omission of nutritional information and storage directions on the glass bottles of the Coca Cola, Fanta, Krest, Stoney and Sprite brands of the Respondent violated consumer rights under Article 46 (1) (a), (b) and (c) of the Constitution. Further, the Court found that the selective provision of nutritional information and customer care and storage directions amounted to discrimination and unequal treatment of consumers contrary to Article 27 of the Constitution. The Court then issued a mandatory injunction directing the Respondents to provide nutritional information, storage directions and customer care information on all their glass bottle brands within 6 months of the delivery of the judgement.

Significance of the Case

The case brought out the interrelatedness of other fundamental rights to the right to health. The realisation of the rights to consumer protection and the right to information, enable the realisation of the right to health. Good nutrition is a basic element of good health for the population. The State is under an obligation to ensure the provision of quality and nutritious food. Part of the core obligations of State Parties in the realisation of the right to health entails the provision of food which is nutritionally adequate and safe. The right to health therefore cannot be realised without the provision of nutritionally safe consumable products, and the right of consumers to know what is contained in those products.

SEXUAL AND REPRODUCTIVE HEALTH

What is Sexual and Reproductive Health?

The World Health Organisation (WHO) defines Sexual Health as, "*A state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence.*" [62]

The WHO has then defined Reproductive Health as, "*a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so.*" [63]

Sexual and reproductive health is thus a state of physical, emotional, mental and social well-being in relation to all aspects of sexuality and reproduction, not merely the absence of disease, dysfunction or infirmity.

At the International Conference on Population and Development (ICPD) held in Cairo in 1994, 179 governments adopted a revolutionary Programme of Action and called for women's reproductive health and rights to take centre stage in national and global development efforts. ICPD defines reproductive health care as, "*the constellation of methods, techniques and services that contribute to reproductive and sexual health and wellbeing by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations and not merely counselling and care related to reproduction and sexually transmitted diseases.*" [64]

[62] See https://www.cdc.gov/sexualhealth/Default.html
[63] See https://www.who.int/westernpacific/health-topics/reproductive-health
[64] See https://www2.ohchr.org/english/issues/development/docs/rights_reproductive_health.pdf

General Comment No. 22 of the Committee on Economic, Social and Cultural Rights on the Right to Sexual and Reproductive Health explains that the right to sexual and reproductive health includes, "*...the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health... ...*" *as well as "...unhindered access to a whole range of health facilities, goods, services and information..."*

The achievement of sexual and reproductive health therefore relies on the realisation of sexual and reproductive rights, which are based on the human rights of all individuals including privacy, right to decide whether and when to be sexually active; right to decide whether, when and by what means to have a child or children, and how many children to have, access over their lifetime to the information, resources, services and support necessary to achieve all of the above, free from discrimination, coercion, exploitation and violence.

International Instruments and Standards on Sexual and Reproductive Health Rights

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) enshrines the right to health in Article 12 and requires States to eliminate all forms of discrimination that would prevent women from accessing healthcare on the same level as men. General Comment No. 24 of the Committee on the Elimination of All Forms of Discrimination Against Women recognizes lack of privacy and punitive measures on women who seek abortion services as barriers that prevent women from being able to seek healthcare on the same level as men.

The United Nations Convention on the Rights of the Child [65]provides for the right to the highest attainable standard of health for every child, which includes access to reproductive health information, commodities and services.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) prohibits acts of torture as well as cruel, inhuman, and degrading treatment or punishment. Pursuant to this prohibition, CAT requires States to take legislative, administrative,

[65] Article 24.

judicial, or other measures to prevent and address torture, cruel, inhuman, and degrading treatment, or punishment (TCIDT). This includes measures to redress reproductive rights violations (including physical violence such as being hit, punched or slapped during labour, childbirth or the post-partum period); verbal abuse (such as being shouted at, scolded, mocked, insulted or threatened with withdrawal of treatment for a woman or her child), denial of services (such as when women who request pain relief in the context of seeking reproductive services are denied such medications) and non-consensual procedures, such as not being informed of what healthcare providers are doing including sterilization.

African Regional Instruments and Standards on Sexual and Reproductive Health Rights

The two regional instruments that provide for sexual and reproductive health rights are the Banjul Charter and the Maputo Protocol. The Banjul Charter provides for the right to the best attainable standard of mental and physical health, [66] which includes the right to the best attainable standard of sexual and reproductive health. The Banjul Charter also enshrines a number of rights that are inextricably linked with the right to best attainable standard of sexual and reproductive health. These include protection from discrimination; [67] the right to freedom from discrimination on the grounds of sex or other status;[68] and the right of every individual to equality before the law;[69] the right to integrity of the person in Article 4; right to protection from torture and cruel, inhuman or degrading treatment in Article 6; and right to liberty and security of the person in Article 6.

The Maputo Protocol expressly obligates States to ensure that the sexual and reproductive health and rights of women and girls are respected and promoted under Article 14.These include the right to family planning education, the right to exercise control over one's fertility, decide one's maternity, the number of children and the spacing of births, and choice of contraceptive methods and the right to adequate, affordable health services at reasonable distances, including information, education and communication programs for women, especially those living in rural areas.

[66] Article 16(1) of the Charter.
[67] Article 18(3) of the Charter.
[68] Article 2 of the Charter.
[69] Article 3 of the Charter.

Article 14 (2) (c) of the Maputo Protocol further recognizes the right of every woman to access safe and legal abortion in cases of sexual assault, rape, incest, and where the pregnancy endangers the woman's life or mental and physical health. The Maputo Protocol also enshrines women's right to integrity and security of the person in Article 3; right to protection from harmful cultural practices in Article 5; and right to equality in marriage and all aspects related to the family in Article 6. Additionally, the Maputo Protocol recognizes specific groups of women and girls who are especially vulnerable, including women in armed conflict in Article 11; women with disabilities in Article 23; and women in distress in Article 24. General Comment No 2 on Article 14.1(a), (b), (c) and (f) and 14 (a) and (f) of the Protocol requires State parties to ensure that the right to health of women, including sexual and reproductive health, is respected and promoted.

African Charter on the Rights and Welfare of the Child (ACRWC) which enshrines the right to health in Article 14, includes adolescent girls' right to sexual and reproductive health.

In elaborating on the interdependence and interconnectedness of sexual and reproductive health rights with other rights, the African Charter on Human and Peoples' Rights (ACHPR) in General Comment No. 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c) of the Maputo Protocol, specified that the right to dignity enshrines the freedom to make personal decisions without interference from the State or non-State actors. Further, that the right to make personal decisions involves taking into account or not the beliefs, traditions, values and cultural or religious practices, and the right to question or to ignore them. [70]

The General Comment also clarifies that the right to health care without discrimination requires State parties to remove impediments to the health services reserved for women, including ideology or belief- based barriers. Administrative laws, policies and procedures of health systems and structures cannot restrict access to family planning/contraception on the basis of religious beliefs. [71]

On the principle of conscientious objection, the General Comment guidance on the right to freedom from being subjected to discrimination prohibits any deprivation of access to family planning/contraception services by healthcare providers for reasons of conscientious objection.

[70] https://achpr.au.int/index.php/en/node/854
[71] ibid

While it is true that they may invoke conscientious objection to the direct provision of the required services, the General Comment calls on State parties to ensure that the necessary infrastructure is set up to enable women to be knowledgeable and referred to other health care providers on time. In addition, State parties must ensure that only the health personnel directly involved in the provision of contraception/family planning services enjoys the right to conscientious objection and that it is not so for the institutions. However, the right to conscientious objection cannot be invoked in the case of a woman whose health is in a serious risk, and whose condition requires emergency care or treatment. [72]

National Legal Framework on Sexual and Reproductive Health in Kenya

The protection of sexual and reproductive health rights is anchored in the Constitution of Kenya 2010. Several statutes have provisions which give effect to the protection of sexual and reproductive health rights, including the Health Act 2017, Sexual Offences Act 2006, Children Act 2022 and the Penal Code CAP 63.

Article 43(1)(a) provides that, "*Every person has the right to the highest attainable standard of health, which includes the right to healthcare services, including reproductive health care.*"

Article 26 (4) of the Constitution also provides that, *"Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law."*

Section 6 (1) of the Health Act 2017 recognizes the right to reproductive health care, which includes:

a) *the right of men and women of reproductive age to be informed about, and to have access to reproductive health services including to safe, effective, affordable and acceptable family planning services;*

b) *the right of access to appropriate health-care services that will enable parents to go safely through pregnancy, childbirth, and the postpartum period, and provide parents with the best chance of having a healthy infant;*

[72] ibid

c) *access to treatment by a trained health professional for conditions occurring during pregnancy including abnormal pregnancy conditions, such as ectopic, abdominal and molar pregnancy, or any medical condition exacerbated by the pregnancy to such an extent that the life or health of the mother is threatened. All such cases shall be regarded as comprising notifiable conditions.*

Section 6(2) of the Health Act 2017 defines a trained health professional as one who can treat conditions arising in pregnancy as a medical officer, a nurse, midwife or a clinical officer who has been educated and trained to proficiency in the skills needed to manage pregnancy-related complications in women, and who has a valid licence from the recognized regulatory authorities to carry out that procedure.

Section 35(3) of the Sexual Offences Act[73] requires the Minister responsible for Health to prescribe circumstances under which a victim of a sexual offence may at any time access treatment in any public hospital or institution.

The HIV and AIDS Prevention and Control Act[74] makes provision for issues on the testing and treatment of HIV/AIDS and the non – discrimination of persons living with HIV/AIDS including in reproductive matters.

Section 16 (1) of the Children Act[75] recognizes the right of every child to the highest attainable standard of healthcare services in accordance with Article 43 of the Constitution. The Act introduces third party consent for provision of reproductive health services to children which is subject to the express consent of the parent or guardian. Section 16 (2) however recognizes that every child has the right to enjoy the best attainable state of physical, mental and psychological health while Section 16 (3) provides that in pursuance of the right to healthcare services under this section, every child has the right to privacy and a child-friendly environment. Section 16 (4) guarantees every child to amongst others the right to access to age-appropriate information on health promotion and the prevention and treatment of ill- health and disease, mental health and reproductive health.

[73] Act No 3 of 2006
[74] Act No 14 of 2006.
[75] Act No 29 of 2022.

Sections 158-160 of the Penal Code[76] impose a blanket criminalization of abortion.

Thematic Areas Under Sexual and Reproductive Health Rights

1. Adolescent Sexual and Reproductive Health Rights

Decriminalisation of consensual and non-exploitative sexual conduct

This section reviews the existing tensions between laws that criminalize consensual sexual conduct with the aim of "achieving a worthy or important societal goal of protecting children from premature sexual conduct" and the need to ensure that adolescents that engage in consensual sexual conduct are not unable to access sexual and reproductive health services.

To begin with, the Committee on the Rights of the Child (CRC), in its General Comment 20 on the implementation of the rights of the child during adolescence (CRC General Comment 20), enjoined States parties to balance protection and evolving capacities when defining an acceptable minimum legal age for sexual consent. The CRC clearly stated that "States should avoid criminalising adolescents of similar ages for factually consensual and non-exploitative sexual activity." General comment No.7 on Article 27 of the ACRWC on sexual exploitation also calls on State Parties to decriminalise consensual, non-abusive and non-exploitative sexual activities among child peers.

From a review of the cases summarised below, it is clear that criminalisation of consensual sexual conduct among adolescents has a stigmatising effect. This may prevent them from seeking much needed sexual and reproductive health services which may lead to death or irreversible damage to their sexual and reproductive health.

Eliud Waweru Wambui v Republic Criminal Appeal 102 of 2016 [2019] KECA 906 [KLR]

Court of Appeal at Nairobi

Nambuye, Musinga & Kiage, JJ. A

22 March 2019

Sexual intercourse with adolescent girls – Consent to sexual activity - Sexual Offences Act

[76] Cap 63, Laws of Kenya.

Summary of the facts

This was a second appeal as the Appellant had been convicted by the Chief Magistrate's Court at Thika of defilement, contrary to Section 8(1)(4) of the Sexual Offences Act. His appeal before the High Court was unsuccessful. One of the Appellant's major complaints was that the age of the complainant was not proved to the required standard.

Issues for determination

Among the grounds of appeal included whether the Appellant's conviction and sentencing were safe, given the full circumstances of the case, particularly on the age of the girl.

Determination

While allowing the appeal, the Court delved into the issue of consensual and non-exploitative sexual conduct amongst adolescents. It made a clarion call for the re-examination of the issue of statutory rape as an issue that required serious and open discussion. The Court made reference to other jurisdictions such as England where only sex with persons less than the age of 16, which is the age of consent, is criminalised and even then, the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age.

The Court called for a candid national conversation on this sensitive yet important issue, which implicated the challenges of maturing, morality, autonomy, protection of children and the need for proportionality and which was long overdue. The Court made reference to the injustice of the imprisonment of young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent had been held to be immaterial because they were under 18 years.

Significance of the Case

The case highlights the complex issues related to the age of consent and the criminalization of consensual sexual activity among adolescents. The Court's call for a national conversation on the matter underscores the need to consider the broader implications of such laws on the sexual and reproductive health of young people. The case emphasizes the importance of distinguishing exploitative and non-exploitative situations, as well as the need for proportionate and rights-based approaches to address the complexities of adolescent sexual behaviour, autonomy, and protection. This recognition is significant in promoting comprehensive sex education, respecting the sexual and reproductive health rights of young people, and avoiding overly punitive measures that may have adverse health and social consequences.

P.O.O. (A minor) v Director of Public Prosecutions & the SRM, Mbita Law Courts Petition No 1 of 2017

High Court at Homabay

Omondi, J.

17 August 2017

Section 8(1) as read with 8(4) of the Sexual Offences Act - Legal capacity to consent to sex - best interest of the child

Summary of the facts

The Petitioner challenged the continuation of defilement charges against him in the Mbita Law Courts. He contended, among other things, that the continued prosecution of the case was discriminatory and denied him equal rights and protection of the law.

Issues for determination

1. Whether the Petitioner was a minor.
2. Whether the Petitioner's constitutional right to be treated equally before the law (Article 27 of the Constitution) was infringed by the Respondents.
3. Whether the Petitioner's right to fair trial was infringed Article 50 of the Constitution.
4. Whether the Petitioner's constitutional rights as a child were infringed.

Determination

The Court noted that the conduct complained about demonstrated some element of agreement and expressed its concern about convicting minors who decide to "experiment" mutually when such cases are often brought against the boy by the girl's parents after they find out she is pregnant. The Court agreed with the Petitioner's claim and quashed the charges filed before the magistrate's Court in Mbita.

Significance of the case

The Court recognized the importance of distinguishing consensual sexual experimentation among minors from criminal offenses like defilement, particularly in cases where both parties are close in age. By quashing the charges, the Court acknowledges that criminalizing such conduct can have adverse implications for the sexual and reproductive health and rights of minors, especially young girls. It emphasizes the need for a balanced and age-appropriate approach to matters related to sexual health and relationships among minors, considering the best interests of the child and promoting comprehensive sex education rather than punitive measures.

CKW v Attorney General & Another Petition No. 6 of 2013 [2014] eKLR

High Court at Eldoret

Ochieng, J.

25 July 2014

Adolescent sex - Section 8(1) as read with 8(4) of the Sexual Offences Act - Consensual sexual activity between minors - Criminalization of consensual sexual acts between minors

Summary of the facts

The Petitioner had been charged and convicted with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. The said charge was read and explained to the Petitioner before the Chief Magistrate's Court, Eldoret, in Criminal Case No. 1901 of 2013. The Petitioner's contention was that the sexual act between him and the complainant was consensual as the complainant was his girlfriend. The Chairman of the North Rift Chapter of the Law Society of Kenya participated in these proceedings as an Amicus Curiae. He pointed out that the law has been applied in a discriminatory manner as only the boy (Petitioner herein) has been charged yet the complainant had willingly gone to the Petitioner's house, where she and the Petitioner then had consensual sex.

Issues for determination

1. Whether or not Sections 8 (1) and 11 (1) of the Sexual Offences Act were inconsistent with the Constitution of the Republic of Kenya.

Determination

The Court upheld the conviction, holding that minors have no legal capacity to consent to sexual intercourse, as they needed protection from engaging in premature sexual conduct. The Court further noted that the criminalization of consensual sexual conduct was "aimed at achieving a worthy or important societal goal of protecting children from premature sexual conduct".

Significance of the Case

The significance of this case is that the continued criminalisation of sexual activity between minors may have the impact of stigmatising sexual activity between them thus preventing them from seeking sexual and reproductive health services, and further preventing them from realising their right to health under the Constitution.

Access to Sexual and Reproductive Health Rights Information and Services for Adolescents

This section reviews regional jurisprudence on forced pregnancy testing and expulsion of school girls who are found to be pregnant. The practice of mandatory pregnancy testing, expulsion of pregnant and married adolescent girls and denial of re-entry back to the formal education system has been found to violate the rights of girls as envisioned under the African Charter on the Rights and Welfare of the Child (African Children's Charter).

Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v. The United Republic of Tanzania, Communication No: 0012/Com/001/2019 (Decision No 002/2022)

The African Committee of Experts on the Rights and Welfare of the Child

ACERWC Committee Members communication signed by Honourable Joseph Ndayisenga Chairperson ACERWC

Mandatory pregnancy testing - Expulsion from school due to pregnancy - Sexuality education for adolescents - Child-friendly sexual reproductive and health services - Child marriage

Summary of the facts:

In the case, the Legal and Human Rights Centre and the Centre for Reproductive Rights, acting on behalf of Tanzanian girls ("the Complainants"), challenged the government of Tanzania's policy and practice of subjecting primary and secondary school girls to forced pregnancy testing and expelling them from school when they are found to be pregnant or married.

It was the complainants' case that due to these policies and practices, thousands of girls were dropping out of school each year due to pregnancy. In Tanzania, mandatory pregnancy testing is practised in almost all public schools, forcing girls as young as 11 years to take pregnancy testing without their consent. Girls are also required to take a pregnancy test when they enrol in schools and those who are found to be pregnant are denied admission.

Issues for determination:

1. Whether the Respondent State had adopted a policy and practice which had resulted in forced pregnancy testing of schoolgirls and the expulsion of pregnant and married girls from schools with no re-entry opportunities;
2. Whether the act of the Respondent State was a violation of the various rights of children and its State obligations in the African Charter on the Rights and Welfare of the Child;
3. Whether the applicants were entitled to any remedies.

Determination by the Committee

The Committee observed that Tanzania's policy and practice of mandatory pregnancy testing, expulsion of pregnant and married adolescent girls and denial of re-entry back to the formal education system violated the rights of Tanzanian girls as envisioned under the African Charter on the Rights and Welfare of the Child (African Children's Charter) and other international and regional human rights instruments it had ratified.

In particular, the government had violated the girls': right to education (Article 11); right to equality and non-discrimination (Article 3); right to be protected from harmful social practices and stereotypes (Article 21); right to have their best interests as the primary consideration in all actions towards them (Article 4); right to health as it includes the right to access sexual and reproductive health services (Article 14); right to privacy (Article 10) and the right to be free from cruel, inhuman, and degrading treatment (Article 16).

The Committee also found that the government of Tanzania had failed to meet its obligation to undertake general measures of implementation in accordance with Article 1 of the Convention. The Committee's recommendations to the United Republic of Tanzania were that it should

1. Provide sexuality education for adolescent children and provide child friendly sexual reproductive and health services;
2. Undertake proactive measures towards the elimination of child marriage and other harmful practices that affect girls including by taking measures to address the underlying factors such as gender-based discrimination, poverty, and negative customary and societal norms;
3. Act against any actors who conduct forced pregnancy testing of any kind, or who discriminate against girls on the grounds of their pregnancy or marital statuses including through expelling and detaining married or pregnant girls.

Significance of the case

The decision by the Committee demonstrated the significance of State policies in the realisation of sexual and reproductive health rights of adolescents. The State has an obligation to ensure that any measures and policies formulated do not violate the rights of its citizens. One of the key tenets of the realisation of the right to sexual and reproductive health (which is a part of the right to health) is the provision of comprehensive sexuality education and the provision of adolescent friendly services. Measures that are punitive and discriminatory against pregnant girls violates their rights to sexual and reproductive health rights.

Assisted Reproduction

Every person is entitled to reproductive healthcare services, goods and facilities that are available in adequate numbers, accessible both physically and economically and without discrimination and also are of good quality. The alleviation of infertility is one of the sexual and reproductive health services that both men and women are entitled to. Surrogacy arrangements are commonly entered into as ways in which people can alleviate infertility and childlessness. This section shows the manner in which Courts have dealt with surrogacy arrangements.

A.M.N & 2 others v Attorney General & 5 others Petition No. 443 of 2014 [2015] KEHC 6960 (KLR)

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Lenaola J

13 February 2015 Surrogacy - Genetic parenthood - Gestational parenthood In Vitro Fertilisation - Best Interests of the Child - Surrogacy agreement.

Summary of the facts

X was diagnosed with secondary infertility after losing one child at infancy and having had four miscarriages. She was advised to seek an egg donor In Vitro Fertilisation/ Embro Transfer (IVF/ET) as the most suitable fertility option and both X and her husband, Y, accepted the advice. It was agreed that a surrogate arrangement was the next best option and Z agreed to be the surrogate host. Her husband was also agreeable to the arrangement and a Surrogacy Agreement was subsequently signed on 6 June 2012. By that agreement, Z inter alia consented to have three embryos transferred to her and to hand over the born baby to the genetic parents.

On 7 June 2012, Z underwent the embryo transfer and on 5 February 2013, she delivered twin babies of the female gender. The hospital issued a Birth Notification Certificate indicating that X and Y were the parents of the twins and the Department of National Registration (2nd Respondent) issued their birth certificates on 12 June 2013 with those particulars recorded. The twins also received Kenyan Passports on 19 June 2014. Sometime after June 2014, X and Y, applied for British Citizenship for the children to enable them travel to the United Kingdom (UK), but the application was unsuccessful. The UK Passport Office responded and stated that to establish British citizenship for the minor children, there were two options available. The first was adoption under Article 23 of the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of the Inter-Country Adoption. Certificates issued under Article 23 of the Hague Convention Article 23 were acceptable for passport services.

The second one was registration as a British citizen. They were advised that it was open to contract the United Kingdom Visa & Immigration service (UKV&I) with a view to registering the children as British citizens. X and Y applied for a review of the said decision and in response, the UK Passport Office stated that from the information given in the application, the children's claim would be because they had a British parent named on their birth certificate. Information provided in support of the claim raised concerns that the details given on the birth certificate were not true. Again, the application was rejected.

Issues for determination

1. Whether the birth certificates issued to the twin children were properly issued under the current legal regime in Kenya.
2. Whether the information contained in them was truthful and if not, what information they should lawfully contain.
3. Who the lawful mother of the twin children was.
4. In view of the position taken by the UK Passport Office as regards the entry into the UK by the twin children, what reliefs were available to the Petitioners.

Determination

The Court analysed who the mother of surrogate children was. The Court noted that the issue had dogged other Courts in the past and the effect had been painful for affected parties. This pain is what X expressed in this case. She raised the issue of the fact that as she pursued entry into the UK for the children while in Kenya, she lost her employment in the UK and had become almost destitute. The Court noted that a host woman is presumed in law to be the mother of a surrogate child until other legal processes are applied to transfer legal motherhood to the commissioning woman. The Court undertook a comparative analysis.

In the UK for example, where the Petitioner hailed from, the Court noted that the surrogate mother having carried a child following assisted reproduction 'and no other woman', is the child's legal mother under Section 33(1) of Human Fertilisation and Embryology Act (HFEA) 2008. This remained the case unless the child was subsequently adopted or parenthood transferred through a parental order. Absent adoption or a parental order, the surrogate mother retained parental responsibility.

In other jurisdictions such as France, Iceland and Italy, the surrogate mother had no parental rights over the child and the child born was legally the child of the prospective parents. However, it was the view of the Court that in the absence of a legislative framework in Kenya and noting specifically the issues before the Court, the position taken by the UK Courts ought to prevail here. The Court determined that the surrogate mother was the mother of the twins until such a time as the necessary legal processes were undertaken or until this or any other Court had issued requisite orders in that regard. The Court noted that, unlike the UK Courts, the Kenyan law did not provide for parental orders and the only option available was that of adoption.

The Court noted that its decision would be guided by two main considerations: The need to ensure that the unit of the family as intended in the surrogacy agreement was not ruined by unnecessary detail and technicality; and that the best interests of the surrogate children were always paramount. The Court further held that the surrogate mother was the legal mother, and the genetic father was the legal father until a legal process was invoked to transfer legal parenthood to the mother. This position would remain until a statutory framework was created, perhaps along the lines of the law in the U.K. because of our historical ties including in our laws.

The Court noted that the Attorney General recognized the lacunae in Kenyan law wherein he stated, "*Noting advances in medical health, and the likelihood that surrogacy arrangements are likely to be witnessed on a more frequent basis in the years to some, there is merit in the government initiating a deliberate process of public policy formulation on the question of surrogacy. It is therefore strongly recommended that a formal inter-agency and multi-stakeholder process be initiated by the Ministry of Health to consider the need for a formal policy, and possibly law, on surrogacy in Kenya. The stakeholders may need to consider the following key issues among others during that process:*

a. The need for a policy or legislation on surrogacy in Kenya;

b. The advisability of the tool of parental orders in the transfer of legal parentage under surrogacy arrangements;

c. Definition of key terminology in surrogacy transactions;

d. Implications of a legal recognition of surrogacy in Kenya on all related laws and regulations; e. Constitutional implications arising from recognition of surrogacy, particularly in the case of same-sex couples in Kenya.

f. Issues of advertising for surrogacy arrangements and involvement of third parties;

g. The question of commercial versus altruistic surrogacy; and h. Implications of surrogacy on medical ethics."

The Court noted the above initiative and added that the matter required urgent attention to save prospective parents the agony that X and Y had undergone. The Court further noted that there was no doubt that Kenya required a law to regulate surrogate arrangements to protect all involved and affected parties including and most importantly, the children.

The Court issued the following orders. First, pending a fast-tracked adoption process for the surrogate twins, their birth certificates and Kenyan passports were to be amended and/or altered to indicate that Z and not X was their biological mother. Second, that the adoption proceedings contemplated in (a) above were to be fast-tracked and an order issued directing the Deputy Registrar of the Family Division to so fast-track the adoption proceedings in the interests of justice. Thirdly, in cases of surrogacy, the surrogate mother was to be registered as the mother of a born child pending legal proceedings to transfer legal parenthood to the commissioning parents. Finally, the Attorney General was directed to fast-track the enactment of legislation to cater for surrogacy arrangements in Kenya.

Significance of the case

This case is significant to the right to health as it addresses the legal complexities and challenges related to surrogacy arrangements, specifically concerning the determination of legal parenthood and the need for legislative regulation in the absence of clear legal frameworks in Kenya. The Court's decision prioritizes the best interests of the children born through surrogacy and emphasizes the necessity for a statutory framework to protect all parties involved in surrogacy arrangements. This recognition highlights the importance of establishing legal guidelines for surrogacy to ensure the rights and well-being of children and prospective parents, ultimately contributing to comprehensive and safe reproductive health practices.

J.L.N. & 2 Others v. Director of Children's Services & 4 Others Petition No. 78 of 2014 [2014] eKLR

High Court of Kenya at Nairobi

Majanja J.

30 June 2014

Surrogacy – Surrogacy Agreement – Surrogate motherhood – Genetic parenthood – Births and Deaths Registration – Best interests of the child

Summary of the facts

The 1st Petitioner entered into a surrogacy agreement with the 2nd and 3rd Petitioners and gave birth to twins at MP Shah Hospital (the "Hospital"), the 3rd Respondent. The 1st Petitioner was the surrogate mother of the twins, while the 2nd and 3rd Petitioners were the genetic parents. Following delivery, the question arose as to whose name, the surrogates, or the genetic mother's, should be entered in the Acknowledgement of Birth Notification (the "Notification"), as required under the Births and Deaths Registration Act, Cap 149 of the Laws of Kenya (BDRA).

The hospital sought the advice of the Director of Child Services (Director) who decided that the children were in need of care and protection. The children were therefore placed under the care of a children's home. The children were later released to the 1st Petitioner, and the hospital issued the notification in her name. The Petitioners filed a suit against the Director and others in the children's Court to prevent the children from being put up for adoption. Pending the hearing and determination of the main suit, the children's Court ordered that the children be released into the custody of the genetic parents, and that the surrogate mother be allowed unlimited access for purposes of breastfeeding the children.

The children's Court also ordered that the names of the genetic parents be entered into the birth notifications as well as the birth certificates. The Petitioners sought orders to compel the Respondents to release the children into their custody and not interfere with the surrogacy agreement, and an order for damages. They also sought declarations that the Hospital's disclosure of the Petitioners' medical information to the Director contravened the Petitioners' constitutional rights to privacy, and that the Director's decision to seize the children from the surrogate mother contravened both her rights and the constitutional rights of the children.

Issues to be Determined

The Court adjudicated on the following issues:

1. Whether the hospital violated the Petitioners' right of privacy under Article 31 of the Constitution; and
2. Whether the Director violated the Petitioners' rights in taking away the children.

Determination

The hospital did not violate the Petitioners' right to privacy when it divulged information about the surrogacy agreement while seeking the advice of the Director on what to do about the circumstances involving the Petitioners and the Hospital. The Director violated the rights and fundamental freedoms of the Petitioners, including their right to dignity, when seizing the children and placing them in a children's home.

One of the challenges was whose details should be included: the surrogate mother's or the genetic parents'. The Court held that the mother referred to in the BDRA was the birth mother, and by virtue of Section 2 of the Children's Act, the surrogate mother had the immediate responsibility to maintain the children and was entitled to their custody. The Court therefore found that the hospital had made the right decision to give the particulars of the mother.

However, since there was no law on surrogacy, nothing prevented the hospital from registering the names of the genetic parents in the notification. In its final determination, the Court was ultimately persuaded by the hospital, which argued that in the absence of a law on surrogacy, and in the face of uncertainty about what to do, it was justified in seeking the guidance of the Director. It said that this was a justifiable limitation on the right to privacy of the Petitioners. Further, the Court cited Section 38(1) of the Children's Act which mandated the Director to safeguard the welfare of children.

On the second issue, the Court considered whether the Director had acted in the best interests of the children. The Court found that the children were not in need of care and protection. The Court pointed out that the Director was called upon to guide the Hospital on what to do about the registration and to decide on to whom the children would be released. The Court noted that there was no issue about the mother rejecting them, nor was there any dispute between the surrogate mother and the genetic parents.

The Court therefore found that the decision of the Director to seize the children and place them in a children's home was not in the best interests of the children in respect of Article 53(2) of the Constitution and Section 4(2) of the Children's Act. It held that the actions of the Director to seize the children contravened the right to dignity of the Petitioners and caused them embarrassment and distress. The Court observed that the issues it was asked to adjudicate arose because there was no legislative regime on surrogacy in Kenya.

The Court was of the opinion that it was the duty of the State to enact legislation to regulate surrogacy. This duty stemmed from the right to health and health care services, including reproductive health guaranteed under Article 43(1)(a) of the Constitution, but also the right to recognition and protection of the family under Article 45(1). It followed the decision of the High Court of Kenya in Organization for National Empowerment v. Principal Registrar of Persons and Other (Petition No. 289 of 2012 [2013] eKLR) and decided that the details of the genetic parents be registered rather than those of the surrogate mother because the child is entitled to the identity of its genetic parents. The Court awarded damages to the Petitioners as compensation for violation of their right to dignity.

Significance of the Case

This case is significant to the right to health as it addresses the legal complexities and challenges surrounding surrogacy in Kenya, emphasizing the need for a legislative framework to regulate surrogacy arrangements. The Court's decision highlights the importance of protecting the rights and best interests of the children born through surrogacy and the genetic parents, contributing to the realization of reproductive health and family rights as guaranteed under the Kenyan Constitution. Furthermore, the case underscores the duty of the State to enact laws that safeguard the health and legal rights of individuals involved in surrogacy, ultimately ensuring the protection of families and children's welfare in surrogacy arrangements.

Abortion as a Sexual and Reproductive Health Issue

Article 26(4) of the Constitution of Kenya provides that, "*Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.*"

What the Constitution seems to permit is medicalised abortion – termination of a pregnancy based on the danger posed to the health and life of the mother. The health of the mother does not only constitute the physical health, but also the mental health. The Center for Reproductive Rights has developed Mental Health Indicators for Legal Abortion.[77]

While not all the cases in this section are directly related to the right to health, they demonstrate the approach that Courts take towards abortion generally. The Kenyan legal system appears

[77] Center for Reproductive Rights 'Understanding the Mental Health Indication for Legal Abortion' August 2013, available at https://reproductiverights.org/wp-content/uploads/2020/12/Kenya-Mental-HealthAbortion-Fact-Sheet.pdf

preoccupied with treating abortion as a criminal issue rather than as a sexual and reproductive health issue.

When healthcare professionals are prosecuted for saving the lives of girls and women who have suffered complications as a result of botched abortions, then many may shy away from offering these crucial health care services that have the potential to save lives.

The cases in this section deal with prosecution of healthcare professionals who are suspected to have procured botched abortions. The cases highlight how abortion stigma impacts the quality of the prosecution and judgement during the trial.

Jackson Namunya Tali v Republic Criminal Appeal No. 173 of 2016 [2017] eKLR

Court of Appeal at Nairobi

Waki, Nambuye, M'inoti, JJ. A

19 October 2017

Burden of proof-Proof beyond reasonable doubt for murder-Procuring an abortion-proof of alleged botched abortion to go beyond mere suspicion

Summary of facts

In July 2009, a pregnant woman came to Tali's health clinic in Gachie, Kiambu County experiencing severe pain and bleeding. After diagnosis, Mr. Tali determined that she needed to go to a bigger and better equipped health facility to receive specialised medical attention. Because she could not afford to hire an ambulance for the transfer, Mr. Tali agreed to transport her to the next facility. The woman died in Mr. Tali's car while being transferred. Mr. Tali was then charged and convicted of murdering the woman. In the trial Court, the judge believed Mr. Tali had been trying to assist the woman to procure an abortion, and that this alleged botched abortion had led to the woman's death. However, the government pathologist testified that he was unable to determine the cause of the death because there was no direct evidence that the accused had interfered with the pregnancy and caused her death.

On appeal, Mr. Tali argued that the legal criteria to convict for murder were not fulfilled in his case and that there was no evidence of an unlawful act or omission by himself. The "unlawful act" relied upon by the trial Court was an alleged attempt by Mr. Tali to procure an abortion for his patient, but to reach this conclusion, the trial Court relied on facts that were unsupported or

were directly contradicted by other facts. In addition, Mr. Tali argued that there was no evidence that the deceased died from an alleged attempted abortion. Mr. Tali also argued that the trial Court was wrong in shifting the burden of proof of exoneration onto himself, which constituted a constitutional violation.

Issues for determination

The Issues for determination by the Court of Appeal were as follows:

1. Whether the trial Court erred in law and in fact in relying on insufficient or no evidence to substantiate the offence of murder in the absence of any of the primary elements of mens rea and actus reus proven.

2. Whether the trial Court erred in law and in fact in forming and holding opinions and stating facts that were not born in (sic) the evidence on record.

3. Whether the trial Court erred in law and in fact in admitting evidence and exhibits whose foundation and chain of custody was suspect and was not laid to the Court and applying non corroborated evidence against the Appellant.

4. Whether the trial Court erred in law and fact in failing to recognize and appreciate material inconsistencies in the various accounts of evidence whose doubt should benefit the Appellant.

5. Whether the trial Court erred in law and in fact in upholding his opinion in the place of the evidence of an expert and in offhandedly rejecting or disbelieving the evidence of an expert which evidence was exculpatory to the Appellant.

6. Whether the trial Court erred in law and fact in shifting the burden of proof to the Appellant contrary to the Constitution.

Court's determination

Upon hearing the appeal, the Court of Appeal pronounced itself on several issues highlighted by both Mr. Tali and the State. Of note were the Court's pronouncements on the sloppy investigation and prosecution of the matter that highlight how abortion stigma may have impacted the quality

of the prosecution and judgement during the trial. The Court noted that, "*In this case there was no pretence by the prosecution that it was focusing on any one or more of the elements [of murder] stated above to prove causation or intent. The theory of attempted abortion that was latched on by the investigating officer and eventually accepted and, with respect, unduly embellished by the trial Court…"* [78]

The Court of Appeal found that the prosecution failed to tender evidence that the medical instruments and equipment collected from Mr. Tali's clinic and the blood samples, all of which were taken for forensic examination, had connected Mr. Tali with the attempted abortion and therefore the death of the deceased.

The Court also found that there was no evidence that the medication given to the deceased by the appellant the day before her death was toxic or related to abortion. The Court of Appeal took issue with the way the explanation given by the accused during his initial trial was dismissed. In the Court of Appeal's words, "*The appellant in this case gave an elaborate defence explaining his interaction with the deceased, Grace and Owino (prosecution witness 6). His evidence was given short shrift and peremptorily dismissed by the trial Court without proper and contextual analysis ...." "On the whole we are far from satisfied that the offence of murder was proved beyond any reasonable doubt. All that was established was suspicion that the appellant may have had a hand in the death of the deceased, but mere suspicion, however strong, is never probative of an offence in our criminal justice system."* [79]

The Court thus allowed Mr. Tali's appeal, quashing the conviction, and reversing the death sentence imposed upon him. The Court ordered his immediate release from prison unless otherwise lawfully held.

Significance of the case

The case symbolised a major reprieve for trained healthcare professionals in their provision of sexual and reproductive health services (particularly abortion services) to patients. Many healthcare professionals face the stigma and the fear of prosecution even when they are offering

[78] At page 8 of the judgement.
[79] At page 11 of the judgement.

legitimate and legal abortion – related services. The overturning of the conviction of Tali, should restore some confidence among trained healthcare professionals, that their services will not be criminalised. They can then provide emergency health services and much needed reproductive health services to women who need them.

Federation of Women Lawyers (FIDA – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) Petition No. 266 of 2015 [2019] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Muchelule, Ngugi, Odunga, Achode, Mativo JJ.

12 June 2019

Right to the highest attainable standard of health – Abortion services – Standards and Guidelines for managing all the aspects of prevention of unintended and risky pregnancies – Victims of sexual violence

Summary of facts

In 2011, to address the challenge of unsafe abortion and lack of a comprehensive policy framework to enable provision of services, the Ministry of Health (MoH) made positive steps to implement the constitutional provisions on abortion. It set up a multi-sectoral working group with a wide range of stakeholders, including representatives from the Health Ministry, health regulatory bodies and associations, religious sector, development partners and civil society organisations. The Working Group was to draft Standards and Guidelines for managing all the aspects of prevention of unintended and risky pregnancies, cases of unintended and risky pregnancies and post-abortion care. The Guidelines also set standards for the audit, monitoring, and evaluation of comprehensive abortion care in Kenya.

The Standards and Guidelines were adopted by MOH in September 2012 and became a tool that guided clinicians and patients in making decisions about appropriate abortion care and treatment. The Standards set the minimum requirements that each health facility and service provider was required meet to provide safe legal abortion services. At its adoption, the MOH indeed conceded that the one missing link in reducing maternal mortality had been the absence of technical and policy guidelines for preventing and managing unsafe abortions to the extent allowed by law.

On 3 December 2013, the Director of Medical Services (DMS) wrote to all County Directors of Health and other stakeholders, including health organisations and a religious body, advising them of the immediate withdrawal of Standards and Guidelines, and the National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies. The Director said it had come to the attention of MOH that the guidelines and curriculum were not being used for their intended purposes.

On February 24 2014, the Office of the Director of Medical Services (DMS) circulated a memo notifying all health care professionals that they would face professional and legal sanctions for attending training on safe abortion practices and the use of Medabon medicine for abortion. On the same date, the DMS also reprimanded the Kenya Obstetrical and Gynaecological Society (KOGS) for developing a training curriculum on safe abortion and for spending 60% of time on abortion during their Annual Scientific Conference. That same year, a 14-year-old girl (JMM) died from complications that resulted from an unsafe abortion. After becoming pregnant as a result of rape, JMM was unable to access safe abortion services. She had her pregnancy terminated by an unqualified provider and did not receive the post-abortion care she needed.

Issues for determination

The Court framed the following as the Issues for determination

1. Whether Article 26(4) of the Constitution permits abortion in certain circumstances.
2. Who a trained health professional is for the purposes of Article 26(4) of the Constitution.
3. What the right to health and the right to reproductive health entail.
4. Whether pregnancy resulting from sexual violence falls under the permissible circumstances for abortion under Article 26(4) of the Constitution.
5. Whether the DMS's impugned letter and memo met the test for limitation of rights set out in Article 24 of the Constitution.
6. Whether the decision to withdraw the 2012 Standards and Guidelines and Training Curriculum and to issue the Memo violated Articles 10 and 47 and was ultra vires the powers of the DMS.
7. Whether the decision of the DMS violated the Petitioners' rights and the rights of other women of reproductive age guaranteed in Articles 26, 27, 29, 33, 35, 43 and 46 of the Constitution.
8. Whether the decision of the DMS violated the rights of health workers guaranteed in Articles 32, 33, 34, 35 and 37 of the Constitution.

9. Whether the circumstances of JMM qualified her for post-abortion care under Article 43 of the Constitution.
10. Whether PKM as the personal representative of the estate of JMM was entitled to comprehensive reparation, including indemnification for material and emotional harm, suffered as a result of the actions of the Respondents.

Determination

The Court found that the withdrawal of the Standards and Guidelines, the ban on training of health professionals on safe abortion and the use of Medabon, the threat of penal sanctions against the health professionals by the Director of Medical Services were unlawful, illegal, arbitrary, and unconstitutional and thus the Standards and Guidelines and the training curriculum were to continue to exist as if they were never withdrawn.

The Constitution provides for a right to abortion where, in the opinion of a trained health professional, there is need for emergency treatment, or that the life or health (mental or psychological or physical) of the woman or girl is in danger, or if permitted by any other written law.

Abortion is permitted in Kenya if a pregnancy results from rape or defilement, and if in the opinion of a trained health professional it endangers the physical, mental, and social well-being of a woman or girl.

The blanket prohibition of abortion under the Penal Code could not stand because it was inconsistent with the provisions of the Constitution as well as the Sexual Offences Act. Kenya's refusal to be bound by Article 14 (2) (c) of the Maputo Protocol to the African Charter on Human and People's Rights had no effect to the extent that those provisions of the Protocol mirror those in Article 26 (4) of the Constitution of Kenya, which is binding.

Trained health professionals permitted by the Constitution to make an opinion that an abortion is necessary include nurses, clinical officers, and midwives in addition to doctors and specialist obstetrician gynaecologists.

The Court agreed with and adopted the World Health Organization's definition of health to mean "a state of complete physical, mental and social well-being, and not only the absence of disease or infirmity".

Significance of the Case

The Court in this case agreed with and adopted the World Health Organization's definition of health to mean "a state of complete physical, mental and social well-being, and not only the absence of disease or infirmity". The Court also recognised that women and girls have the right to the highest attainable standard of health, which includes the right not just to physical wellbeing, but also mental and social wellbeing. The case is significant for many vulnerable girls and women who suffer sexual violence and have no recourse when they conceive as a result of this violence. By restoring the abortion and post – abortion care guidelines, many women who get unwanted pregnancies as a result of sexual violence, will have recourse and access to healthcare. This will result in improved maternal outcomes in the country, which in turn enhances the realisation of the right to health.

PAK & another v Attorney General & 3 others (Constitutional Petition E009 of 2020) [2022] KEHC 262 (KLR)

High Court at Malindi

Nyakundi J.

Abortion as a fundamental right under the Constitution-Medical abortion-Criminalisation of abortion under Section 159 of the Penal Code-Arbitrary arrests and prosecutions for seeking or offering abortion services-Constitutional values of dignity, autonomy, equality and bodily integrity

Summary of facts

This petition was filed by "PAK," the patient who was a minor, and Salim Mohammed, a health care provider. PAK experienced pregnancy complications and sought emergency care at the nearby Chamalo Medical Clinic. Mohammed—a trained clinical officer qualified to provide legal abortion care—treated her after determining she had lost her pregnancy. Both PAK and Mohammed were arrested and detained by the police. She was accused of attempting an abortion while Mohammed was accused of providing her a medication abortion. PAK was remanded to juvenile prison for one month as she sought to secure funds for bail, which were eventually provided by the Center and RHNK. Mohammed was detained for one week before posting bail. On September 23 2019, PAK was charged with the offence of procuring an abortion contrary to Section 159 of the Penal Code. The charges stated that PAK, intending to end her pregnancy, took drugs that led to her miscarriage. On the same date, Salim Mohammed was charged with an attempt to provide abortion contrary to Section 158 of the Penal Code, with the prosecutor

stating that Salim, together with others, gave PAK drugs that led to her miscarriage. He was further charged with supplying drugs to procure abortion contrary to Section 160 of the Penal Code.

On October 23 2019, before the Senior Principal Magistrates Court in Kilifi, with support from the Center, the Petitioners challenged the lawfulness of the charges under the Constitution, the Sexual Offences Act 2006, and the judgement of the High Court in *Federation of Women Lawyers (FIDA – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) Petition No. 266 of 2015* .

On December 2 2020, the Petitioners filed a lawsuit against government officials in Malindi, Kilifi County after a lower Kilifi Magistrates' Court refused to drop the charges against both PAK and Mohammed.

Determination

The Court affirmed abortion as a fundamental right under the Constitution of Kenya and ruled that the arbitrary arrests and prosecution of patients and health care providers for seeking or offering abortion services were illegal. In its ruling, the Court directed the Kenyan Parliament to enact an abortion law and public policy framework that aligns with the Constitution. The Court held that protecting access to abortion impacts vital Constitutional values, including dignity, autonomy, equality and bodily integrity. It observed that criminalising abortion under the Penal Code without a constitutional statutory framework was an impairment to the enjoyment of women's reproductive rights.

Republic v John Nyamu & 2 others Criminal Case 81 of 2004 [2005] eKLR

High Court at Nairobi

Rawal, J

14 June 2005

Abortion – personhood of foetus – Charge of Murder – Whether foetus capable of being murdered

Summary of facts

Dr. Nyamu, a gynaecologist who provided reproductive health services, was arrested, and charged, along with two nurses working at his clinic, for the alleged murder of two foetuses that were dumped on a highway in Nairobi. The allegation was that the foetuses were illegally aborted at Nyamu's clinic. Although the media and public narrative focused on the provision of alleged illegal abortions, Dr. Nyamu and the two nurses were charged with two counts of murder.

Issues for determination

The Court was called to determine the following issues.

1. Whether the offence as per law has been shown to have been committed by the Prosecution.
2. Whether the two foetuses were capable of being killed, along with consideration of the evidence to decide the main issue i.e., whether there is any evidence connecting either all or any of the accused persons, with those offences.

Determination

The Court discussed the import of Section 214 of the Penal Code in relation to Section 203 of the same. The High Court noted that Section 203 of the Penal Code provides that, *"[a] person who, with malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."* The Court further noted that Section 214 of the Penal Code provides the following: *A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not."*

Though the State argued that the operative part of Section 214 should be, *"whether it has breathed or not, and whether it has an independent circulation or not", the Court found the operative part to be "when it has completely proceeded in a living state from its mother."* In this case the Court stated: *"... for a child to become a person the most important ingredient is "when it has completely proceeded in a living state from the body of its mother".* That ingredient is not present in this case. Without that the fetuses in two counts were not persons capable of being killed. There is no murder.

The Court determined that besides "wide yawning gaps" in the facts and evidence submitted

by the prosecution, foetuses were not capable of being murdered as established in Section 214 of the Penal Code. The Court ruled that the prosecution had failed to prove a case of murder against Dr. Nyamu and the two nurses and found them not guilty.

Significance of the Case

This case demonstrates the pre-occupation of the Kenyan legal system with abortion as a criminal issue rather than as a sexual and reproductive health right issue.

Maternal Healthcare Services

This section analyses the jurisprudence on maternal healthcare. Mistreatment in maternal care or detention for failure to pay maternity fees in Kenya have been found to be inconsistent with the Constitution and the national and County Governments directed to develop policy guidelines to implement the Presidential directive on free maternal care.

JOO (also known as J M) v Attorney General & 6 others Petition No. 5 of 2014 [2018] eKLR

The High Court of Kenya at Bungoma

Ali Aroni, J

22 March 2018

Right to the highest attainable standard of health – Right to reproductive rights – Degrading and inhuman treatment – Mistreatment in maternal care - Physical and emotional trauma – Infringement of dignity

Summary of facts

The case concerned a woman who visited a public hospital for maternal care and was subjected to mistreatment by the nurses. The Petitioner alleged that her fundamental rights as enshrined in the Constitution, regional and international human rights instruments were grossly violated. She sought remedies including an order for general damages for physical and emotional trauma and a declaration that the physical and verbal abuse amounted to a violation of her rights.

Issues for determination

1. Whether the matter before Court was competent.
2. Whether there was a violation of the Petitioner's rights under the Constitution of Kenya and international instruments as regards the right to healthcare in particular maternal health care; the right to dignity and the right to information.

3. 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.

Determination

The Court held that the Respondents had failed to avail the basics(drugs and cotton wool are basic provisions in any healthcare). To require the Petitioner and other poor women to purchase basic necessities in a public facility, where healthcare was anchored on the Constitution, and where a Presidential directive was specific on the provision of free maternal care, was nothing short of violation of a basic rights.

Significance of the Case

The Court held that the failure of the National and County Governments 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, was a contravention of the Constitution and international instruments that Kenya has acceded to as a country.

M A & Another v Honourable Attorney General & 4 others Petition No. 562 of 2012 2016] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Ngugi J

Right to the highest attainable standard of health – Unlawful and arbitrary detention – inability to pay medical costs - the right to dignity - right to liberty - right to be free from cruel, inhumane and degrading treatment – sexual and reproductive health

Summary of facts

In 2012, two women were held in detention at Pumwani Maternity Hospital due to their inability to pay maternity fees. The Petitioners, who were represented by the Center for Reproductive Rights, experienced extremely poor conditions during their detention. For instance, the second Petitioner was forced to sleep on the floor for a period of seven days. Eventually, their spouses and family were able to gather enough funds to pay the fees, and the Petitioners were subsequently released from the hospital.

Issues for determination

1. Whether the petition failed to state with a reasonable degree of precision, the manner in which the Petitioners' rights were violated;
2. Whether the Respondents violated the Petitioners' rights to liberty and security of the person; freedom of movement; freedom from torture, cruel and degrading treatment; dignity; health and non-discrimination;
3. Whether the Petitioners were entitled to the remedies they sought.

Determination

The Pumwani Maternity Hospital's detention of the Petitioners due to their inability to pay their medical bills was deemed arbitrary, unlawful, and in violation of the Constitution. There was no legal provision that authorised or mandated health institutions to detain patients or clients for non-payment of medical expenses. The act of detaining the Petitioners in poor conditions, such as making them sleep on the floor and subjecting them to unsanitary conditions, constituted cruel, inhuman, and degrading treatment.

Furthermore, by refusing to provide treatment to the Petitioners or subjecting them to mistreatment based on their inability to pay for maternal health services, the State failed in its duty to provide maternal health services in a manner that is non-discriminatory and respects the dignity of women.

The Court analysed the right to health and determined that it encompasses the principles of availability, accessibility, acceptability, and good quality (AAAQ) of health services. Further, the concept of accessibility went beyond physical proximity and included the affordability of healthcare services. Therefore, if the cost of healthcare services was prohibitively high, it rendered them inaccessible to individuals. As a result, the Court granted damages to compensate for the violation of fundamental rights in this case.

Significance of the case

The Court's determination emphasizes that the right to health includes the principles of availability, accessibility, acceptability, and good quality of health services. By ruling that the detention of the Petitioners was a violation of their constitutional rights and highlighting the importance of affordability in healthcare accessibility, the case contributes to shaping a legal framework that ensures equitable access to healthcare services and protects individuals from

inhumane and degrading treatment based on their economic status. It underscores the obligation of healthcare institutions and the State to provide healthcare services in a non-discriminatory manner, promoting the dignity and well-being of individuals seeking medical care.

Center for Health, Human Rights and Development and 4 Others v. Nakaseke District Local Administration (2015) Civil Suit No. 111 of 2012

High Court of Uganda

Kabiito J

30 April 2015

Maternal Healthcare

Summary of facts

The Plaintiffs in this case were the Center for Health, Human Rights and Development (CEHURD), the husband to and three daughters of Nanteza Irene (the deceased) . They filed a lawsuit against the Nakaseke District Local Administration (Local Authority), which is the governing body overseeing Nakaseke District Hospital (Hospital). The deceased was taken to the hospital for childbirth when her labour began. According to the Plaintiffs, during labour, the deceased was diagnosed with a condition called obstructed labour, which meant she needed the assistance of trained medical professionals to deliver her baby.

Unfortunately, the only doctor capable of managing the condition was supposed to be on duty at that time but was absent. After approximately eight hours, the deceased experienced complications and passed away. The Plaintiffs sought compensation from the Defendant, who held administrative responsibility for the hospital. They claimed that the Defendant violated the health rights of the deceased and the rights of her surviving children.

Issues for determination

1. Whether the Defendant violated the human and health rights of the deceased;
2. Whether the rights of the children she left behind were also violated by the Defendant;
3. Whether the Defendant was liable, and if so whether damages should be awarded.

Determination

The deceased died as a result of complications during labour, due to neglect of duty of the doctor who was supposed to attend to her, so that she failed to receive the necessary management and

care for the emergency condition she had developed. This was a violation of the constitutional rights of the deceased as well as the constitutional rights of the surviving children. The Defendant, which was the local authority and was responsible for management and operations of Nakaseke Hospital, including provision of medical services, was vicariously responsible for the death of the deceased, and the violation of the human rights of the deceased and her surviving children.

Significance of the case

The Court's determination establishes that the failure to provide timely and necessary medical care constitutes a violation of constitutional rights to health, not only for the deceased but also for her surviving children. By emphasizing the duty of the local authority to ensure the proper functioning of healthcare facilities under its jurisdiction, the case contributes to reinforcing the legal obligations of authorities in safeguarding individuals' right to health and underscores the need for accountability when such rights are infringed.

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

Constitutional Court of Uganda

Mpagi-Bahigeine, Byamugisha, Kavuma, Nshimye, Kasule, JJJ.A

30 October 2015

Reproductive health rights - Maternal health care - Maternal mortality - Uganda National Minimum Health Care Package

Summary of facts

The Petitioners in this case filed a lawsuit against the government, alleging that it had failed in its responsibility to provide basic healthcare, maternal commodities, and maternal healthcare to expectant mothers. They presented specific instances of maternal deaths that directly resulted from this failure. The Petitioners argued that the consequences of this failure included high maternal and infant mortality rates. They claimed that the government's failure to provide basic maternal healthcare violated constitutionally guaranteed rights under Articles 22, 24, 33, 34, and 44 of the Constitution of the Republic of Uganda, as well as the right of access to health services outlined in Objectives XX, XIV (b), XV, and Article 8A. Additionally, the Petitioners criticised the government for not fulfilling its international obligations, including respecting the right to the highest attainable standard of health as stipulated in Article 45 of the Constitution.

In response, the Respondent raised a preliminary objection, arguing that the Court could not adjudicate on the issues raised by the Petitioners as they involved political questions. The Respondent contended that such matters fell within the realm of political discretion, which, according to the law, were the responsibility of the Executive and the Legislature.

Issues for determination

The Court was therefore asked to determine the following issues:

1. Whether the right to the highest attainable standard of health was a constitutional right by virtue of Article 45 of the Constitution.
2. Whether the inadequate human resources for maternal health and lack of emergency obstetric care services at health centres were infringements of the right to health.
3. Whether non-provision of basic maternal healthcare services in health facilities contravened Article 8A or Objectives XIV and XX of the Constitution.
4. Whether non-provision of basic maternal healthcare packages in government hospitals, resulting in the deaths of pregnant women and their children, was a violation of the right to life as guaranteed under Article 22 of the Constitution.
5. Whether health workers' failure to attend to pregnant women subjected women to degrading and inhuman treatment, in contravention of Articles 24 and 44(a) of the Constitution.
6. Whether the high rates of maternal mortality in Uganda contravened Articles 33(1), (2) and (3) of the Constitution.
7. Whether the families of Sylvia Nalubowa and Jennifer Anguko, who died in hospital due to non-availability of basic maternal commodities, were entitled to compensation.

Determination

The petition brought up acts and omissions that were categorised as falling within the scope of a 'political question.' The Court determined that there was no specific constitutional issue that necessitated interpretation or resolution.

Significance of the case

The Court's determination highlighted that certain matters, despite their importance in the context of healthcare and maternal mortality, might be considered 'political questions,' which fall under the purview of the Executive and the Legislature rather than the Judiciary. While the case did not lead to immediate legal remedies, it raised crucial awareness about the need for

comprehensive healthcare policies and the importance of political will in addressing maternal health issues. It also emphasized the significance of having a legal framework that explicitly recognizes the right to health and maternal healthcare to hold the government accountable for meeting its obligations.

Sexual Rights

Criminalization of the Transmission of HIV

AIDS Law Project v. Attorney General & 3 Others Petition No. 97 of 2010 [2015] eKLR

High Court of Kenya, Constitutional and Human Rights Division

Lenaola, Ngugi, Odunga, JJJ

18 March 2015

HIV and AIDS Prevention and Control Act – Vagueness of legal provisions - Sexual contact – Confidentiality - Equal protection - Discrimination

Summary of facts

The Petitioner contested the validity of Section 24 of the HIV and AIDS Prevention and Control Act, No. 14 of 2006 (the Act), which became effective on December 1 2010, as per Legal Notice No. 180 of 2010. The Petitioner argued that this particular provision contained language that was both vague and overly broad, and therefore should be declared unconstitutional and invalid. The Petitioner contended that the provision failed to clearly communicate its intended purpose in law, resulting in a lack of certainty.

Additionally, the Petitioner asserted that Section 24 of the Act was unconstitutional because it perpetuated discrimination against people living with HIV (PLWH) based on their health status. Such discrimination was deemed to be in violation of the rights guaranteed under Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which has been incorporated into the Basic Law through Article 27 of the Constitution.

Issues for determination

1. Whether Section 24 of the Act was unconstitutional for containing language that was vague and overbroad;
2. Whether Section 24 of the Act violated the rights to privacy under Article 31 of the Constitution.

Determination

Section 24 of the Act contained ambiguous language, particularly regarding the term "sexual contact," which lacked a clear definition. This ambiguity created uncertainty and made it difficult for individuals targeted by this section to understand how they were expected to behave and who exactly fell within its scope. The provision was drafted in such a broad manner that it could potentially be interpreted to apply even to women who unintentionally exposed or transmitted HIV to children during pregnancy, delivery, or breastfeeding. Consequently, Section 24 of the Act failed to adhere to the principle of legality, which is an essential component of the rule of law.

This principle requires that offences be clearly defined in the law, ensuring that individuals are aware of the specific actions or omissions that render them liable. Furthermore, Section 24 of the Act mandated individuals with HIV to disclose their status to their "sexual contacts." However, it failed to establish any corresponding duty for these "sexual contacts" to maintain confidentiality regarding the disclosed information. As a result, Section 24 of the Act was found to be in violation of the constitutional right to privacy as outlined in Article 31 of the Constitution of Kenya 2010.

Significance of the case

The significance of this case to the right to health lies in its examination of the legal provisions criminalizing the transmission of HIV, particularly the vagueness of language in the HIV and AIDS Prevention and Control Act. The Court's determination that Section 24 of the Act was unconstitutional due to its ambiguous and overbroad language has important implications for the rights of individuals living with HIV and AIDS in Kenya.

This decision underscores the importance of clear and precise legal frameworks in safeguarding the rights of PLWH and ensuring that legal provisions do not inadvertently criminalize HIV transmission in a manner that violates privacy and equality. It contributes to the protection of the right to health by advocating for legal clarity and precision in public health laws.

EM & 6 others v General & another; HIV Justice Worldwide & another (Amicus Curiae); National Aids Control Council (Interested Party) Petition No. 447 of 2018 [2022] KEHC 16532 (KLR)

High Court of Kenya at Nairobi

Ong'udi, J

20 December 2022

Sexual Offences Act – Violation of Constitutional rights - Section 26 Sexual Offences Act – Discrimination – Transmission of HIV

Summary of facts

Several Petitioners challenged the constitutionality of Section 26 of the Sexual Offences Act No.3 of 2006 in Kenya. The Petitioners argued that the provision was vague, discriminatory, and violated their constitutional rights under several articles of the Kenyan Constitution. They sought several orders from the Court, including a declaration that Section 26 was inconsistent with the Constitution and a further order that each party should bear their own costs.

Issues for determination

Whether Section 26 of the Sexual Offences Act No.3 of 2006 was unconstitutional for being inconsistent with the Constitution

Determination

The Petitioners did not establish their claims to warrant the issuance of the orders sought, resulting in the dismissal of the petition.

Significance of the case

While this case involved a challenge to the constitutionality of Section 26 of the Sexual Offences Act in Kenya, its dismissal signifies the continued existence of this legal provision. Section 26 has been a subject of debate and concern due to its potential impact on individuals living with HIV, particularly the risk of criminalizing HIV transmission. The case's outcome underscores the need for continued advocacy and legal reform to ensure that laws related to HIV transmission are clear, non-discriminatory, and respectful of constitutional rights, with a focus on safeguarding public health without violating individual rights to health and dignity.

The Rights of Intersex Persons & Legal Recognition of Intersexuality

The 2019 Census revealed that there are around 1524 intersex persons.[80] Intersex persons face stigma and discrimination which has an impact on their access to healthcare services. The Courts would therefore have a role in protecting the human rights of these vulnerable groups of persons, including enforcing their right to healthcare.

R.M. v. Attorney General & 4 Others Petition 705 of 2007 [2010] eKLR

High Court of Kenya at Nairobi
Okwengu, Dulu, Sitati JJJ
2 December 2010
Intersexuality

80 National Council on the Administration of Justice (NCAJ) 'Report on the Status of Intersex Persons in the Criminal Justice System in Kenya' (2022) 1. Available on https://www.knchr.org/Portals/0/REPORT-ON-INTERSEX-PERSONS%203_1.pdf

The Petitioner, who was born with both male and female genitalia (intersex condition), was raised as a male by his parents. However, due to his condition, he faced numerous challenges in obtaining a birth certificate and a national identity card, which were necessary for enjoying citizenship rights, such as the ability to register as a voter, obtain travel documents, acquire property, and secure employment. As a result, he dropped out of school at a young age and encountered difficulties in formalising his marriage since the law did not recognize his marital status.

During his time in prison remand, awaiting the resolution of his robbery with violence case, a medical examination conducted as part of a routine search confirmed his intersex condition. Consequently, a Court order was issued to remand him at a police station rather than in the prison, reflecting the uncertainty surrounding his gender identity. However, he was later tried, convicted, and sentenced to death, leading to his confinement in a male prison facility where he shared cells and facilities with male inmates. In this environment, he alleged exposure to abuse, mockery, ridicule, inhumane treatment, and sexual molestation by fellow male inmates.

The Petitioner argued that the failure of the legal framework to recognize intersex individuals resulted in the infringement of his fundamental rights, including dignity, freedom from inhuman treatment, freedom from discrimination based on sex, freedom of movement, freedom of association, the right to a fair hearing, and the right to protection under the law. He relied on the provisions of the Constitution of Kenya, 2010, as well as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) to support his case.

Issues for determination

1. Whether the petition was a representative suit, and if so, whether the Court had jurisdiction under Section 84 of the repealed Constitution of Kenya 1963 to consider generally the rights and violations of rights of intersex persons.
2. Whether the Petitioner was an intersex person, and if so, whether the Petitioner, as an intersex person, suffered from a lack of legal recognition and protection under the Constitution and other applicable laws, resulting in violations of the Petitioner's human

rights, including, among others, the right of everyone to be recognised as a person before the law, the right to equality and non-discrimination as guaranteed under Section 82 of the repealed Constitution of Kenya 1963, and the constitutionally guaranteed rights to life, liberty and security of the person.

3. Whether the Petitioner suffered violation of his fundamental right to be free from torture, cruel, inhuman, or degrading treatment provided under Section 74 of the repealed Constitution of Kenya 1963.

Determination

The Petitioner failed to provide any data or evidence indicating the presence of a specific number of intersex individuals in Kenya, which would be necessary to establish a class or group of persons on behalf of whom the Petitioner could bring a representative suit. Consequently, the Petitioner lacked the legal standing (locus standi) to initiate a representative suit on behalf of other intersex persons.

Moreover, the Petitioner, as an intersex person, was adequately protected by existing laws, and there was no infringement upon their constitutionally guaranteed rights or other rights based on their intersex status. Therefore, no discrimination occurred under the law on that basis.

However, the Petitioner's right to protection against inhuman and degrading treatment, as provided under Section 74 of the repealed Constitution of Kenya 1963, was violated by prison officials. As a result, the Petitioner is entitled to receive general damages of Kshs. 500,000 and an additional 20% of their costs, to be paid by the Attorney General and Commissioner of Prisons.

Significance of the case

While the case primarily focused on the legal recognition and rights of intersex individuals, it underscores the broader issue of recognizing and respecting the rights and dignity of individuals with diverse gender identities and expressions. Intersex individuals, like all people, have health-related needs and rights that must be acknowledged and respected within healthcare systems. This case highlights the need for inclusive healthcare policies and practices that address the specific health concerns and rights of intersex individuals, ensuring they receive appropriate care and support, which is significant in promoting the right to health for all, regardless of their gender identity or intersex status.

Baby "A" (suing through her mother, E.A.) and The Cradle the Children Foundation v Attorney General, Kenyatta National Hospital, and the Registrar of Births and Deaths Petition No. 266 of 2013 [2014] eKLR

The High Court of Kenya

Lenaola J

5 December 2014

Intersex children - Legal recognition

Summary of facts

The Petitioner, Baby A, was born with both male and female genitalia. The 2nd Respondent in the case, Kenyatta National Hospital, conducted medical tests on the Petitioner. In one of the documents that captured the Petitioner's personal details, a question mark "?" was inserted in the column for indicating the individual's sex. Additionally, Baby A had never been issued a birth certificate. The Petitioner argued that the insertion of a question mark to indicate the Petitioner's sex constituted a violation of the child's rights to legal recognition, dignity, and freedom from inhuman and degrading treatment. These rights are protected under Section 4 of the Children Act, 2001, and Articles 27, 28, and 29 of the Constitution of Kenya, 2010.
Furthermore, the Petitioner contended that the absence of legislation, such as the Registration of Births and Deaths Act (RBDA), Cap 149 of the Laws of Kenya, recognizing children with intersex conditions, infringed upon various rights guaranteed to children under the Constitution and various international human rights treaties. These treaties include the Convention on the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and People's Rights (ACHPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).

Issues for determination

1. Whether Baby A was an intersex person and if so, whether the baby suffered lack of legal recognition because of Sections 2(a) and 7 of the Births and Deaths Registration Act and whether therefore these provisions were inconsistent with Article 27 of the Constitution;

2. Whether there was need for guidelines, rules and regulations for surgery on persons with intersex conditions;
3. Whether there was a need to collect data on persons with intersex conditions in Kenya and if so, who was mandated to do so.

Determination

There was no evidence to suggest that the rights of Baby A or other individuals with intersex conditions were violated due to Sections 2(a) and 7 of the Registration of Births and Deaths Act. The Court noted that the lack of recognition for individuals with intersex conditions within the current legal framework was an inconsistency. The Court ruled that the government had the responsibility of safeguarding the rights of babies and individuals with intersex conditions by establishing a legal framework that addressed their specific needs. This framework had to encompass aspects such as registration under the Registration of Births and Deaths Act, medical examinations and tests and corrective surgeries.

Significance of the case

This case underscores the importance of recognizing and protecting the rights of intersex individuals in the context of healthcare and legal recognition. It emphasizes that the lack of a legal framework addressing the rights and specific needs of intersex individuals is inconsistent with constitutional guarantees and international human rights treaties. The judgment highlights the need for guidelines and regulations regarding surgeries for individuals with intersex conditions and emphasizes the government's responsibility to collect data on this population. Ultimately, the case contributes to the broader discourse on inclusivity in healthcare and legal systems, reinforcing the right to health for intersex individuals by advocating for legal recognition and protection of their rights within the existing legal framework.

Baby A (Suing through the Mother EA) & Another v Attorney General & 6 Others (2014) eKLR

Summary of the facts

EA who is the mother of the 1st Petitioner gave birth to a baby who had both male and female genitalia. One of the arguments on behalf of the Petitioner was that corrective surgery for intersex children is not necessary unless there is therapeutic need to conduct the surgery and that forced genital normalisation, involuntary sterilisation, medical display and reparative therapies often lead to irreversible changes to the body and interferes with the child's right to family and

reproductive health rights generally. The Petitioner's case was that the Court should direct that such surgeries should be conducted when the child is of age so that they can make an informed decision and choice. The Petitioner argued that a corrective surgery without regulation is akin to experimentation on a human body in violation of Article 27 of the Constitution.

Determination

In dismissing the Petition, the Court still made orders that the 1st Respondent submit to the Court within 90 days information related to organ agency or the institution responsible for collecting and keeping data related to intersex children and persons generally. The 1st Respondent was also to file a report to the Court within 90 days of the decision, the status of a statute regulating the place of intersex persons as a sexual category and guidelines and regulations for corrective surgery for intersex persons.

Significance of the case

This case holds significance in recognizing the rights of intersex children in the context of medical interventions. While the Court dismissed the petition challenging the necessity of corrective surgery for intersex children, it issued important orders directing the submission of information and reports related to intersex children's data collection, legal status, and guidelines for corrective surgery. This underscores the Court's acknowledgment of the complexities surrounding intersex issues and the need for regulatory frameworks to protect the rights and well-being of intersex individuals. The orders reflect a commitment to addressing the gaps in the legal and healthcare systems concerning intersex persons, contributing to the ongoing discourse on the right to health for individuals with intersex variations.

Semenya v. Switzerland (European Court of Human Rights Application no. 10934/21)

Pere Pastor Vilanova, President, Yonko Grozev, Georgios A. Serghides, Darian Pavli, Peeter Roosma, Ioannis Ktistakis, Andreas Zünd[81]

11 July 2023

Discrimination

Summary of facts

In 2018, World Athletics enacted controversial regulations which applied to athletes deemed as having a 'Difference of Sexual Developments' (the "DSD Regulations"). Ms Semenya

[81] https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7021287-9471834&filename=Notification%20of%20the%20application%20Semenya%20v.%20Switzerland.pdf

was affected by these regulations and took the matter to the Court of Arbitration for Sport (CAS), which found in favour of the World Athletics. Ms Semenya appealed the decision of the CAS (which sits in Lausanne) to the Federal Supreme Court of Switzerland. The Federal Court dismissed the appeal, finding that the regulations were an appropriate, necessary and proportionate means of achieving the legitimate aims of fairness in sport. Ms Semenya then referred the matter to the European Court of Human Rights (ECtHR).

Issues for determination

The Applicant was challenging the compatibility of certain regulations that had been issued by the IAAF (a Monegasque private-law association) and subsequently endorsed by the CAS and the Swiss Federal Court, with various provisions of the European Convention of Human Rights. The Court further noted that Switzerland had played no part in the adoption of the DSD Regulations. The Court therefore decided to focus its examination on the issue whether the review carried out by the CAS and the Federal Court had, in the present case, satisfied the requirements of the Convention.

Determination

The ECtHR ruled that the European Convention of Human Rights had been violated in the case concerning the DSD Regulations. The Court identified several issues with the Regulations that were not adequately addressed in the CAS decision. It questioned both the scientific and legal basis of the Regulations, particularly highlighting the following concerns:

(i) The hormone treatment mandated by the DSD regulations had "significant" side effects;
(ii)Even if female athletes followed the prescribed hormone treatment diligently, they might still be unable to meet the DSD requirements;
(iii) There was limited evidence indicating that athletes with Ms. Semenya's condition had any significant athletic advantage under the relevant circumstances.

Notably, in the sporting context, Ms. Semenya could only challenge the DSD Regulations through arbitration with CAS. To participate in the required testing for competition, she had to sign contracts containing compulsory arbitration clauses, a common practice in sports disputes referred to CAS. The ECtHR held that CAS did not apply the provisions of the Convention properly, leading to serious doubts about the validity of the DSD Regulations, particularly concerning the aforementioned issues.

The subsequent review by the Federal Supreme Court of Switzerland was deemed insufficient and failed to address CAS's concerns in a manner consistent with the Convention's requirements. As a result, Ms. Semenya did not receive sufficient protection of procedural and institutional safeguards, leading to a violation of Article 14, which prohibits discrimination, in conjunction with Article 8, which protects the right to respect for private and family life. Ultimately, the ECtHR concluded that there had been a violation of Article 13 of the Convention, which guarantees an individual the right to an effective remedy for any breaches of the Convention.

Significance of the case

The case highlights the intersection of human rights, discrimination, and sports regulations, specifically focusing on the right to health in the context of athletes with variations in sex development. The European Court of Human Rights ruled that the regulations imposed by World Athletics, which required female athletes with certain differences in sexual development to undergo hormone treatments to be eligible for competition, violated the European Convention on Human Rights.

The decision emphasizes the importance of upholding human rights, including the right to health, in the formulation and implementation of sports regulations. It underscores the need for careful consideration of the impact of such regulations on the health and well-being of athletes and the requirement for an effective remedy when human rights violations occur in the realm of sports.

Sexual Orientation

COI & another v Chief Magistrate Ukunda Law Courts & 4 others Civil Appeal 56 of 2016 [2018] eKLR

The Court of Appeal of Kenya at Mombasa

Karanja, Karanja, Koome JJA

22 March 2018

Medical examinations-HIV-Hepatitis B testing-anal examination-self-incrimination-fair hearing-probative value-privacy, dignity

Summary of facts

The Appellants in this case were arrested on suspicion of being homosexuals. During the investigation, they refused to undergo medical examination. However, by Court order, they were compelled to undergo medical examinations, including anal examinations. The Petitioners argued that these forced medical examinations violated several rights protected under the Constitution of Kenya, including the right not to be treated in a cruel, inhuman, or degrading manner (Article 29), the right to privacy (Article 31), the right to non-discrimination (Article 27), and the right to dignity (Article 28). They also contended that this method of obtaining evidence, i.e., non-consensual medical examination, contradicted their right to a fair trial as guaranteed under Article 50 of the Constitution.

Issues for determination

1. Whether the examinations and tests conducted on the appellant were lawful and/or reasonable in the circumstances.
2. Whether the results obtained from those examinations were properly admitted as evidence in the criminal proceedings.
3. Whether the appellants' rights were violated at Kwale Prison.

Determination

The requirement for the accused to provide samples for purposes of proving an offence, as provided under the Sexual Offences Act, infringed on the Petitioners' rights. The Court concluded that the actions of the Respondents, which involved subjecting the Petitioners to anal examinations, constituted a violation of the Petitioners' rights as outlined in Articles 25, 27, 28, and 29 of the Constitution. Additionally, the Court of Appeal held that the use of evidence obtained through these anal examinations in criminal proceedings against the Petitioners further violated their rights under Article 50 of the Constitution, which guarantees the right to a fair trial.

Significance of the case

This case highlights the importance of upholding individuals' rights to privacy, dignity, and protection from cruel, inhuman, or degrading treatment in the context of medical examinations and testing. The ruling sets a precedent by affirming that non-consensual, intrusive medical examinations, such as anal examinations, are unlawful and violate constitutional rights. This decision emphasizes that individuals' rights to health and physical integrity must be protected

even in cases involving criminal investigations, and that evidence obtained through such violations cannot be admissible in Court. It reinforces the principle that the pursuit of justice should not come at the expense of individuals' fundamental human rights, including their right to health.

Reproductive Rights in the Workplace

The discussion around the realisation of the right to health must take into account the reproductive health rights of workers in the work place. Workplace policies and work designs should be sensitive to the reproductive issues that employees face. The Employment Act 2007 provides that a female employee shall be entitled to three months maternity leave with full pay. A male employee shall be entitled to paternity leave of two weeks with full pay. Vide an amendment to the Employment Act, the law now provides for one month pre- adoption leave.[82]

A major challenge, especially for women in the workplace who have to face maternity issues, is discrimination due to pregnancy. Article 27(4) of the Constitution provides that no one shall be discriminated on, among other reasons, the basis of pregnancy. The Health Act 2017 makes provision for lactation stations that must be well equipped and suitable for the purpose of lactating mothers. The cases highlighted in this section, even though not directly concerned with the right to health, deal with the maternity rights of women which takes care of a part of their reproductive health rights.

G M V v Bank of Africa Kenya Limited Industrial Court Cause No. 1227 of 2011 [2013] eKLR

Employment and Labour Relations Court at Nairobi

Rika, J

31 July 2013

Summary of the facts:

The facts of the case were that the claimant was the Respondent's employee for five years. In the last two years of her employment, she was blessed with two issues. While the first pregnancy had few difficulties, the second pregnancy was not smooth, forcing the claimant to take sick leave. The Respondent later terminated the claimant's contract, an action that the claimant asserted

[82] Section 29A, introduced by Amendment Act No. 2 of 2021.

was a result of her pregnancy and not her performance. Aggrieved, the claimant instituted the suit claiming unfair discrimination under Section 5 of the Employment Act of 2007.

Issue for Determination

Whether the dismissal of the claimant amounted to discrimination under Section 5 of the Employment Act.

Determination by the Court

In any proceedings where a contravention of Section 5 (3) was alleged, the employer had to bear the burden of proving that the discrimination did not take place as alleged, and the discriminatory act or omission was not based on any grounds specified in this section. The Court further explained that gender violence could not be adequately redressed through the ceiling of 12 months salary given for unfair termination under the Employment Act. The Court had to therefore be careful not to see sexual harassment as just another unfair termination. The Court declared that the Respondent's actions discriminated against and violated the Claimant's constitutional rights.

Significance of the case

The ruling underscores that discrimination against pregnant employees, including unfair dismissal, is a violation of their constitutional rights. This decision sets a precedent for upholding the rights of individuals to have access to maternity leave and a safe working environment during pregnancy, ensuring that their right to health is not compromised due to discriminatory employment practices. It reinforces the principle that employers must not discriminate against employees based on pregnancy or related health conditions, thereby contributing to the protection of women's health and well-being in the workplace.

Mercy Gakii Nabea v Malindi Management Strategy Ltd Cause 40 of 2018 [2019] eKLR

Employment and Labour Relations Court at Malindi

Ndolo J

13 February 2019

Redundancy-Lawful and fair termination-Issuance of proper notice-Maternity leave and notice period as separate and distinct rights

Summary of the facts

On 1 December 2007, the Claimant was employed by the Respondent as a security guard. On 12 December 2017, she applied for maternity leave which was granted. While still on maternity leave, she received a letter terminating her employment contract on account of redundancy and a sum of Kshs. 65,159, was offered to her. She declined this sum, leading to the institution of this case.

Issues for determination

a) Whether the termination of the Claimant's employment was lawful and fair;
b) Whether the Claimant was entitled to the remedies sought.

Determination by the Court

The Court recognised that redundancy was a legitimate ground for termination of employment. However, the Court was emphatic that redundancy was not a carte blanche in the hands of an employer, as Section 40 (1) of the Employment Act had to be complied with. Redundancy could only be undertaken at the instance of the employer when the conduct of the employee was not in issue. There was a heavy responsibility placed on the employer to secure the rights of the affected employee and ensure that the redundancy exercise was undertaken fairly and objectively.

The Court referred Section 40 of the Employment Act which stipulates the conditions for redundancy. The first condition is the issuance of notices of redundancy: one to the employee's trade union (or to the employee in person where they are not a member of a trade union) and another to the local Labour Office stipulating the reasons for and extent of the redundancy. The second condition is the issuance of a termination notice addressed to each departing employee. The third deals with the redundancy selection criteria, including seniority in time, skill, ability and reliability of the employee. The last four conditions in Section 40 stipulate the statutory benefits to be paid to the employee declared redundant.

In relation to the notice, the Court found that there was no redundancy notice issued to the claimant. Further, the timing of the termination contemplated that the Claimant would serve termination notice simultaneously with her maternity leave, which flew in the face of the

Employment Act. There were also no appraisal reports that demonstrated that the employee was a poor performer. Moreover, the timing which the Respondent asserted that the Claimant performed poorly coincided with her pregnancy.

The Court concluded that the Respondent's actions amounted to unlawful and unfair termination of employment. Further, the Court explained that the actions of the Respondent amounted to discrimination on the basis of pregnancy.

Significance of the case

The ruling reinforces the importance of protecting the health and well-being of pregnant workers by establishing clear guidelines and conditions that employers must follow when considering termination due to redundancy. This legal precedent underscore that pregnant employees cannot be subjected to unfair and discriminatory employment practices, which could jeopardize their health and livelihood during a vulnerable period. The case serves as a reminder of the legal protections in place to safeguard the right to health during pregnancy and emphasizes the importance of employers adhering to these regulations.

Significance of the Cases on Reproductive Rights in the Workplace

The case demonstrates how many women face discrimination because of their pregnancy status in the workplace. Many employers do not recognise the importance of the protection of the sexual and reproductive health rights of women in the workplace. Maternity protection as a sexual and reproductive health rights issue needs to be taken into account within work places.

HEALTH FINANCING AND FINANCIAL PROTECTION

A key component of the right to the highest attainable standard of health, is the financial accessibility of health services by the citizens in Kenya. Health financing is thus a significant policy consideration for the State in ensuring the progressive realisation of the right to health. Currently healthcare in Kenya is financed by three major sources – government expenditure, out of pocket expenditure and donors.

A significant number of Kenyans rely on out-of-pocket sources to meet their healthcare financial needs. This drives many households to poverty in the country.[83] It is also not unusual to find health facilities detaining patients due to unsettled medical bills. This situation was exacerbated during the COVID-19 pandemic when many patients were admitted in hospital due to COVID-19 related complications.[84] The detention of patients in hospital for non-payment of medical fees is seen to be a violation of the right to health and other health related rights.[85]

Health financing, encompassing revenue mobilisation, pooling of risks and resources, and strategic purchasing, has a profound influence on mechanisms that drive Universal Health Coverage (UHC) in developing economies.[86] Health financing policy plays a critical role in ensuring equitable access to healthcare services for all citizens, regardless of their socio-economic status. However, in the context of developing economies, high financial hardship persists, significantly affecting individuals and communities' ability to access necessary healthcare. The burden of healthcare costs, exacerbated by limited resources and economic challenges, poses significant barriers to health services and undermines the realization of the fundamental right to health.

[83] Linet Owoko, 'Out of Pocket Spending on healthcare above Sh. 150bn' (Business Daily Newspaper, Monday February 6, 2023) available at https://www.businessdailyafrica.com/bd/data-hub/out-of-pocket-spending-on-healthcare-above-sh150bn--4112402

[84] Tom Obengo, 'Medical Debt during Epidemics: A Case for Resolving the Situation in Low – and – Middle Income Countries such as Kenya' (2023) 7 Wellcome Open Research 245

[85] Robert Yates, Tom Brookes and Eloise Whitaker, 'Hospital Detentions for Non – Payment of Fees: A Denial of Rights and Dignity.' (2017) Research Paper, Centre on Global Health Security (Chatham House, The Royal Institute of International Affairs); see also Dr Stella Bosire and Dr. Ifeanyi Nsofor, 'Hospital Debt, Detention and Dignity in Health' (2022) Amnesty International

[86] Kutzin, Joseph. (2013). Health financing for universal coverage and health system performance: concepts and implications for policy. Bulletin of the World Health Organization, 91 (8), 602 - 611. World Health Organization. http://dx.doi.org/10.2471/BLT.12.113985

Figure 5 below presents the health financing context in Kenya

Figure 5: Kenyan Health Financing Context

Highlights on the Kenyan Health Financing Context

Kenya spends about 11% of its annual budget on Health against the 15% Abuja target.

The Government spends 2.3% of the country's Gross Domestic Product (GDP) on health against the recommended 5%.

County Governments spend approximately 29% of their budgets on health.

Only 26.5% of Kenyans have any form of health insurance, with 24% covered by NHIF and 2.5% by private insurance.

Out of Pocket payments for health account for approximately 24% of the total health spending in Kenya against the recommended level of below 15%

Source: MOH National Health Accounts, 2021 [87]

The Judiciary can significantly contribute to strengthening health financing policy by upholding the principles of justice, fairness, and accountability, and by adjudicating cases related to healthcare financing. The jurisprudence in this section highlights how the Judiciary plays a significant role in strengthening health financing policy in the context of a developing economy progressing towards universal health coverage. By upholding principles of fairness, accountability, and justice, and by adjudicating health financing-related cases, the Judiciary contributes to the establishment of an equitable, efficient, and effective health financing system that promotes access to healthcare services for all citizens.

The Courts have sought to strike a balance between the right to access healthcare and the right to recover expenses incurred in the treatment of a patient. While a person is entitled to his right to freedom of movement and liberty, hospitals are equally entitled to their right to property. The Courts have ruled that it is not just for persons to walk into private hospitals for treatment and expect to walk out without paying under the guise of the constitutional protection of their liberty and freedom of movement. That said, it is also not open to hospitals to detain patients who are unable to pay their debts. The Courts have therefore held that an illegal detention of a patient was not an avenue for the recovery of a debt and expenses incurred during such unlawful detention are not to be borne by patients.Moreover, where a patient dies, their corpse cannot

[87] Ministry of Health. 2021. Kenya National Health Accounts 2016/17 – 2018/19. Nairobi, Kenya, Government of Kenya

be held or detained as security for payment of outstanding bills. It was therefore repugnant to public policy to allow hospitals to retain corpses for purposes of debt recovery.

Nathan Muhangani Shimwenyi v Attorney General & 2 Others Petition No. 282 of 2012 (2017) eKLR

High Court of Kenya at Nairobi

Ngugi, J

6 July 2012

Right to health – Arbitrary and forceful detention – Inability to pay hospital bill – Emergency medical treatment - Violation of constitutional rights

Summary of the facts

The Petitioner sustained serious injuries after a near fatal road accident and obtained medical treatment at Kenyatta National Hospital (KNH). His hospital bill got to Kshs. 1.4 million, an amount which the Petitioner was unable to pay. KNH discontinued medical care because the Petitioner was unable to continue making payment. The Petitioner sought to leave KNH in order to receive treatment in an alternative facility, but KNH detained him until he had paid the amount he owed.

Issues for determination

1. Whether the Respondents detention of the Petitioner for inability to pay his hospital bill was a violation of his constitutional rights.

Determination

The Court recognised that in as much as the Petitioner had a right to health and to emergency medical treatment, he also had an obligation to meet the cost of such treatment, otherwise this would lead to a collapse of the hospital and would adversely affect the rights of other citizens who are also dependent on public health institutions. However, due to the health situation of the Petitioner, the hospital was ordered to furnish the Petitioner with a detailed statement, and that the Petitioner pay to the hospital the sum of Kshs. 250,000 as well as security and a detailed payment plan for payment of the balance. Upon the Petitioner fulfilling this condition, the hospital would release his medical records to him and release him to seek medical attention elsewhere. In this case, the Court tried to balance the rights of patients to access emergency medical treatment as part of their right to the highest attainable standard of health, with the right of health facilities to recover the costs of what they have expended on treating the patient, so that they do not economically collapse.

Significance of the case

This case is significant in addressing the delicate balance between an individual's right to health, particularly emergency medical treatment, and the financial sustainability of health facilities. The Court acknowledged the patient's right to health but also considered the hospital's need to recover costs. By providing a detailed statement, setting a reasonable payment plan, and releasing the patient upon partial payment, the Court attempted to reconcile these competing interests. This case underscores the importance of finding equitable solutions to ensure access to healthcare without compromising the financial viability of health institutions.

MAO & another v Attorney General & 4 Others Petition No. 562 of 2012 [2015] eKLR
High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Ngugi, J

17 September 2015

Right to Health – Forceful and arbitrary detention in health facility – Inability to pay medical bills - User fees – Cost of Maternal care - Health Financing - Access to services – Affordability of health services – Violation of rights to health, reproductive health and dignity

Summary of the facts

The Petitioners came from an economically-disadvantaged background. As such, they sought obstetric services at a City Council clinic where the cost of delivery was much cheaper in comparison to private facilities. However, due to complications that arose, they both ended up in the care of the 5th Respondent (Pumwani Maternity Hospital). In both cases, they were denied treatment, until they could raise some of the money demanded by the hospital amounting to Kshs 3,600. The 1st Petitioner had only Kshs. 1,000 while the 2nd Petitioner had an insurance card, which though issued by an organisation housed within the hospital, and from the evidence bore the name of the hospital, "Changamka Pumwani Maternity Smart Card" was apparently not acceptable. The 2nd Petitioner, despite having an insurance card was kept waiting until she had to go into emergency surgery, and as a result allegedly suffered a ruptured bladder. The Petitioners further submitted that the waiver system largely failed because it took a long time to request and be granted a waiver, and even worse, in some instances, many hospital users are unaware that a waiver system existed, and whom to approach, and so they do not initiate the waiver process. The Petitioners sought orders, inter alia, declaring that their detention in the hospital was arbitrary and a violation of their constitutional rights. They also sought orders directing the 3rd, 4th and 5th Respondents to take administrative, legislative and policy measures that would eradicate the practice of detaining patients who could not pay their medical bills by implementing the Ministry of Health's commitment to offer free maternity services in public facilities. They also sought for an order requiring the Respondents to create

an accountability system that would ensure that the practice of arbitrary detention in health facilities did not continue.

Issues for determination

One of the main Issues for determination was whether the Petitioners right to health, dignity, liberty, freedom of movement, freedom from torture and non – discrimination had been violated.

Determination

The Court noted that the right to health and the right to dignity were inextricably linked and any quality healthcare institution had to respect the dignity of patients. Quality healthcare means that there is responsiveness to the needs of the patients. The fact that the Petitioners, as patients, were detained due to the lack of the ability to pay their medical bills was a violation of their right to dignity and health. Accessibility to healthcare requires non – discriminatory access to health facilities especially for the vulnerable and marginalised. There was thus a violation of their constitutional rights including their right to health.

Significance of the case

This case highlights the critical intersection between the right to health and economic circumstances. The Court recognized that the denial of treatment based on the inability to pay medical bills constitutes a violation of the patients' right to health and dignity. By emphasizing the link between the right to health and the right to dignity, the Court underscored the importance of treating patients with respect and ensuring that economic constraints do not compromise access to essential healthcare services. This case reinforces the principle that healthcare institutions must be responsive to the needs of patients and that discriminatory practices, especially against vulnerable and marginalized individuals, are incompatible with constitutional rights to health and dignity.

Tryphosa Jebet Kosgey v Elgon View Hospital Petition 5 of 2013 [2016] eKLR
High Court of Kenya at Eldoret

Kimondo, J

19 May 2016

Right to health – Detention due to unpaid medical bills – Itemisation of hospital bill – Costs of healthcare in private health facility - Violation of Constitutional rights

Summary of the facts:

The Petitioner in this case claimed that she was unlawfully detained by the private health facility in which she was admitted for ten days after her discharge. She claimed that her constitutional

rights had been violated by the Respondent. She also contested the bill that was given to her by the Respondent. Even if, by the time of the hearing of the petition the bill had been paid and she had left the hospital, she still contested the amount in the bill. It is noteworthy that the Petitioner had come from a public hospital (Iten) and had voluntarily opted for treatment in a private hospital.

Issues for determination

1. Whether the Petitioner was unlawfully detained in the hospital.
2. Whether the hospital bill was exorbitantly high.

Determination

The Court found that the Petitioner had indeed been unlawfully detained for ten days in the hospital. The Court also found that the Petitioner was entitled to an itemised bill and full accounts which were ordered to be furnished to the Registrar of the Court within 30 days of the judgement. The Petitioner was awarded damages of Kshs. 100,000/= for unlawful detention.

Significance of the case

This case underscores the importance of protecting an individual's right to health and personal liberty, even in the context of private healthcare facilities. The Court recognized that the Petitioner's detention, subsequent to her discharge, was a violation of her constitutional rights. Additionally, the Court emphasized the right of patients to receive itemized bills and transparent information about healthcare costs, addressing concerns related to potentially exorbitant billing practices. This case contributes to the broader understanding that access to healthcare is not only about physical treatment but also involves protecting individuals from arbitrary detention and ensuring transparency in healthcare billing, regardless of whether the healthcare facility is public or private.

Christine Kidha v Nairobi Women's Hospital Petition No. 345 of 2015 [2016] eKLR
High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Onguto, J

7 December 2016

Forced and arbitrary detention due to unpaid medical bills – Violation of Constitutional rights of dignity and liberty - Contractual Debt Enforcement

Summary of the facts

The Petitioner sought and obtained medical care which required admission from the Respondent. Six days later, the Petitioner was due to be discharged. However, at the time of her discharge,

the Petitioner was unable to fully settle her medical bill with the Respondent which stood at Kshs. 339,495.24. Kshs. 160,000.00 was then paid leaving a balance of Kshs. 173,000.00, which she promised to clear upon release. In the meantime, the Petitioner further contended that her predicament was brought to the Respondent's attention, and she further expressed her willingness to clear the outstanding balance by offering security in the interim in the form of motor vehicle KBA 703Q. This was rejected and instead, the Respondent resorted to unlawful confinement and detention until 3 September 2015 when she was released pursuant to a Court order.

Issues for determination

1. Whether detention was the most appropriate measure in compelling financing.
2. Whether the Petitioner's constitutional rights had been violated.
3. Whether the Petitioner should only be liable for costs of medical care given to her only until the time of discharge.

Determination

The Court held that detention of a person that seeks to procure or compel a person to perform a contractual duty is a violation of the right to liberty under the Constitution. The Petitioner's detention was therefore unjustifiable, arbitrary and a violation of her constitutional rights. A contractual debt should be enforced by moving to Court with a view to recovering the debt. The Court also held that the Petitioner should only pay the amount owed as at the time of her discharge and not during the time of her unlawful detention.

Significance of the case

The case demonstrates that hospital detention is a violation of health-related rights such as the right to liberty and the right to dignity. It is also inconsistent with the efforts towards universal health coverage.

Gideon Kilundo & Daniel Kilundo Mwenga v Nairobi Women's Hospital Petition No. 242 of 2018 [2018] eKLR

High Court of Kenya (Constitutional and Human Rights Division)

Okwany, J

5 September 2018

Right to health – Unlawful and arbitrary detention – Non – payment of medical bills – Competing interests of hospital and patient – Violation of Constitutional rights

Summary of the facts

The 2nd Petitioner, having been involved in a car accident, was admitted to the Respondent hospital's intensive care unit upon the 1st Petitioner's undertaking to settle the medical bills. When the 2nd Petitioner was discharged from the Respondent hospital, he was detained due to non-payment of the hospital bill. The Petitioners sought declaratory orders that the detention of the 2nd Petitioner was arbitrary, unlawful and a breach of his constitutional rights

Issues for determination

1. Whether the continued detention of the 2nd Petitioner in the Respondent's hospital was a unlawful, arbitrary and a violation of his constitutional rights.

Determination

The Court determined that in as much as the Petitioner was entitled to his right to freedom of movement and liberty, the Respondent was equally entitled to their right to property. The Petitioners' rights under the Constitution were not absolute. The Court noted that it was not just for persons to walk into private hospitals for treatment and expect to walk out without paying under the guise of the constitutional protection of their liberty and freedom of movement.

That said, the Court held that an illegal detention of a patient was not an avenue for the recovery of a debt. The petition was allowed in that a declaration was made that the continued detention of the Petitioner by the Respondent was arbitrary and unlawful and an order of mandamus was issued to compel the Respondent to release the 2nd Petitioner from the unlawful detention.

Significance of the case

The ruling strikes a balance between an individual's right to health and access to medical treatment and a healthcare provider's right to fair compensation for their services. The Court's ruling reinforces the principle that healthcare facilities have a legitimate interest in recovering medical bills but cannot resort to unlawful and arbitrary detention of patients to achieve this goal. It upholds the fundamental rights of individuals to freedom of movement and liberty, ensuring that patients are not subjected to illegal detention due to unpaid medical bills. This decision underscores the importance of protecting patients' rights while also addressing the financial interests of healthcare providers, thereby contributing to a fair and just healthcare system.

Emmah Muthoni Njeri v Nairobi Women's Hospital Petition No. 352 of 2018 [2021] eKLR [88]

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Korir, J

Unlawful and arbitrary detention – inability to pay medical bill on discharge – violation of Constitutional Rights – length detention - Compensation

Summary of the facts

The Petitioner was admitted to the Respondent hospital and treated. At the time of discharge she was not able to fully pay her medical bill and was detained at the Respondent's hospital thus incurring more charges. She was discharged in May 2018 but was billed until October 2018. She sought a declaration that the actions of the Respondents infringed her constitutional rights and that the Respondent be ordered to release her. She also prayed for compensation for violation of her fundamental rights.

Issues for determination

1. Whether the Petitioner was unlawfully detained by the Respondent for failure to pay medical bills
2. Whether the Petitioner was entitled to general and exemplary damages for violation of her constitutional rights

Determination

The Court found that the Petitioner was illegally detained at the hospital. While there was no evidence of torture or inhuman treatment, and therefore she was not entitled to exemplary damages, she was, however, entitled to general damages, assessed at a level that took into account her prolonged detention. The Petitioner was not entitled to pay any amount incurred during her unlawful detention.

Significance of the case

This case reinforces the principle that healthcare providers cannot unlawfully detain patients due to unpaid medical bills upon discharge. The Court's ruling ensures that individuals are not subjected to arbitrary detention, and it awards general damages to the Petitioner, highlighting the consequences of prolonged and unlawful detention. This decision contributes to protecting patients' rights and ensuring that healthcare facilities act within the boundaries of the law while seeking payment for their services, ultimately promoting a just and ethical healthcare system.

[88] http://kenyalaw.org/caselaw/cases/view/208766/

CKN & another v Nairobi South Hospital Petition E082 of 2021 [2022] KEHC 16497 (KLR)

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Ong'udi, J

20 December 2022

Security, Medical Bills, Discharge, Detention, Court orders

Summary of the facts

The Petitioners allege a violation of children who were detained in the Respondent's facility against the Petitioners' will. This was attributed to the fact that the Petitioners had failed to pay an outstanding medical bill. They also claime d that despite an order for release of the minors issued by the Court, the same was not complied with until after an application for contempt of Court. However the Respondent claims that the children were born prematurely therefore they were underweight and were kept at the Neonatal Intensive Care Unit. They therefore required specialised care and treatment which came with a considerable cost. With time, two of the minors were discharged into their grandmother's care upon attaining the required weight whilst their mother continued receiving treatment and the other two remained owing to the fact that they were underweight. Observantly, at the time of discharge of the first two minors and the 2nd Petitioner the pending bill was Kshs 1,467,429/49 and the 1st Petitioner was to pay Kshs 200,000/= by March 8, 2021. At the time of discharge of the remaining minors the outstanding bill was Kshs 3,137,848.83, which is yet to be settled. Nevertheless, the Respondent through his counsel argues that detention as a cause of action was necessitated owing to the fact that the Petitioners never seemed serious about settling the medical bill.

Issues for determination

1. Whether the Respondent violated the Petitioners' rights upon detention despite there being a security offered in lieu of payment.

Determination

Ong'udi J found that the conduct of holding onto the minors as a condition for payment of the outstanding medical bill is unlawful and unconstitutional practice as it violates the minors rights under Articles, 28, 29(1), 53(1) (c) 7 (f) and the Petitioners rights under Article 25(a). He further opined that the Respondent was in contempt of Court as there were orders issued by the Court directing the Respondent to immediately release the two minors to the Petitioners upon furnishing of a security.

From the above, it has become established practice emanating from the Courts that medical

facilities ought to recognize securities in place of payment rather than compelling payment through forced detention which is a flagrant violation of rights. In the above circumstances, it is the Courts view that no patient should be unlawfully detained where they have shown good faith in promising to pay by offering a security. This is largely so because the Courts have to balance the interests of both patients and facilities which have to be financed through payment to adequately cater for the medical needs of the society.

Significance of the case

This case highlights the significance of protecting the right to health, especially for vulnerable individuals such as children. It sets a crucial precedent by reaffirming that medical facilities cannot unlawfully detain patients, even in cases of unpaid bills, if patients have shown good faith in providing security for payment. This decision emphasizes the need to strike a balance between the interests of healthcare facilities and patients while upholding their constitutional rights. It promotes ethical and lawful practices in the healthcare sector, ensuring that patients are not subjected to arbitrary detention due to financial constraints and reinforcing the principle that patients' rights must be respected at all times, including during disputes over medical bills.

Omusundi & another v Superintendent of Nakuru Level Five Hospital & 2 others Petition No. E13 of 2021 [2022] KEHC 10535 (KLR)

High Court of Kenya at Nakuru

Chemitei, J

23 June 2022

Detention, Facility, Waiver, Bills

Summary of the facts

The Petitioners herein decried the hospital detention practice undertaken by the 1st and 2nd Respondents that were unable to pay their medical bill. Additionally, the Petitioners claimed that the 1st Respondent refused to disclose information that they sought from them. Consequently, the Petitioners deponed that cumulatively, these actions were contrary to Article 28, Article 29 (b)(d)(f), Article 39 (1)and Article 47 of the Constitution of Kenya.

In addition to the above allegations, the 2nd Petitioner sought the release of some of the patients who were detained at Nakuru Level 5 Hospital owing to the accruing bills during the contingency. Additionally, the 1st and 2nd Respondents failed to provide the Petitioners with the board resolutions or policies which the Department of Health relied on to determine which patients should be detained after being discharged due to unpaid medical bills. Finally, whereas patients ought to pay for services provided by the hospitals, there was a need for a policy

framework to guide hospitals on how they could recover their medical bills while respecting the dignity of Kenyans as provided for under the Constitution.

Issues for determination

Based on the summary above, the Court found two Issues for determination:

1. Whether the petition met the set threshold for a petition; and,
2. Whether the Petitioners were entitled to the prayers sought in the petition

Determination

Owing to the omnibus nature of the petition, the Court, making reference to the classical Anarita Karimi Njeru vs. Republic case, found that the Petitioners had not set out with a reasonable degree of precision the violations which they complained of and the manner in which the said rights were allegedly infringed. Consequently, the petition was disallowed. Nevertheless, a close reading of Justice Chemitei's judgement reveals very critical elements with regards to payment of medical bills of indigent persons. The honourable judge, in his understanding, recognizes the necessity of developing waiver frameworks that prescribe guidelines on procedures and treatment to be accorded to indigent members of the society visiting hospitals for medical attention in the unfortunate event they are unable to foot the bills. Consequently, the learned judge in this case spelled out the obligation accruing to the relevant authorities of making such information accessible to the public without compromising the privacy of the patient.

Significance of the case

This case underscores the significance of developing clear and transparent waiver frameworks to guide healthcare facilities in dealing with indigent patients who cannot afford to pay their medical bills. This decision emphasizes the need for policy frameworks that ensure the dignity and rights of patients are respected while addressing financial constraints. While the petition itself was disallowed due to its lack of specificity, the judgment highlights the importance of making information on such frameworks accessible to the public without compromising patient privacy, thereby contributing to the protection and promotion of the right to health for all citizens, especially those facing financial challenges.

Isaac Ngugi v. Nairobi Hospital & 3 others [2013] eKLR

High Court (Constitutional and Human Rights Division)

D.S Majanja

30 September 2013

Continued treatment-Recovery of an amount-Outstanding Medical Bill

Summary of the facts

The Petitioner was the son and administrator of the estate of Elizabeth Mary Wamaitha Ngugi ("the deceased") and had been granted a limited grant of letters of Administration ad Litem to pursue this case on behalf of the deceased. The Petitioner's case was that his late mother's rights and freedoms were violated by Nairobi Hospital when it refused to discharge her on account of unpaid hospital bills- Kshs. 4,051,426 incurred in her treatment. He contended that the hospital was the author of its own misfortune and thus it could not seek to recover the full amount of Kshs. 9,410,629. The Petitioner's case was that the hospital was only entitled to the amount due as of 25 February 2012.

The 1st Respondent averred that the Petitioner once requested for transfer of the patient due to skyrocketing escalation of the bills, but later pleaded with the hospital to continue taking care of the patient while he sought funds. The 1st Respondent further avers that when the deceased was considered fit for discharge, they attempted to reach out to the Petitioner and other next of kin to no avail. Shortly after, the condition of the deceased worsened, yet the facility kept on administering treatment despite the previous bill going unpaid. Nevertheless, a proposal to liquidate the debt was confirmed by the Petitioner's advocates' which indicated that efforts would be made to clear the outstanding medical bill in monthly instalments of Kshs 150,000/= and that the title to the deceased's property would be delivered to the hospital as security pending full payment.

Issues for determination:

The germane issue for consideration in this matter was:

1. Whether the "detention" of a patient herein for non-payment of hospital bills was a violation of the person's fundamental rights and freedom and the money could thus not be recovered by the hospital.

Determination of Court

In his dictum, Majanja J found that the Hospital in this circumstance was placed in a delicate position. The circumstances were such that it could not discharge the patient without having regard to her overall welfare.

With regards to whether the detention amounted to isolation of rights, the learned judge responded in the negative. It was his view that the negotiations of the hospital bill which the Petitioner, as manager of the patient's estate had authority to pay, were on the understanding that the Hospital would continue to take care of the patient. Following their final meeting, it was clear that the hospital was to continue treatment of the patient until such time as instructions were issued

to the contrary and from the evidence provided, no such instructions were forthcoming. The Petitioner and his legal advisors, who had authority to demand that the patient be discharged or transferred to another facility, were aware that the hospital would continue to take care of the patient as long as she remained in hospital. It followed that the Petitioner ought to pay the stated bills because in this instance, the actions of the hospital did not amount to an unlawful detention.

Significance of the case

Through this ruling, the Court emphasized that in certain circumstances, such as when negotiations for bill settlement are ongoing, the hospital may continue to provide care without violating the patient's rights. This decision underscores the need for clear communication and agreements between healthcare facilities and patients or their representatives regarding financial obligations and treatment continuation. It contributes to the understanding of the legal nuances involved in the intersection of healthcare and financial responsibilities, promoting a fair and balanced approach to the right to health.

Ludindi Venant and Another v Pandya Memorial Hospital Mombasa HCCC No. 63 of 1998 [1998] eKLR

High Court of Kenya at Mombasa

Judge Waki

17 March 1998

Guarantee-Payment Plan

Summary of the facts

The Petitioner, who had brought a patient to the Respondent hospital, went back to the hospital to check on his patient only to be given the shocking news that he had passed away the previous day. Upon request to be granted permission to depart with the body for burial purposes, he was slapped with a sobering bill of Shs.644,410/=. Despite registering his dissatisfaction towards the bill claiming it was inflated and ridiculous, to say the least, the hospital refused to release the body until the bill was paid. Emphatically, the hospital said it had a policy regarding patients who died there in the cause of treatment.

The patient who only had Shs.133,540 on 13.1.98 made his payment but the hospital would not listen to his pleas that he would raise the balance later. In remedying the situation, he took the alternative the hospital said was available and later provided as security a parcel of land valued at Shs.850,000. The Title deed, Certificate of Official Search and Valuation Report were forwarded to the Advocates of the Hospital including a 6-month payment plan. The Petitioner

averred that the documents had not been returned to them despite the detention. Despite all the efforts advanced by the Petitioner, the hospital refused to release the body of the deceased. In the meantime, the hospital continued to charge fees for storage of the body at the rate of Shs.700/= per day.

Issues for determination

1. Whether debt for medical services could be solicited from a deceased person.

Determination

In his evaluation, Justice Waki asserted that despite being run by a charitable society, the hospital engaged in provision of medical services. As such, the hospital had to: employ medical staff for the dispensation of service, secure drugs and pay its staff, all of which had to be procured using finances. Thus, for all intents and purposes, the Hospital ran as a commercial institution. In this regard, he stated that this reality informed the legally binding document drawn for execution by persons seeking admission, particularly the individual who undertook to make payment for the medical services rendered.

Despite making the above case, the Court frowned upon the actions of the hospital in detaining the corpse for non-payment of bills. This was premised upon the fact that there was no property in a dead body. The learned judge rightfully argued that it would be utterly repugnant and against public policy to withhold a corpse for purposes of debt recovery. In his words, "*...with utmost respect to the hospital, that on any view it would be equally repugnant to public policy to sanction the use of dead bodies as objects in the game of commercial ping-pong.*"[89] Justice Waki asserted that dead bodies ought to be disposed of without delay.

From the foregoing, the Court considered that for disputes on a debt for medical services, it should be solicited from someone who was still alive, not the deceased, owing to the fact that the law makes provision for ways of binding such a person to pay the debt owed. It logically followed that a corpse could not be offered or held as security for payment of a debt. In the words of the Court, a corpse, "*...cannot be auctioned if there is default. It cannot be used to earn rental income in a cold-room. In sum, there is no legal basis for detaining it, and it would be callous and sadistic to hold otherwise.*"[90]

Significance of the case

This case establishes the legal and ethical boundaries regarding the recovery of debts for

[89] At page 6.
[90] Ibid.

medical services, particularly in the context of deceased individuals. The ruling emphasizes the repugnance of using dead bodies as objects in the pursuit of commercial interests and underscores the principle that a corpse cannot be held as security for the payment of a debt. This decision protects the dignity of the deceased and recognizes the ethical responsibility of healthcare institutions to prioritize the timely and respectful disposal of dead bodies over financial considerations. It reinforces the understanding that the right to health extends beyond the provision of medical services to encompass the ethical and humane treatment of individuals, even in death.

AUTONOMY AND CONSENT TO TREATMENT

The concept of consent is an expression of the right of the patient to self – determination and autonomy. Informed consent is a significant part of the right to health. In General Comment No. 14 of the Committee on Economic Social and Cultural Rights, it states that, *"The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom and the right to be free from interference such as the right to be free from torture, non – consensual treatment and experimentation."* [91] This means that health requires the will of the person with regard to their individual well – being.

The Special Rapporteur on the right to the highest attainable standard of health has stated that, *"Informed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision, protecting the right of the patient to be involved in medical decision – making, and assigning association duties and obligations to health - care providers."* [92]

He goes on to state, *"Informed consent in health, including (but not limited to) clinical practice, public health and medical research, is an integral part of respecting, protecting and fulfilling the enjoyment of the right to health as elaborated in Article 12 of the International Covenant on Economic, Social and Cultural Rights and enshrined in numerous international and regional human rights treaties and national constitutions."* [93]

The components for a valid consent are: legal and mental capacity to make decisions; sufficient information and voluntariness in the decision making process.

This section analyses how the Courts have analysed the right to consent to medical procedures and treatment. Kenyan Courts have given guidelines as to what is to be considered in determining

[91] At para 8.

[92] Report of Anand Grover, Special Rapporteur, on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, presented at the 64th Session of the UN General Assembly, 10 August 2009, para 9. Available at https://www.refworld.org/pdfid/4aa762e30.pdf.

[93] Ibid, para 18.

whether the threshold for informed consent by a health practitioner has been met. As can be gleaned from the jurisprudence, not only is there an obligation to ascertain the capacity of the patient to give consent and obtain the consent in writing, but the consent also cannot be transferred from one health facility to another. Each health provider has the onus of obtaining informed consent from the patients that visit their facility. Moreover, where a doctor operates without the consent of their patient, save for cases of mental instability or emergencies, it amounts to trespass to the person and assault.

L A W & 2 others v Marura Maternity & Nursing Home & 3 others; International Community of Women Living with HIV (ICW) (Interested Party); Secretariat of the Joint United Nations Programme on HIV/AIDS & 2 others (Amicus Curiae) Petition No. 606 of 2014 [2022] KEHC 17132 (KLR)

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Mrima, J

16 December 2022

Right to reproductive health – Treatment without consent – Meaning of consent – Forced sterilisation - Factors to consider when determining whether Informed consent has properly been obtained by health provider

Summary of the facts

The 1st Petitioner, when pregnant with her second child, visited a certain health clinic for her regular ante-natal check-ups. During the routine check, she was found to be HIV positive and was advised that in the interests of her own health and that of the baby, she should not have any more children. She was then given two vouchers with the abbreviations CS and TL which she was to present at the Marura Maternity and Nursing home (the 1st Respondent) when she was due for delivery.

She successfully underwent a Caesarean Section and delivered her baby. In 2010, the Petitioner wanted to have another child but was unable to get pregnant. Upon visiting a medical camp, she was informed that her fallopian tubes were blocked. On enquiry, it was found that the TL stood for tubal ligation which she underwent at the 1st Respondent's health facility. She argued that her right to reproductive health, among other constitutional rights, had been violated. She also argued that the health facility did not obtain her informed consent before conducting the medical procedure on her.

Issues for determination

1. What were the factors to be considered when determining whether informed consent had been properly obtained by a health care provider?
2. Whether consent obtained from a patient was transferable from one health facility to another.
3. Whether the Petitioner's constitutional right to reproductive health, and other related socio – economic constitutional rights, had been violated.

Determination

The Court observed that the law in Kenya recognizes and underscores the need by a healthcare provider to obtain informed consent from a user before undertaking any procedure on that person. However, there was no developed standard procedure in the manner in which such consent was to be obtained. The reason being that discretion is granted to the healthcare provider to choose the manner in which the consent will be obtained or presumed as long as it is within the Constitution and the law. The Court then went ahead to outline the threshold to be met in establishing that informed consent was obtained:

a. *Ascertained the age of the patient.*
b. *Ascertained if the patient was a minor or was under any disability that made him/her unable to understand and consent, for instance, if one was too ill or mentally incapacitated.*
c. *In the event the patient was a minor or was under any disability that made him/her unable to understand and consent, such consent was to be obtained from another person legally authorised to give such consent.*
d. *Ascertained the literacy level of the patient or the one legally authorised to give such consent, as the case could be.*
e. *Ascertained the language the patient wished to use. An interpreter could be availed if need be.*
f. *Ascertained, as much as possible, the background of the patient.*
g. *Disclosed the patient's health status as restrained by the law or a Court order.*
h. *Explained the range of promotive, preventive and diagnostic procedures and treatment options generally available to the patient.*
i. *Explained the benefits, risks, costs and consequences generally associated with each option.*

j. *Explained the patient's right to refuse the recommended medical options and the implications, risks, and legal consequences of such refusal.*
k. *Took all reasonable steps and ensured that the patient, or the one giving the consent, was reasonably free and not under any form of compulsion, duress or coercion.*
l. *The explanations given to the patient were to be, in as much as possible, in the nature of a dialogue with the aim of ensuring that the patient fully understood the seriousness of her/his condition, the anticipated benefits and risks of the proposed treatment and any reasonable alternatives so much so that the patient made an informed decision. To a very great extent technical language was to be avoided.*
m. *The patient ought to be accorded time, if need be, to enable him/her to consider the information given and to decide except in cases where the procedure was an emergency.*
n. *The consent had to be in writing.*

Using these factors as a basis for its decision, the Court held that proper informed consent had not been obtained by the 1st Respondent in conducting the tubal ligation on the 1st Petitioner. This caused her mental anguish due to the irreversibility of the procedure that she underwent, and violated her constitutional rights, inter alia, her right to reproductive health. The Court also held that consent could not be transferred from one health facility to another. Each health provider had the onus of obtaining informed consent from the patients that visit their facility.

Significance of the case

The ruling affirms the importance of obtaining informed consent in healthcare procedures and upholding the right to reproductive health. It sets clear and comprehensive guidelines for healthcare providers to follow when obtaining informed consent, emphasizing that the consent process should be patient-centered, respectful of the patient's background, and should involve a thorough discussion of the potential risks and benefits of medical procedures.

This case underscores the necessity for healthcare facilities to respect patients' autonomy and dignity, especially in cases where reproductive rights are involved. It also clarifies that consent cannot be transferred from one healthcare provider to another, reiterating the importance of obtaining fresh informed consent at each facility, thereby protecting the rights and well-being of patients and ensuring the quality of healthcare services.

HWK v Rachel N. Kang`ethe & Karen Hospital Nairobi Civil Case No. 337 of 2014 [2019] eKLR

High Court of Kenya at Nairobi

Njuguna, J

28 November 2019

Treatment without consent – Informed consent – Trespass to person – Person suffering from mental disorder – Capacity to consent – Treatment of involuntary patient under the Mental Health Act, Cap 245

Summary of the facts

The Plaintiff was at her work place on 12 October 2011 when a group of five men and women claiming to be acting under the instructions of the 1st Defendant forcefully injected her with unknown drugs which incapacitated and immobilised her. She was later admitted by the 1st and 2nd Defendant at the 2nd Defendant`s hospital in Karen, where subsequent injections were administered which rendered her completely incapable of movement for the entire period when she remained admitted and even after she was discharged. She argued that during confinement, she was denied the opportunity to be visited by her relatives and friends. She further argued these actions were illegal and amounted to trespass and assault on her body.

Issues for determination

1. Whether the Plaintiff was abducted under the 1st defendant's instructions and taken to the 2nd Defendant's hospital.
2. Whether the Plaintiff was forcefully admitted at the 2nd defendant's hospital and treated without her consent.
3. Whether the Plaintiff was entitled to both general and special damages as set out and prayed for in the Plaintiff.
4. Who should meet the costs of the suit.

Determination

The Court observed that it was trite law that a doctor who operated without the consent of his patient was, except in cases of mental disability or emergency, guilty of the civil wrong of trespass to the person and the criminal offence of assault. Further, that a patient has the right to be informed of the risks inherent in treatment which is proposed.

The Court was of the view that consent is not only required in cases of operation but also in normal treatments of patients, which in most cases is implied and especially in cases where a patient freely walks in a hospital for treatment. Since the Plaintiff was in no condition to give consent, and since the drugs were prescribed by the Defendant and the treatment done in the best interest of the Plaintiff having been mentally unsound, the Court held that the Defendants acted in good faith and with reasonable care.

Significance of the case

The case clarifies that healthcare providers have a legal and ethical duty to ensure that patients provide informed consent for any medical procedures or treatments, except in cases of mental disability or emergency, where the best interest of the patient must be taken into account. This case reinforces the fundamental principle that a patient's autonomy and right to consent to medical procedures must be respected, contributing to the protection of patients' rights and their overall well-being in the healthcare system.

RAO v MGH & 2 others HIV and AIDS Tribunal Cause No 030 of 2019 [2020] eKLR

HIV and AIDS Tribunal at Nairobi

Helene Namisi (Chairperson), Melissa Ng'ania, Justus T. Somoire, Dr. Maryanne Ndonga, Abdullahi Diriye, Tusmo Jama, Dorothy Kimeng`ech

27 November 2020

Invasive procedures-informed consent-HIV testing

Summary of the facts

The Claimant fell ill and was admitted at the 2nd Respondent facility where the 3rd Respondent conducted a series of tests on her, including a HIV test, without her consent. The Claimant alleged that no pre-test or post-test counselling was done. Further, the 3rd Respondent disclosed the results of the tests publicly without her consent, despite the Claimant being admitted in a ward with other patients, which caused the Claimant to suffer emotional and psychological distress. The Respondents denied the averments and argued that all tests were done in the knowledge and consent of the Claimant.

Issues for determination

1. Whether the 3rd Respondent obtained the prior informed consent of the Claimant before testing her for HIV;

2. Whether the Respondents conducted the mandatory pre and post HIV test counselling therapy;
3. Whether the Respondents disclosed the Claimant's HIV results to a third party;
4. What remedies the Claimant was entitled to;
5. What remedies the Respondents were entitled to in their counterclaim.

Determination

In holding the Respondent did not obtain the Claimants informed consent, the Tribunal relied on the decision in *CNM v Karen Hospital Ltd HAT No. 008 of 2015 [2016]* eKLR where it was held that in medical treatment requiring invasive procedures, the doctor or health care personnel was required to provide sufficient information to the patient to enable the patient give informed consent. In HIV testing, informed consent means the patient agrees to be tested on the basis of understanding the testing procedures, reasons for testing, and is able to assess the personal implications of having or not having the test performed. The Tribunal further noted that informed consent aims at upholding the dignity of the patient, since such dignity is not lost simply because one has fallen sick or one does not know what his treatment will entail, which treatment is better, or the risks associated with the available treatment options.

Significance of the case

The ruling underscores that healthcare providers must obtain the prior informed consent of patients before conducting any medical tests, and this consent should include an understanding of the testing procedures, reasons for testing, and the potential implications of the test results. By upholding the principle of informed consent, the case reinforces the dignity of patients and their right to be fully informed and involved in decisions about their healthcare, contributing to the protection of individual rights and well-being in the context of medical procedures.

COL & another v Resident Magistrate- Kwale Court & 4 others Civil Appeal No 56 of 2016 [2016] eKLR

In the Court of Appeal at Mombasa

W. Karanja, M.K. Koome, Alnashir Visram JJA

22 March 2018

Homo-sexual-informed consent-forced anal examination-HIV testing-Hepatitis B

Summary of the facts

The Petitioners argued that their rights were violated by the Respondents contrary to Article

22(1) of the Constitution. It was submitted that the Petitioners were suspected of being homosexual, thus investigations started upon which they refused to undergo medical tests. However, upon being charged before the Kwale Principal Magistrate's Court, they were ordered to undergo medical examination including anal check-up, HIV and Hepatitis B testing. The Petitioners thus argued that the forced medical examination violated their constitutional rights, in particular Article 29(f) of the Constitution. Further, it was submitted that the signing of Post Rape Case Forms by the Petitioners did not constitute consent for the 3rd Respondent`s medical personnel to examine the Petitioners. Moreover, the Petitioners contended that the forced medical examinations violated their right to privacy and dignity under Article 28 of the Constitution.

The Petitioners contended that consent was fundamental to invasion of a person`s body, that such invasion without consent was an assault or torture, and that consent was not required where an order of the Court is made under Section 36(1) of the Sexual Offences Act. Further, that the tests for Hepatitis B were unnecessary without consent and taking of blood contrary to Article 31 of the Constitution.

The Respondents argued that their actions done in good faith were not in breach of any provision of the Constitution since under Section 36 of the Sexual Offences Act, the Court had jurisdiction to order taking of samples from any accused and Section 36(7) immunised the Respondents from any liability.

The High Court found that the Petitioners, by failing to object or protest the tests, willingly and voluntarily consented to the medical examination. If the Petitioners had any doubt about the consent, they were at liberty to apply for stay of proceedings and appeal against such decision or order to undergo medical examination.
An appeal was made to the Court of Appeal.

Issues for determination

1. Whether the examinations and tests conducted on the appellant were lawful and/or reasonable in the circumstances.
2. Whether the results obtained from those examinations could be properly admitted as evidence in the criminal proceedings.

3. Whether the appellants' rights were violated at Kwale Prison.
4. What orders should issue.

Determination

The Court of Appeal observed that the right to privacy was closely linked to the right to dignity, and extended to a person not being compelled to undergo a medical examination. It went further to state that the spirit of Section 36 of the Sexual Offences Act was that while a Court had the power to direct examination of an accused person to establish involvement in sexual offence, such discretion was subject to the limitation that the Court could only issue an order with respect to an offence committed under the Act and not any other. Finding that the appellants were not arrested in the act and that there was no complaint, the Court held that there was no reasonable explanation for suspecting them of having committed the offence. As a result, the subordinate Court acted beyond its mandates in granting the order in issue contrary to Article 24 of the Constitution.

Significance of the Case

Through this judgement, the Court of Appeal emphasized that individuals have the right to be free from compelled medical examinations, and any invasion of a person's body without proper consent amounts to a violation of the right to privacy and dignity. The judgement clarified that Court-ordered medical examinations must be within the scope of the relevant legislation and should be reasonable and justified by the circumstances of the case. By protecting individuals from unwarranted intrusion into their bodily autonomy, the case contributes to upholding fundamental rights in the context of health examinations, setting a precedent for respecting individual autonomy and privacy in legal proceedings.

Minister of Justice and Correctional Services v Etate of Stransham-Ford (531/2015) 2016 ZASCA 197

In the Supreme Court of South Africa

Lewis, Seriti, Wallis, Dambuza JJA, Schippers AJA

6 December 2016

Lethal agent-Euthanasia-Physician assisted suicide

Summary of the facts

Mr. Robbert Stransham-Ford was an advocate. On 19th February 2013 a prostate biopsy confirmed the presence of adenocarcinoma. The cancer was aggressive and by January 2015

had spread to lymph glands elsewhere in his body. On 13 March 2015, an ultrasound biopsy confirmed the presence of lymphoma. On 15 March 2015, he was admitted to Victoria Hospital in Cape Town suffering from severe abdominal pain. Despite care by several doctors and palliative care by a nurse, Sister Yvonne Jackman, Mr. Robbert died on 30 May 2015. Before he died, on 17 April 2015, he approached the High Court of South Africa, Gauteng Division, seeking an order that a medical practitioner could either end his life by administering a lethal substance, or provide him with the lethal substance to enable him to administer it himself, and that in either event such medical practitioner would not be subject to prosecution or disciplinary steps by the relevant professional body. The High Court allowed his application. The case was appealed to determine whether physician assisted suicide was allowed in South Africa.

Issues for determination

1. Whether physician assisted suicide was applicable in South Africa

Determination

The Court set aside the decision of the High Court for the reasons that Mr. Stransham-Ford had died on the morning of 30 April 2015, two hours before an order was made. Thus, his action ceased to exist and no order should have been made. Further, that there was no full and proper examination of the state of the laws of South Africa in the area of euthanasia and physician assisted suicide., Finally, the circumstances of the case were such that it was inappropriate for the High Court to engage in a reconsideration of the common law in relation to the crimes of murder and culpable homicide.

Significance of the case

This case is significant in addressing the contentious issue of physician-assisted suicide and euthanasia within the context of the right to health in South Africa. The Court's decision not to allow physician-assisted suicide reaffirms the importance of maintaining legal and ethical boundaries around end-of-life decisions, focusing on the need for comprehensive examination of existing laws and regulations, and emphasizing the legal framework within which healthcare professionals operate when making decisions related to patients' lives and well-being. This case sets a legal precedent for the regulation of end-of-life practices, impacting the right to health and ethical considerations in the medical field.

In Re Efigenia Semente; Semente v Chingufo (A 216/2012) [2012] NAHCMD 2

In the High Court of Namibia

Parker AJ

25 September 2012

Medical treatment-Adult Patient-Consent to treatment-Freedom to refuse treatment only subject to patient being competent to exercise such freedom and need to save life of another e.g., unborn baby.

Summary of the facts

Mrs. Efigenia Semente was admitted at the Medi Clinic Hospital, Windhoek, and required blood transfusion to survive a Caesarean section to deliver her baby and thereafter an operation to remove her uterus. However, as Dr. Burmeister was preparing her, Mrs. Semente gave him a copy of `Durable Power of Attorney for Health` which indicated that upon her religious beliefs as a member of the Jehovah's Witness, she did not want a blood transfusion.

Issues for determination

1. Whether Mrs. Semente was compos mentis to exercise her right to refuse treatment in the form of blood transfusion.
2. Whether Mrs. Semente`s enjoyment of her freedom of individual autonomy should be considered against the child's rights of Mrs. Semente`s eight-day-old baby boy, who was delivered by CS, and the rights of her other children and the larger family and society in general.

Determination

The Court affirmed the holding in the English Court of Appeal in Re T (Adult: refusal of medical treatment) (1992) 4 ALL ER 649 (CA) where it was held that competent adults are generally at liberty to refuse medical treatment even at the risk of death. The right to determine what is to be done with one's own body is a fundamental right in the society. However, the Court cautioned that the mere fact that adults have the right to choose does not mean that they have in fact exercised that right. The right to decide one's own fate presupposes a capacity to do so. In that vein, having determined through evidence that Mrs. Semente was not compos mentis, the Court held that she was not competent to exercise her freedom to refuse blood transfusion upon the basis of her freedom of individual autonomy.

Significance of the case

This ruling affirms the right to individual autonomy in medical decision-making and the right to refuse medical treatment, particularly on the basis of one's religious or personal beliefs. It highlights the importance of assessing a patient's competence to make such decisions and clarifies that competent adults generally have the freedom to refuse treatment, even at the risk of their own lives. However, the case also underscores the need to balance individual autonomy with the potential consequences for others, such as unborn children, and the broader interests of family and society, especially when a patient's competence is in question. This case reflects the complex ethical and legal considerations that often arise in healthcare, particularly in situations involving religious beliefs and the right to refuse certain medical interventions.

Carter v Canada (Attorney General), 2016 SCC 4 [2016] 1 S.C.R 13

In the Supreme Court of Canada

CORAM: McLachlin C.J and LeBel, Abella, Rothsein, Comwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

15 January 2016

Physician assisted suicide-Liberty-Security of the person

Summary of the facts

Gloria Taylor and Kay Carter suffered from degenerative conditions that caused them a lot of physical and psychological pain. They sought orders that the trial Court to allow them access to physician-assisted dying to end their lives with dignity. The trial Court ruled in their favour and declared the Criminal Code sections that prohibited physician-assisted suicide unconstitutional based on their violations of the rights to life, liberty, and security of the person per Section 7 of the Canadian Charter of Rights and Freedoms. The trial judge suspended the declaration for one year to allow the government time to respond.

The British Columbia Court of Appeal upheld the lower Court`s decision but limited the declaration of invalidity to competent adults with grievous and irremediable medical conditions who clearly consented to termination of their life. The decision was appealed to the Supreme Court vide a class action suit.

Issues for determination

1. Whether the Court should order an extension of the suspension of the declaration of invalidity.
2. Whether Quebec should be exempted from the four-month extension of the suspension of the declaration of invalidity.
3. Whether during the four-month extension, the Court should grant an exemption for those who wished to seek assistance in ending their life on the bases articulated in the application.
4. Whether during the four-month extension, the Court should grant a constitutional exemption permitting assistance in ending life on the basis articulated in Carter.

Determination

In a unanimous decision, the Court held that the Criminal Code provisions, Sections 241(b) and 14 were of no force or effect to the extent that they prohibited physician-assisted suicide for adult persons who clearly consented to the termination of life and had a grievous and irremediable medical condition that caused enduring suffering that was intolerable to the individual in the circumstances of his or her condition.

Further, the Court found that such provisions limited the rights to life, liberty, and security of the person under Section 7 of the Canadian Charter of Rights and Freedoms. The rationale was that such provisions constrained the ability of the individual to make decisions concerning their bodily integrity and medical care, and security of the person by leaving such individuals to ensure intolerable suffering. The Court also granted the request for exemption so that those who wished to seek assistance from a physician in accordance with the criteria set by the Court would apply to the superior Court of their jurisdiction for relief during the extended period of suspension.

Significance of the case

This case is significant particularly in the context of end-of-life care and the autonomy of individuals facing grievous and irremediable medical conditions. The Supreme Court of Canada's decision to strike down provisions prohibiting physician-assisted suicide underscored the importance of individual choice and dignity in healthcare decisions, even in matters as profound as one's own life and death.

The ruling recognized that in specific circumstances, patients should have the right to make decisions about the termination of their lives when suffering becomes intolerable. This decision established a framework for end-of-life care that respects the fundamental rights to life, liberty, and security of the person and acknowledges the importance of individual autonomy in healthcare decisions, particularly in situations involving severe and irremediable suffering.

Cassandra C. v Connecticut Department of Children and Families, 316 Conn. 476 (2015)

In the Connecticut Supreme Court

Rogers, C.J., and Plamer, Zarella, Eveleigh, McDonald, Espinosa and Robinson, Js.

January 8 2015

Mature minor doctrine-Refusal to medical treatment

Summary of the facts

The Petitioner, the Commissioner of Children and Families (Commissioner), filed a neglect petition seeking an order of temporary custody of Cassandra after certain medical providers reported to the Department of Children and Families (DCF) that Cassandra and her mother were refusing to obtain appropriate medical treatment for Cassandra who had been diagnosed with Hodgkin's lymphoma. The trial Court granted the order placing Cassandra in temporary custody of the department and ordered that she be removed from where she lived with her mother and be placed in her cousin's home. After evidentiary hearing, the trial Court sustained the order of temporary custody and ordered that Cassandra be placed back with her mother on condition that she and her mother cooperate with the medical providers.

Cassandra started chemotherapy but ran away from home before treatment was completed. The Commissioner filed a motion for reconsideration, the trial Court conducted evidentiary hearing and ordered that Cassandra remain in the custody of the department, and authorised the department to make all medical decisions for her.

The Respondents filed an appeal claiming that the trial judge had improperly found that Cassandra was not competent to make her own medical decisions and had violated her constitutional due process right to bodily and family integrity.

Issues for determination

1. Whether Connecticut should recognize as a matter of common law the mature minor doctrine.

Determination

The Court held that except in extreme cases, a physician had no legal right to perform a procedure upon, or administer or withhold treatment from a child without the consent of the child's parents or guardians; unless the child was a mature minor, in which case the child's consent would be required. Further, that the capacity of the child to consent depended on the age, ability, experience, education, training and degree of maturity or judgement obtained by the child, as well as upon the conduct and demeanour of the child at the time of the procedure or treatment.

Finally, the Court held that in the circumstances of the case, Cassandra was not a mature seventeen- year-old and therefore, was not competent to refuse a course of medical treatment that would provide her with her only chance of survival. As a result, there was no need to determine whether the doctrine of mature minor should be adopted because even if it were, it would not apply to Cassandra.

Significance of the Case

The case explores the legal recognition of the mature minor doctrine, addressing the complex intersection of parental rights, the State's intervention in child welfare, and the autonomy of a mature minor in making decisions about their medical treatment. The Court's decision underscores the importance of balancing the interests of parental rights with the recognition of a mature minor's capacity to make informed decisions about their own health. This case establishes legal precedent by clarifying that, in certain circumstances, a mature minor may have the right to make decisions about their medical treatment, subject to considerations of age, maturity, and capacity.

The Queen on the Application of David Tracey (Personally and on behalf of the Estate of Janet Tracey (Deceased) v Secretary of State for Health, Cambridge University NHS Foundation Trust, Equality and Human Rights Commission, and Resuscitation Council (UK) [2014] EWCA Civ 822

In the Court of Appeal of the United Kingdom

Master of the Rolls Lord Justice Longmore and Lord Justice Ryder

17 June 2014

Personal autonomy-DNACPR

Summary of the facts

Mr. Tracey made an application to the Court of Appeal for review against Cambridge University NHS Foundation Trust and the Secretary of State for Health arising from the placing of Do Not Attempt Cardio-Pulmonary Resuscitation notices on the notes of Mr. Tracey`s wife, Janet Tracey. Mrs Tracey was admitted to Addenbrookes Hospital on 19 February 2011 and died on 7 March 2011.

On 5 February 2011, Mrs. Tracey was diagnosed with lung cancer with an estimated life expectancy of 9 months. On 19 February, she sustained a serious cervical fracture after a major road accident and was admitted to the hospital and transferred to Neuro-Critical Care Unit under the care of Mr. Peter Kirkpatrick, a consultant neurosurgeon. Since she had chronic respiratory problems, she was placed on a ventilator but did not respond to treatment for her chest infection. On 27 February, Dr. Lavinio completed the first DNACPR notice, and Mrs. Tracey was successfully weaned from the ventilator and her condition appeared to improve. On the night of 4 March, Mrs. Tracey`s health started to deteriorate and was attended to by Dr. Simons, a neurological and neuro-critical SHO. Mrs. Tracey stated that she did not wish to discuss resuscitation. On 5 March, it was agreed with the family members that a second DNACPR notice, should be completed and placed on Mrs. Tracey`s notes. The same was done on the same day.

The claim advanced against the Trust was that it breached Mrs Tracey's rights under Article 8 of the European Convention on Human Rights ("the Convention") because in imposing the first notice, it failed (i) to adequately consult Mrs Tracey or members of her family; (ii) to notify her of the decision to impose the notice; (iii) to offer her a second opinion; (iv) to make its DNACPR policy available to her; and (v) to have a policy which was clear and unambiguous. The claim advanced against the Secretary of State was that he breached Mrs Tracey's Article 8 rights by failing to publish national guidance to ensure (i) that the process of making DNACPR decisions was sufficiently clear, accessible and foreseeable and (ii) that persons in the position of Mrs Tracey had the right (a) to be involved in discussions and decisions about DNACPR and (b) to be given information to enable them so to be involved, including the right to seek a second opinion.

Issues for determination

1. Whether Mrs. Tracey wished to be consulted about the first DNACPR.
2. Whether Article 8 of the European Convention on Human Rights was engaged.
3. Whether there was a breach of the duty to consult and notify in relation to the first notice.

Determination

The Court held that the Trust violated Mrs Tracey's Article 8 right to respect for private life in failing to involve her in the process which led to the first notice. The Court observed that since a DNACPR decision is one which would potentially deprive the patient of life-saving treatment, there had to be a presumption in favour of patient involvement. There needed to be convincing reasons not to involve the patient. There could be little doubt that it was inappropriate (and therefore not a requirement of Article 8) to involve the patient in the process if the clinician considered that to do so was likely to cause her to suffer physical or psychological harm. Moreover, the Court was of the view that doctors should be wary of being too ready to exclude patients from the process on the grounds that their involvement is likely to distress them; and that the Court should be very slow to find that such decisions made by clinicians in very stressful circumstances, if conscientiously taken, violate a patient's rights under Article 8 of the Convention.

Significance of the Case

The case establishes that patients, even in difficult and distressing medical situations, have a presumptive right to be involved in decisions about life-saving treatments, including DNACPR decisions. The Court's emphasis on patient engagement, the requirement for compelling reasons to exclude them, and the recognition of the significance of considering patients' wishes underscores the importance of individual autonomy in medical decision-making, particularly when it concerns matters of life and death. This case contributes to the broader recognition of the right to health, emphasizing that patients' voices and choices should be central to their healthcare decisions.

HEALTH INFORMATION, HEALTH PRODUCTS AND TECHNOLOGY

Health products include human and veterinary medicines, medical products, medicinal substances, vaccines, diagnostics, medical devices, blood products, traditional and alternative medicine, therapeutic feeds and nutritional formulations, cosmetics and related products. [94]

Health Technologies have been defined in the Health Act 2017 Section 2 as, *"The application of organised knowledge and skills in the form of devices, medicines, vaccines, procedures and systems developed to solve a health problem and improve the quality of life."* [95] Health information, products and technologies are considered important building blocks of an effective health system. [96]

Health Information

In a developing economy progressing towards Universal Health Coverage (UHC), the role of the Judiciary in anchoring best practices in health information and technology is critical, especially considering the emergence of new technologies and innovations in data and data protection. Figure 6 provides a summary context of the health information and technology ecosystem in Kenya.

Figure 6: Health Information and Technology Context in Kenya

Highlights of Health Information and Technology in Kenya

The National Government, through the Ministry of Health (MoH), has taken steps to facilitate a more conducive environment for health information exchange across different information systems. These include the development of guidance documents on digital health standards for electronic HIS, a national enterprise architecture, a master health facility list and a health worker registry, among others.

There has been a proliferation of digital health solutions implemented over the past decade aimed at improving health service delivery. However, these implementations have been found to be uncoordinated, fragmented and not integrated into a cohesive national health information network. This fragmentation has led to the duplication of effort by different implementors and the inability to scale pilots, diminishing the potential benefits of digital health interventions.

Source: Nyangena et al, 2021 [97]

[94] See Ministry of Health, Guidelines on Management of Health Products and Technologies in Kenya (October 2020)

[95] Health Act 2017, s. 2.

[96] See WHO Building blocks of an effective Health System available at https://apps.who.int/iris/bitstream/handle/10665/258734/9789241564052-eng.pdf

[97] Nyangena J, Rajgopal R, Ombech EA, et al. Maturity assessment of Kenya's health information system interoperability readiness. BMJ Health Care Inform. 2021;28(1). doi:10.1136/bmjhci-2020-100241

In General Comment No 14 of the Committee on Economic Social and Cultural Rights, it is explicitly noted by the Committee that the realisation of the right to health is dependent on the realisation of several other rights, including the right to privacy and confidentiality. With the increased utilisation of digitised and electronic health information systems, the likelihood of data breaches is much higher. Health data breaches are also likely to occur, which would compromise the realisation of the right to health. It is worth noting that several policies have been developed to respond to these developments in information systems to ensure the safety of data and records. [98]

The Data Protection Act (No. 24 of 2019) was enacted to make provision for the control of personal data and to protect the privacy of individuals. It also ensures that there are remedies for the processing of their personal data in any manner inconsistent with the Act. It has defined health data as, *"...any data related to the state of physical or mental health of the data subject and includes records regarding the past, present or future state of the health, data collected in the course of registration for, or provisions of health services, or data which associates the data subject to the provision of specific health services."* [99]

Health data and information is also considered as "sensitive personal data" under the Data Protection Act No. 24 of 2019 which should be dealt with according to the principles set out in Section 25 of the Act. One particular area that has generated litigation for breach of confidentiality and privacy is the disclosure of HIV status and results.

The Judiciary ensures the protection of patients' rights to privacy and data security when dealing with health information systems, including electronic health records and digital health platforms. The case law in this section highlights how the Judiciary plays a crucial role in anchoring best practices in health information, products and technology.

[98] See: The Kenya National EHealth Policy (2016 – 2030); The Kenya Standards and Guidelines for MHealth Systems (MOH, 2017); The Standards and Guidelines for Electronic Medical Record Systems in Kenya (2010); The Strategic Plan for Health Informations Systems; The Health Records and Information Managers Act No. 15 of 2016; see also the County E – Health Bill 2021 yet to be enacted.

[99] Data Protection Act No. 24 of 2019, section 2.

Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 Others v Cabinet Secretary Ministry of Health & 4 Others Petition 250 of 2015 [2016] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Lenaola, J

6 December 2016

HIV/AIDS – Collection of personal health data – Privacy and Confidentiality – HIV testing - Disclosure of HIV status - Health related rights - Violation of Constitutional rights

Summary of the facts

In this case, the Petitioners alleged that collecting the names of persons living with HIV/AIDS in a format that linked their names to their HIV status was unconstitutional and a violation of fundamental rights and freedoms under Articles 27, 28, 29, 31, 43, 47 and 53 of the Constitution. The case revolved around a directive issued by the President of Kenya to collect data on all school-going children living with HIV and AIDS.

Issues for determination

1. Whether the act of collecting the names of persons living with HIV/AIDS in a format that links their names to their HIV status was unconstitutional and a violation of fundamental rights and freedoms under Articles 27, 28, 29, 31, 43, 47 and 53 of the Constitution.

Determination

The Court determined that the directive issued by the President requiring the collection of data on school-going children living with HIV was unconstitutional and a violation of fundamental rights and freedoms. The Court also noted that an integral part of the right to health is the right to have personal health data treated with confidentiality. The Court ordered that the data should be destroyed and that the government should develop policies that respect human rights. The Court also directed the government to compensate the Petitioners for the violation of their rights.

Significance of the case

The significance of the case to the right to health is that the maintenance of confidentiality and privacy of health information inspires confidence in the health system. When people seek health services, they are assured that their sensitive medical information will not be disclosed. The prescribed form in this case infringed upon the right to privacy and the right to health of persons living with HIV.

David Lawrence Kigera Gichuki v Aga Khan University Hospital Petition No. 195 of 2013 [2014] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Ngugi, J

29 October 2014

Medical records and information - Right to Privacy and Confidentiality – Breach of privacy and confidentiality – Justification of disclosure of medical information

Summary of the facts

The Petitioner alleged that the Respondent violated his right to privacy by releasing confidential medical information to a third party without his knowledge and consent. The Respondent released confidential medical treatment notes to a law firm, which notes were used in a case where the Petitioner was charged with causing death by dangerous driving. The Petitioner sought damages for the breach of his right to privacy. The Respondent argued that it was under a duty to disclose the information because of the serious charges facing the Petitioner and the public interest in the matter.

Issues for determination

1. Whether the Respondent violated the Petitioner's right to privacy under Article 31 of the Constitution by releasing confidential medical information to a third party without the Petitioner's knowledge and consent.

Determination

The Court stated that while the right to privacy was important and protected under the Constitution, it was not an absolute right and can be limited under certain circumstances. It referred to Article 24, which outlines the factors to consider when limiting a right or fundamental freedom.

The Court relied on principles from other jurisdictions, such as the United States and Australia, which indicate that the right to privacy is not absolute and can be limited in certain situations, such as for valid governmental or public interest reasons.

Applying these principles to the case at hand, the Court concluded that the disclosure of the Petitioner's medical information was justifiable and in the public interest. The request for the information came from an advocate representing the estate of a deceased person involved in a road traffic accident with the Petitioner. The Court found that there were legitimate reasons for the release of the medical records, considering the ongoing Court proceedings.

Significance of the case

The case highlights the delicate balance between an individual's right to privacy and the public interest or legal proceedings. It emphasizes that the right to privacy, including medical confidentiality, is not absolute and may be subject to limitations when there are valid governmental, public interest, or legal reasons. This decision underscores the importance of considering the specific circumstances in cases involving the disclosure of medical information, recognizing that legitimate reasons, such as ongoing Court proceedings, can justify the breach of confidentiality, ensuring a fair and transparent legal process. It contributes to the broader discussion of how individual rights interact with public interests and legal obligations in the context of healthcare and the right to health.

GSN v Nairobi Hospital & 2 Others Petition No. 24 of 2019 [2020] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Korir, J

30 July 2020

HIV status – Disclosure of HIV status and medical information – Violation of the right to privacy – When disclosure of medical information and HIV status is justified

Summary of the facts

The Petitioner's case was that the Nairobi Hospital (1st Respondent) breached its duty of care and her right to privacy by disclosing her HIV status to her insurance company (the 2nd Respondent) without her consent. The 2nd Respondent subsequently breached the same right by informing the Petitioner's employer of her HIV status without her consent. She claims that this resulted in her experiencing stigma and discrimination in the workplace and eventually being unfairly and illegally dismissed from her job. The Petitioner sought various reliefs, including a declaration that the actions of the Respondents were a violation of her right to Privacy and general and exemplary damages.

Issues for determination

1.Whether all or any of the Respondents breached the Petitioner's right to privacy by disclosing her HIV status without her consent.

Determination

The Court found that the Petitioner's HIV status was disclosed without her consent. Consequently, a declaration was issued that the disclosure of the Petitioner's HIV status without

her knowledge and consent was a violation of her right to privacy. The Petitioner was awarded general damages of Kshs. 2,000,000/- for the physical and psychological suffering caused by the violation, and she was granted the costs of the proceedings from the Respondents.

It is worth noting that the Court in this case placed reliance on the HIV and AIDS Tribunal case of EMA v World Neighbours & Another Case No. HAT 007 of 2015, where the Tribunal set out the conditions under which disclosure of the HIV status to medical insurers can be justified. The Tribunal set out four conditions as follows:

a) *Where the patient's viral load was so high that it militated against quick recovery and therefore increased the cost of treatment*
b) *Where the patient's HIV status was the sole or primary cause of the medical condition that was being treated*
c) *Where for any other reason the patient's HIV status or impact significantly affected on the costs of the medical treatment and therefore directly affected the interests both present and future of the medical insurer*
d) *Where recurrence of the problem in the future was reasonably foreseeable owing, not merely as a matter of pure chance but on account of the HIV status of the patient*

In order to enable the realisation of the right to health for persons living with HIV, it is imperative that their privacy and dignity are upheld and that their medical information is not disclosed unjustifiably.[100]

Significance of the case

The ruling underscores the critical importance of safeguarding an individual's right to privacy, particularly concerning their HIV status and medical information. It sets a legal precedent in Kenya, emphasizing that disclosure of HIV status without consent is a violation of an individual's privacy rights. This ruling serves as a protective measure against the unwarranted disclosure of sensitive health information, contributing to the destigmatization of HIV and the protection of the right to health for individuals living with HIV. Moreover, it reinforces the principle that disclosure can only be justified under specific, transparent, and justifiable circumstances, as outlined by the HIV and AIDS Tribunal, ensuring a more patient-centric and rights-based approach to healthcare in the context of HIV.

[100] Kenya Legal and Ethical Network (KELIN), 'Enhancing Privacy and Confidentiality in the Management of Public Health Data: A Brief" (December, 2020); See also the HIV and AIDS Tribunal Compendium of Cases (First edition) available at https://www.undp.org/kenya/publications/hiv-and-aids-tribunal-compendium-cases

Gichuhi & 2 others v Data Protection Commissioner; Mathenge & another (Interested Parties) Judicial Review E028 of 2023 [2023] KEHC 17321 (KLR)

Judicial Review E028 of 2023

High Court at Nairobi (Milimani Law Courts)

Chigiti, J

May 12 2023

Privacy Rights-Fair Administrative Action-Procedural Compliance-Data Protection Commission

Summary of facts:

The case involved a judicial review application brought by the Applicants (Gichuhi & 2 others) against the Office of the Data Protection Commissioner (ODPC), with Florence Mathenge and Ambrose Waigwa joined as interested parties. The Applicants filed a complaint under the Data Protection Act, alleging the unauthorized sharing of personal and sensitive data. The Data Protection Commissioner rendered a decision on January 6, 2023, dismissing the complaint, but this decision was made after the statutory investigation timeline had expired.

Issues for determination

The following key issues are central to the determination of the case:

- **Jurisdiction and Timelines:** Whether the Data Protection Commissioner exceeded its jurisdiction by rendering a decision after the expiration of the statutory 90-day investigation timeline stipulated in Section 56(5) of the Data Protection Act.
- **Impact on Right to Fair Hearing:** Whether the Applicants' right to a fair hearing, as provided under Articles 47 and 50 of the Constitution of Kenya, was violated by the Data Protection Commissioner's decision rendered outside the prescribed timeframe.

Significance to Health: This case holds particular significance in the context of ongoing advancements in Information Technology (IT), Artificial Intelligence (AI), and the Internet of Things (IoT), and their impact on health:

1. ***Data Privacy in Healthcare:*** *With the increasing digitization of healthcare records and the use of AI and IoT in medical diagnostics and monitoring, data privacy becomes paramount. The case underscores the importance of protecting individuals' health-related data, as unauthorized data sharing can have serious implications for patient confidentiality and trust in healthcare systems.*
2. ***Timely Health Services:*** *Adherence to statutory timelines is crucial in healthcare, especially when AI and IoT are involved. Delays in decision-making, as highlighted in*

this case, can impact the timely delivery of health services and diagnostics, potentially affecting patient outcomes.

3. ***Fair Administrative Action:*** *The right to fair administrative action, as emphasized in this case, is directly relevant to healthcare. Patients have the right to expect fair and transparent processes when their health data is processed or when administrative decisions impact their health. This principle promotes trust in healthcare systems and AI-driven diagnostics.*
4. ***Mandamus for Accountability:*** *The Court's issuance of an order of mandamus to compel a fresh investigation carries implications for accountability in healthcare. When healthcare providers or AI systems make errors or decisions that affect patients, accountability mechanisms must ensure that corrective actions are taken promptly.*
5. ***Technological Advancements:*** *As IT, AI, and IoT continue to advance in healthcare, legal frameworks, and regulatory bodies must keep pace to ensure the protection of patients' rights and data. This case highlights the evolving nature of legal challenges in the healthcare sector in the age of digital health.*

Access to Medical Records and Health Information

Information accessibility is considered to be part of the normative content of the right to health under Article 12(1) of the International Covenant on Economic Social and Cultural Rights. The Committee on Economic Social and Cultural Rights has termed information accessibility as 'the right to seek, receive and impart information and ideas concerning health issues and personal health data…'.[101]

Article 35 (1) of the Constitution of Kenya (2010) provides that every citizen has the right of access to –

(a) Information held by the State; and

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom

The Access to Information Act 2016[102] also provides for the right to access information held by another person and required for the exercise of any right or fundamental freedom. [103] The Courts have therefore sought to uphold the right to medical information and records of those that need this information to exercise or protect any fundamental right under the Constitution.

[101] General Comment No 14 on the Right to the Highest attainable standard of health (CESR, E/C.12/2000/4), Para 12(b)

[102] Act No. 31 of 2016.

[103] Section 4(1)(b) of the Access to Information Act 2016.

Republic v Sam Nthenya, Chief Executive Officer, Nairobi Women's Hospital & Another Ex Parte Christine Nzula; Commission on Administrative Justice (Interested Party) Petition No. 172 of 2020 [2021] eKLR [104]

High Court of Kenya at Nairobi, Constitutional and Human Rights Division
Ong'udi, J
18 November 2021

Access to health information and medical records – Role of the Commission on Administration of Justice – Violation of right to medical information

Summary of the facts

The Petitioner had written to the Nairobi Women's Hospital seeking her medical records which included clinical notes, surgical notes and nursing notes. However, the Respondent hospital informed her that her file was missing. The Petitioner sought the intervention of the Commission on Administrative Justice which ordered the hospital to ensure that the Petitioner could access her records. The hospital's failure to comply prompted the Petitioner to bring this action in the High Court.

Issues for determination

1. Whether the Commission on Administrative Justice had jurisdiction to issue orders to the Respondent hospital to produce the medical records.
2. Whether the Petitioner was entitled to the reliefs she sought, including an order for the Respondent to produce her medical records.

Determination

The Court found that the Respondent had violated the Petitioner's constitutional right under Article 35(1) of the Constitution by failing to issue the Petitioner with the full information that she sought. The Petitioner was granted compensation of Kshs. 1,000,000 for this violation.

Significance of the case

The case demonstrates that the right to medical information is a right that enables the realisation of the overall right to the highest attainable standard of health. It underscores the critical role of access to health information and medical records in ensuring the protection of an individual's

[104] http://kenyalaw.org/caselaw/cases/view/222982

right to health. It highlights the importance of government bodies, in this instance, the Commission on Administrative Justice, in safeguarding and enforcing these rights.

The Court's decision, awarding substantial compensation to the Petitioner for the violation of her right to medical information, serves as a powerful reminder that individuals have a legal entitlement to their medical records and any failure to provide them constitutes a breach of their constitutional rights. This case sets a significant precedent in Kenya, reinforcing the principle that access to medical information is an integral component of the right to health and should be protected and enforced accordingly.

Muchiri v Eldoret Hospital Limited Petition No. 024 of 2021 [2022] KEHC (KLR)

High Court of Kenya at Eldoret, Constitutional and Human Rights Division

Coram: Ogola, J

4 October 2022

Access to Medical records – Article 35(1) of the Constitution – Access to Information Act – Violation of right to access medical information

Summary of the facts

The Petitioner in this case requested the medical records of her deceased husband who died while being treated at the Respondent hospital. She wanted to establish, through a professional opinion, the probable cause of death of her husband.

Issues for determination

1. Whether the Respondent had violated the Petitioner's right of access to information.
2. Whether the Respondent should be compelled to give the information requested by the Petitioner.

Determination

The Court held that the Respondent's failure to provide the information sought by the Petitioner was a violation of the right to access information and an order of mandamus was given compelling the Respondent to provide the information sought by the Petitioner.

Significance of the case

The case is a reiteration of the fact that the enforcement of the right to information is necessary for the realisation of the right to health and to deal with any violations of the right to health. The medical information would provide insight into whether the deceased was treated with professionalism and care (an important aspect of the right to health).

Peter Mule (Suing as the administrator and personal representative of the estate of Jane Mueni Ngui) v Kenyatta National Hospital Civil Case No. 364 of 2007 [2013] eKLR

High Court of Kenya at Nairobi

Coram: Ougo, J

13 May 2013

Right to medical records and information – Doctor – patient confidentiality – Article 35(1)(b) of the Constitution

Summary of the facts

The Plaintiff's wife died while receiving treatment at the defendant hospital. He made an application for the Court to order the Defendant to produce all the hospital records relating to his wife's management and treatment at the hospital including the doctors' and nurses' notes, nursing cardex and operation notes. The Defendant claimed doctor–patient confidentiality as a basis on which not to release the records to the Plaintiff as the personal representative of the deceased.

Issues for determination

1. Whether the Plaintiff as the personal representative of the deceased, was entitled to the medical records of the deceased.

Determination

The Court made a ruling that the documents in the possession of the defendant hospital were needed to provide evidence of what went wrong in the treatment and management of the deceased. The Court thus made an order based on Article 35(1) of the Constitution, that the defendant hospital produce and make available the documents sought by the applicant/Plaintiff.

Significance of the case

The case demonstrates that the right to health information and medical records is essential in demonstrating whether there was a violation of the right to health.

Health Products

Figure 7 below provides a brief context on the progress and status of health products and technologies in Kenya.

Figure 7: Health Products and Technologies Context in Kenya

Health Products and Technologies Context in Kenya

From the Health Facility Assessment in FY 2018/19, the mean availability of essential medicines countrywide was 44%. None of the assessed health facilities had all essential medicines available on the day of the survey.

On average, tracer medicines for infectious diseases had the highest availability (70%) and medicines for mental health and neurological disorders had the lowest availability (21%). Availability of drugs for non-communicable diseases was however moderate to low (42%) with less than half of facilities having most of the assessed drugs.

The mean availability of basic equipment stood at 77%. Only 24% of health facilities have all basic equipment items.

The mean availability of diagnostic tests was 56%. However, only 17% of health facilities had all the diagnostic items.

Local manufacturers satisfy less than 30 percent of the domestic health products needs.

Procurement of health products in the public sector is mainly centralized through the Kenya Medical Supplies Authority (KEMSA). Unfortunately, the authority suffers ill repute from corruption, poor fill rate for orders from counties, amongst other inefficiencies.

The Government of Kenya has committed to build its own capacity for the production of human vaccines, as a long-term measure to ensure Kenya becomes self-sufficient in its vaccine needs. Kenya Biovax Institute Limited was incorporated in September 2021 and mandated to manufacture, package and commercialise specialised health products and technologies including vaccines, therapeutics and other biomedical products.

Kenya Biovax Institute projects to begin production by 2024 as it seeks to ensure availability and accessibility of quality and affordable specialized health products and technologies within the region. The institute further seeks to assure access and availability with self-reliance and self-sufficiency in the context of dwindling donor-financing.

Source: MTEF 2023, KHFA 2018/19

In an economy progressing towards Universal Health Coverage (UHC) and the realisation of the highest attainable standard of health, the Judiciary in Kenya plays a critical role in anchoring best practices in health products and technologies. The Judiciary can ensure that healthcare products and technologies, including pharmaceuticals, essential medicines[105] and medical devices are not only readily available, and accessible, but also adhere to safety and quality standards.

The case law in this section highlights how the Judiciary has played a role in enhancing the availability, accessibility and quality of health products, essential medicines and technologies.

PAO & 2 Others v Attorney General; Aids Law Project (Interested Party) Petition No. 409 of 2009 [2012] eKLR

High Court of Kenya at Nairobi

Ngugi, J

20 April 2012

Right to the highest attainable standard of health – Anti-Counterfeit Act 2008 – Access to essential and affordable medicines and drugs – Definition of counterfeit goods and medicine - Intellectual property rights – Industrial Property Act 2001 (Act No. 3 of 2001) - Right to life and dignity of persons living with HIV/AIDS

Summary of the facts

The case concerned the impact of certain provisions of the Anti–Counterfeit Act 2008 on the accessibility of generic HIV drugs for persons living with HIV/AIDS. The Petitioners argued that the Act failed to provide a clear definition of counterfeit goods in Section 2 of the Act in such a manner that would allow generic drugs to be included in the definition. They sought declarations that the rights to life, dignity and health encompassed access to affordable and essential drugs and medicines, including generic ones; that there was no breach of intellectual property rights; and that the Anti-Counterfeit Act 2008 limited access to affordable essential drugs, which was an infringement on the right to life, dignity and health.

[105] Dr. Jamlick Karumbi, Njuguna David, Leonard Cosmas and Dr. Hellen Kiarie, 'Essential Medicines Availability in Primary Health Care Facilities: Insights from the KHFA 2018' (Ministry of Health, Policy Brief: November 2020 Issue)

Issues for determination

1. Whether the provisions of the Anti-Counterfeit Act 2008 regarding the definition of counterfeit goods, infringed on the right of the Petitioners to access affordable essential generic drugs for HIV/AIDS.

Determination

The Court observed that the right to essential medicines is an essential component of the right to health. Therefore, any legislation which would render the cost of essential drugs to be unaffordable to citizens would be a violation of the State's obligations under the Constitution. The Court found that in so far as the Anti-Counterfeit Act threatens to limit access to affordable drugs and medicines including generic medicines for HIV and AIDS, it infringes on the Petitioner's right to life, dignity and health. The States was asked to reconsider the provisions of Section 2 of the Anti-Counterfeit Act to ensure that its citizens have access to the right to the highest standard of health in accessing essential medicines.

Significance of the case

The case serves as a significant legal milestone in Kenya's commitment to protecting the right to health, especially concerning access to affordable and essential medicines. This landmark decision affirmed that access to these medicines, including generic ones, is an integral part of the right to health, as it directly impacts individuals' ability to attain the highest standard of health. The Court's ruling emphasizes the government's obligation to ensure that legislative measures, like the Anti-Counterfeit Act, do not hinder access to crucial medicines for conditions such as HIV/AIDS. This case underscores the need to balance public health and intellectual property rights and sets a precedent for ensuring that affordable and essential drugs remain accessible to all citizens, particularly those living with life-threatening illnesses. It highlights the State's duty to protect and uphold the right to health, ensuring the well-being and dignity of its people.

HUMAN RESOURCES FOR HEALTH

In developing economies working towards Universal Health Coverage (UHC), Human Resources for Health (HRH) face various challenges. These include inadequate staffing, maldistribution of healthcare workers, poor motivation, poor working environments, and inadequate compensation. The Judiciary's role in anchoring best practices in HRH involves addressing these critical issues to ensure equitable and high-quality healthcare services.

Poor motivation and job dissatisfaction can significantly impact healthcare workers' productivity and commitment to patient care. The Judiciary can address cases related to workplace grievances and advocate for better working conditions, which contribute to a supportive and conducive work environment. By emphasising the importance of a positive workplace culture in legal decisions, the Judiciary encourages healthcare institutions to invest in initiatives that promote staff well-being and motivation. [106]

Inadequate compensation is a prevalent challenge that affects HRH retention and can exacerbate workforce shortages. Legal decisions can advocate for equitable remuneration for healthcare professionals, ensuring fair compensation for their expertise and dedication to public health. By addressing issues of wage disparities and setting precedents for reasonable compensation, the Judiciary contributes to the overall satisfaction and retention of skilled healthcare workers.[107]

Poor working environments, such as inadequate infrastructure and lack of necessary resources, hinder healthcare professionals' ability to deliver quality care. The Judiciary's role in settling disputes related to working conditions can drive healthcare institutions to improve facility infrastructure and resource availability, creating an enabling environment for effective service delivery. [108]

[106] Global strategy on human resources for health: Workforce 2030 See at https://iris.who.int/bitstream/handle/10665/250368/9789241511131-eng.pdf?sequence=1 Dussault G, Franceschini MC. Not enough there, too many here: understanding geographical imbalances in the distribution of the health workforce. Hum Resour Health. 2006;4:12. Published 2006 May 27. doi:10.1186/1478-4491-4-12

[107] Dussault G, Franceschini MC. Not enough there, too many here: understanding geographical imbalances in the distribution of the health workforce. Hum Resour Health. 2006;4:12. Published 2006 May 27. doi:10.1186/1478-4491-4-12h:

[108] Munabi-Babigumira, Susan & Glenton, Claire & Willcox, Merlin & Nabudere, Harriet. (2019). Ugandan health workers' and mothers' views and experiences of the quality of maternity care and the use of informal solutions: A qualitative study. PLOS ONE. 14. e0213511. 10.1371/journal.pone.0213511.

Furthermore, the Judiciary can play a pivotal role in advocating for HRH training and professional development opportunities. Legal rulings can emphasise the importance of continuous learning, encouraging governments and healthcare institutions to invest in capacity-building initiatives for healthcare professionals. By ensuring access to training and skill development, the Judiciary supports the enhancement of the healthcare workforce's competence and ultimately improves the quality of healthcare services.[109]

The case law in this section highlights how the Judiciary's role in anchoring best practices in HRH in developing economies progressing towards UHC is crucial. By addressing issues related to poor motivation, poor working environments, and poor compensation, the Judiciary contributes to the development of a skilled and motivated health workforce. Through legal decisions that prioritise fair labour practices, equitable remuneration, and access to training, the Judiciary fosters an environment that enhances the quality of healthcare services and advances the goals of Universal Health Coverage.

Pharmaceutical Society of Kenya & another v Attorney General & 3 others (Petition 85 of 2018) [2021] KEHC 85 (KLR) (Constitutional and Human Rights) (Judgement)

High Court of Kenya at Nairobi

Korir J

22 September 2021

Summary of facts

The Petitioners' main contention was the constitutionality of Sections 16, 19, 33, 45, and the First Schedule of the Health Act, 2017. They argued that these provisions placed health professionals with equal competence on unequal platforms. Specifically, they claimed that pharmacists and nurses were barred from holding certain administrative posts that they were previously eligible for because the new requirement mandated holders of such posts to be registered under the Kenya Medical and Dentists Board. Since pharmacists and nurses were regulated under the Pharmacy and Poisons Board and the Nurses Council, respectively, they were deemed ineligible for these positions.

The Petitioners expressed their concerns regarding various clauses of the Bill before the Health Act was enacted, but their concerns were not incorporated into the final statute. Additionally, they argued that the Health Act violated Article 234(2)(a)(i) of the Constitution as it allegedly created offices in the public service without authorization from the Public Service Commission.

[109] Dussault G, Franceschini MC. Not enough there, too many here: understanding geographical imbalances in the distribution of the health workforce. Hum Resour Health. 2006;4:12. Published 2006 May 27. doi:10.1186/1478-4491-4-12

In response to the 2nd Petitioner's case, the 1st and 2nd Respondents filed grounds of opposition. They contended that the impugned provisions of the Health Act enjoyed a presumption of constitutionality, which the Petitioners failed to rebut. They claimed that the Health Act was enacted in accordance with constitutional requirements and that granting the prayers sought by the Petitioners would undermine the objectives of the Act. They argued that such a decision would result in poor coordination of health services between national and County Governments, as well as a lack of coordinated leadership.

Furthermore, the 1st and 2nd Respondents argued that the Court lacked jurisdiction to hear the matter, as the Petitioners had not exhausted alternative means of seeking redress, such as filing a petition to Parliament. They also suggested that the case should have been brought before the Employment and Labour Relations Court.

The Attorney General also filed grounds of opposition in relation to both petitions. Similar to the other Respondents, the Attorney General asserted that the Petitioners failed to rebut the presumption of constitutionality regarding the impugned provisions of the Health Act. Additionally, the Attorney General claimed that the Petitioners had not exhausted alternative remedies, such as filing a petition to Parliament. Furthermore, it was argued that the Court lacked jurisdiction to address matters pertaining to the employment of nurses at both the national and county levels of government.

Issues for determination

1. Whether the High Court had jurisdiction in relation to a claim where it was alleged that certain professionals in the healthcare system, including nurses and pharmacists, had been discriminated against by being barred from holding certain administrative posts.
2. Whether the provisions of Article 119 of the Constitution, which allowed any person to petition Parliament for any matter concerning an enactment, ousted the High Court's jurisdiction to entertain a matter about the alleged unconstitutionality of a statute in the first instance.
3. Whether there was adequate public participation in the enactment of the Health Act 2017.
4. Whether an issue that was not pleaded could be introduced for the Court's consideration through submissions.
5. Whether the provisions of Sections 16, 19 and 33 of the Health Act, 2017 and the First Schedule to the Health Act 2017, which limited the holding of certain administrative posts to members of the Medical Practitioners and Dentists Board, discriminated against other health care professionals, including nurses and pharmacists.

Determination

In this case, the Petitioners raised concerns about the constitutionality of certain provisions of the Health Act 2017. They argued that these provisions created unequal platforms for health professionals with equal competence by excluding pharmacists and nurses from holding certain administrative posts they were previously eligible for. The requirement that holders of these posts should be registered under the Kenya Medical and Dentists Board excluded professionals regulated by the Pharmacy and Poisons Board and the Nurses Council.

The Respondents contended that the impugned provisions enjoyed a presumption of constitutionality and that the Health Act was enacted in accordance with constitutional requirements. They argued that granting the prayers sought by the Petitioners would undermine the objectives of the Act, leading to poor coordination of health services between national and County Governments.

The Court determined that it had jurisdiction to hear the matter, as the petitions raised issues related to the constitutionality of statutory provisions, falling within the Court's jurisdiction under Article 165(3) of the Constitution. The Court also clarified that the right to petition Parliament, as provided for by the Petition to Parliament (Procedures) Act, 2012, did not replace the constitutional authority of the Court to determine the constitutionality of any enactment.

Regarding the exhaustion doctrine, the Court emphasised that while alternative remedies such as petitioning Parliament were available, the right to petition the Court was a fundamental constitutional prescription that could not be deemed of lesser effect. The choice of remedy rested with the parties, and the Court found no merit in the argument that the Petitioners failed to exhaust a statutory remedy.

The Court considered the issue of public participation and noted that while public involvement in legislative enactments was mandated, it did not guarantee that any particular view expressed would prevail. The Court found that the Petitioners' claim of lack of public participation was not sufficiently substantiated.

In determining the constitutionality of the provisions, the Court examined their purpose and effect on constitutional rights. It found that the differentiation introduced by the impugned provisions, which excluded certain healthcare professionals from occupying specific posts, lacked a discernible justification and violated the principle of equality before the law. Therefore, Sections 16, 19, and 33 of the Health Act were declared unconstitutional.

The Court also found that the first schedule of the Health Act, which limited managerial positions to specific healthcare providers, was unconstitutional to the extent that it excluded members of the Petitioners. However, it upheld the constitutionality of Section 6 and Section 45 of the Act.

In conclusion, the Court determined that certain provisions of the Health Act, 2017 violated the Constitution by creating unequal platforms for healthcare professionals and excluding members of the Petitioners from certain posts. The Court declared Sections 16, 19, and 33, as well as the First Schedule, unconstitutional, while upholding the constitutionality of Section 6 and Section 45.

Significance

The case establishes the constitutional principles related to the equality of healthcare professionals and ensuring that statutory provisions align with constitutional rights, ultimately impacting the human resources for health and the realization of the right to health in Kenya.

Peter Ndungu Mbugua & 39 others v County Assembly of Nyandarua & 2 others [2018] eKLR

High Court of Kenya at Nyahururu
Wendoh J
16 October 2018

Summary of the facts

The Applicants, who were members of the medical profession offering health care services, including nurses, clinical officers, pharmacists, doctors, laboratory technicians sought to quash the Respondents' decision purporting to levy a single business permit from the members of the medical profession within Nyandarua County. They contended that they were licensed by their professional bodies to offer services, that the said bodies regulated their operations, that they paid licensing fees to their respective regulatory bodies, that the monies were collected on behalf of the National Government; that the action of County Government of Nyandarua purporting to levy single business permits from them was unconstitutional and amounted to double taxation.

The Respondents opposed the application, arguing among others, that it was an abuse of the Court process; that Courts had already made decisions to the effect that professions like pharmacy ought to pay single business permit, and that it did not amount to double taxation; and that in so far as the applicants purported to include pharmacists in the application, the issue had been determined.

Issues for determination

1. Whether the application was properly before the Court by way of judicial review.
2. Whether the application was res judicata as regards pharmacists whose case was determined in Kenya Pharmaceutical Association & another v Nairobi City County and the 46 other County Governments & another (Petition 97 of 2016) [2017] eKLR..
3. Whether County Governments would levy for a single business permit from members of the medical professional bodies except for pharmacists.

Determination

The purpose of issuing judicial review orders was to address situations where public bodies or officers have acted beyond their powers, acted without authority (ultra vires), or acted illegally, particularly when the rules of natural justice have been violated. In this case, the Applicants alleged that the Respondents acted ultra vires their powers, and their application could not be dismissed solely because it was brought by way of judicial review. Therefore, the applicants were rightfully before the Court.

According to Article 185 of the Constitution, the County Assembly has the power to enact laws, including the authority to levy taxes and charges. Additionally, Article 209(3)(c) empowers counties to impose any tax authorised by an Act of Parliament. Both the national and County Governments are permitted to impose charges for the services they provide, as stated in Article 209(4) of the Constitution. Legislation, as defined in Article 260 of the Constitution, includes an Act of Parliament or a law made under the authority conferred by an Act of Parliament, as well as a law made by a County Assembly. Therefore, the laws enacted by the County Government of Nyandarua, including Section 4 of the Finance Act, qualified as legislation and fell within the County's jurisdiction.

The Court noted that while pharmacy is a profession, it also involved the trade of selling pharmaceutical products. Unlike professions such as law or architecture, which exclusively provide services, pharmacy includes trade activities. Therefore, the issue of payment of trade licences by pharmacists had already been decided (res judicata), and should not have been part of the application.

Since 2010, there have been two levels of government in Kenya: the national government and the County Government. Each level has its own mandates and may levy taxes on certain functions. However, if the national government already levied a particular tax, the County Government could not impose the same tax. In the present case, medical doctors, nurses, and clinical officers already paid their regulatory bodies for yearly certificates to practise their professions.

The applicants, as professionals, are regulated by the relevant professional bodies, and their activities are overseen by the national government, which requires them to pay the bodies in order to obtain annual practising certificates. These certificates confirm their qualification for the year and authorise them to carry out their professional activities.

In the Fourth Schedule to the Constitution, trade development and regulation, including trade licensing, are among the services devolved to the County Government. However, the regulation of professionals is explicitly excluded. Therefore, the County Government was prohibited from issuing regulatory licences. By demanding a single business permit from the applicants (excluding pharmacists), the Respondents acted oppressively and exceeded their powers.

Therefore, the Court issued orders of certiorari quashing the decision of the Respondents to levy a single business permit from members of the medical profession within Nyandarua County (excluding pharmacists). Further, the Court issued an order prohibiting the Respondents from implementing their decision to levy a single business permit from members of the medical profession within Nyandarua County (excluding pharmacists).

Significance

This case underscores the need to protect the rights and working conditions of healthcare professionals. By challenging the imposition of a single business permit, the case ensures that healthcare professionals are not burdened with additional financial obligations that could hinder their ability to provide essential health services. It reinforces the importance of maintaining fair and supportive conditions for healthcare workers, which is essential for ensuring an adequate and motivated healthcare workforce.

The case also reaffirms that healthcare professionals play a crucial role in the delivery of healthcare services, and any financial or regulatory burdens that hinder their practice can impact the right to health of the population they serve. By clarifying the jurisdictional boundaries and emphasizing that the regulation of healthcare professionals falls under the purview of the national government, the case helps protect the right to health of the citizens by ensuring that healthcare providers can operate without unnecessary financial constraints and in compliance with national standards and regulations. It underscores the importance of a robust healthcare workforce and its ability to deliver quality healthcare services, thus upholding the right to health of the population.

SOCIAL DETERMINANTS OF HEALTH

In a developing economy progressing towards Universal Health Coverage (UHC), the Judiciary's role in anchoring best practices related to social determinants of health is crucial for promoting health equity. Social determinants, such as access to clean water, adequate housing, a safe environment, and nutritious food, significantly influence population health and contribute to health disparities. The Judiciary's involvement in addressing legal cases related to these determinants can advocate for policies and interventions that tackle the root causes of health inequities. [110]

Challenges in addressing social determinants of health in a developing economy may include limited access to basic amenities, inadequate infrastructure, and socio-economic disparities. By adjudicating cases related to these challenges, the Judiciary can influence the implementation of social programmes aimed at improving living conditions and reducing poverty. Legal rulings can lead to the allocation of resources towards essential social services, such as water and sanitation facilities, affordable housing, and poverty reduction initiatives, thus advancing health equity.[111]

Moreover, the Judiciary plays a significant role in ensuring that marginalised and vulnerable populations have equal access to health-enhancing resources. Legal decisions that prioritise health equity and fairness can result in policies and interventions that target underserved communities, promoting equitable health outcomes across the population.[112]

By reinforcing the importance of social determinants of health in achieving equitable health outcomes, the Judiciary contributes to the advancement of UHC that considers the broader social context of health. Recognizing the interplay between social factors and health outcomes, the Judiciary's involvement in shaping health policies can lead to a more comprehensive and inclusive approach to healthcare delivery, ultimately fostering health equity in the developing economy.

[110] Marmot M, Bell R. The Sustainable Development Goals and Health Equity. Epidemiology. 2018;29(1):5-7. doi:10.1097/EDE.0000000000000773

[111] Saunders M, Barr B, McHale P, Hamelmann C. Key policies for addressing the social determinants of health and health inequities. Copenhagen: WHO Regional Office for Europe; 2017 (Health Evidence Network (HEN) synthesis report 52)

[112] Pega F, Govindaraj S, Tran NT (2021) Health service use and health outcomes among international migrant workers compared with non-migrant workers: A systematic review and meta-analysis. PLoS ONE 16(6): e0252651. https://doi. org/10.1371/journal.pone.0252651

Culture and Health

Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) Petition No. 244 of 2019 [2021] KEHC 450 (KLR) (Constitutional and Human Rights) (17 March 2021) (Judgement)

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Achode, Kimondo and Muigai, JJJ

17 March 2021

Female genital mutilation -Highest attainable standard of health – Role of qualified medical practitioner – Right to cultural expression

Summary of the facts

The Petitioner Dr. Tatu Kamau challenged the constitutionality of the Prohibition of Female Genital Mutilation Act (No 32 of 2011) and the Anti-Female Genital Mutilation Board under the Act. The Petitioner contended that Sections 2, 5, 19, 20 and 21 of the Act contravened Articles 19, 27, 32 and 44 of the Constitution by limiting women's choice and right to uphold and respect their culture, ethnic identity, religion, beliefs, and by discriminating between men and women. She argued that Section 19(1) of the Act expressly forbade a qualified medical practitioner from performing female circumcision, thus denying adult women access to the highest attainable standard of health under Article 43.

The Respondents contended that the Act was lawfully enacted per Article 94(1) & (5) of the Constitution; that there was no external cultural practice that has been imposed on the Petitioner. However, it was the harmful cultural practice of FGM that had been outlawed. Further, the Respondents asserted that a cultural practice cannot be deemed to be a national heritage.

Issues for determination

1. Whether Sections 2, 5, 19, 20 and 21 of the impugned Act were unconstitutional.
2. Whether the 2nd Respondent (the Board) was illegally created and its mandate infringed on the rights of women as enshrined in the Constitution.
3. Whether FGM was a harmful cultural practice.
4. Whether the rights of women to uphold and respect their culture and identity had been violated by the Act.
5. Whether the Petitioner was entitled to the reliefs sought.
6. Who should pay costs.

Determination

The Court found a contradiction in the proviso to Section 19; it was not clear how a sexual

re-assignment procedure that would totally alter the female genitalia could be permissible or less invasive than Type I FGM as classified in Section 2 (1) of the Act. Further, the Court noted that the Act failed to criminalize Type IV FGM, thereby favouring miniscule of the population who practise aspects of Type IV FGM, including women who could afford labiaplasty or the cutting favoured by some religious aspects such as the Dawood Bohras.

The Court agreed with the Petitioner that the exception in Section 19(3) to a surgical operation on another person which was necessary for that other person's mental health had not been substantiated.

The Court observed that the rationale for FGM/C varied from one community to another. Further, it noted that medicalization of FGM/C did not mitigate harm on the girl/woman as demonstrated by the FGM/C survivors; FGM/C was harmful to girls and women due to removal of healthy genital parts, it caused immediate, short-term and long-term physical and psychological adverse effects. The Court held that despite the rights under Articles 11, 32 and 44 of the Constitution relating to culture, religion and beliefs and language, the rights could be limited due to the nature of the harm resulting from FGM/C to the individual`s health and well-being. Moreover, the Court found that the Act did not violate the women's right to dignity.

Finally, the Court observed that the practice of FGM/C affected the right to practice cultural life and the right to health, human dignity, and in instances when it resulted in death, the right to life. The Court thus proposed an amendment to Section 19 of the Prohibition of Female Genital Mutilation Act, 2011 with a view to prohibiting all harmful practices of FGM.

Significance of the case

The Court's determination highlights that FGM, irrespective of cultural or religious justifications, results in immediate, short-term, and long-term physical and psychological harm to girls and women. It recognizes that the practice of FGM not only infringes on an individual's right to health but also affects their right to life, dignity, and the practice of cultural life. By proposing an amendment to the Prohibition of Female Genital Mutilation Act, the ruling underscores the imperative to protect women's health and well-being by prohibiting all harmful FGM practices. This decision contributes significantly to safeguarding the right to health of women and promoting gender equality by combatting harmful cultural practices.

Environment and Health

There is an undeniable link between the right to a clean, safe and healthy environment and the right to health. In June 2022 the United General Assembly passed a resolution and declaration

that the planet has a right to a healthy environment.[113] In the Resolution, it was recognised that the right to a clean, healthy and sustainable environment is related to other rights and existing international law (including the right to health). The right to health cannot be enjoyed without ensuring that the right to a safe, healthy and clean environment is protected. Good physical, mental and social health depends on sound environmental conditions.

The Committee on Economic, Social and Cultural Rights has interpreted the right to health to include the underlying determinants of health such as, "*access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health – related education and information, including on sexual and reproductive health.*" [114]

The State therefore has an obligation to fulfil, protect and respect the right to health with these underlying determinants, including healthy environmental conditions, in mind. These obligations are buttressed by the provisions of General Comment No. 15 (2013),[115] which provides that climate change is one of, *"the biggest threats to children's health and exercebates health disparities. States should therefore put children's health concerns at the centre of their climate change adaptation and mitigation strategies."* [116]

On a domestic level, the Constitution of Kenya in Article 42 provides that, "*Every person has the right to a clean and healthy environment…"*

Environmental degradation, due to the failure to prevent activities that damage the environment, has led to food and nutrition insecurity as well as climate change crises that have had a profound impact on the right to health of citizens, especially in the developing countries such as Kenya.

Courts have therefore been called upon to consider disputes relating to the obligations of the State and State departments to prevent pollution and the adverse effects of environmental degradation such as climate change and food and nutrition insecurity, and indeed to enforce the State's obligations to put in place positive measures to ensure that the fundamental rights of citizens are protected in the face of environmental challenges.

[113] https://digitallibrary.un.org/record/3982508?ln=en
[114] General Comment 4, para 11.
[115] https://www.refworld.org/docid/51ef9e134.html
[116] Para 50.

This section will consider the interrelationship between the environment and health from three major lenses: Pollution, Climate Change and Food and Nutrition Security.

Pollution

Kelvin Musyoka & 9 others v Attorney General & 7 others Petition No 1 of 2016 [2020] eKLR [117]

Environment and Land Court at Mombasa

Omollo, J

16 July 2020

Right to highest attainable standard of health – Right to a clean and healthy environment – Polluter pays principle - Right to Life – Right to safe and clean water – Right to Information - Toxic waste emissions – Lead poisoning – Violation of constitutional rights

Summary of facts

The Petitioners brought the petition on their own behalf and on behalf of the residents of Owino–Uhuru village within Changamwe Division, Mikindani area of Mombasa County. The Petitioners claimed that the 8th Respondent had leased a neighbouring plot to the 7th Respondent which then set up a lead acid batteries recycling factory. The activities of the factory led to the emission of toxic waste which seeped into the Owino–Uhuru village causing the residents illnesses as a direct consequence of lead poisoning. They argued that more than 20 people had died as a result of the lead poisoning. They sought declarations that several fundamental constitutional rights had been violated – their right to a clean and healthy environment, the right to the highest attainable standard of health, the right to clean and safe water and the right to life. They also sought a declaration that the systematic denial of access to information about how exposure to lead would affect them and what precautionary measures should be taken, violated their right to information under Article 35(1) (a), (b) and (3) of the Constitution. The Petitioners also sought compensation for the damage to their health, the environment and for loss of life.

Issues for determination

1. Whether the Petitioners suffered violations to their constitutional rights to a clean and healthy environment, right to health, clean and safe water, life and information due to the actions of the Respondents.
2. Whether the Petitioners were entitled to compensation in general damages against the Respondents as a result of damage to their health, environment and life.

[117] http://kenyalaw.org/caselaw/cases/view/198619/

3. Whether orders of mandamus should issue against the Respondents to remediate the contaminated environment.

Determination

The Court allowed the petition. It held that there was mishandling of the effluent from the lead recycling operations causing toxic waste exposure that led to diseases and deaths among the Owino–Uhuru community. The Court also found that the National Environment Management Authority had contributed to the violations of the rights of the Petitioners because it had failed to enforce environmental standards. The Court, in granting compensation, apportioned liability for cleaning up, remediation and payment of compensation among the government agencies named as Respondents and the 7th Respondent.

Significance of the case

The case demonstrates the important link between environmental pollution and health. The case is instructive in holding the government and its agencies responsible for their constitutional obligations to maintain a clean and healthy environment and in turn protect the right to health of citizens. The level of compensation that was granted (Kshs. 2 billion) seems intended to send the message that not only must the polluter pay, but any hazardous activities that would affect the environment and health of citizens would not be taken lightly.

Joseph Gachihi Ngugi & 2 others v County Government of Nyeri & 3 others Petition No. 8 & 9 (consolidated) of 2020 [2021] eKLR

Environment and Land Court at Nyeri

Olola, J

2 December 2021

Right to clean and healthy environment - Solid waste management - Health hazards

Summary of the facts

The Applicants approached the Court for orders on grounds including that their rights to a clean and healthy environment had been infringed due to poor management of the Gikeu dumpsite located in Karima Ward by the 1st, 2nd and 3rd Respondents as well as the failure to collect garbage from Othaya Township. The Applicants contended that the dumpsite had deteriorated to the extent that the waste occasionally spilled into adjacent public roads, adjoining private property, passageways and drainage systems. Further, they contended that the odious smoke from the dumpsite had adversely affected their lives; that they were no longer able to access clean air or water; and that both adults and children around the area had been experiencing respiratory diseases and asthmatic attacks, all which are attributed to the smoke and smell

from the Gikeu dumpsite. The Petitioners prayed for orders of prohibition and/or injunction to restrain the Respondents from any further dumping of waste on the suit property described as Othaya/Thuti/425.

The 1st Respondent contended that the dumpsite was the only one in Othaya Sub-County in Nyeri. It denied that it had managed and operated the dumpsite poorly and negligently as the problem of solid waste management was one facing all the 47 counties. Further, the 1st Respondent's position was that it was engaging the relevant stakeholders, including the 4th Respondent, to address the concerns and challenges. The 4th Respondent stated that the site had led to some negative impacts such as odour from waste decay, cases of water stagnation, and uncovered garbage. However, the 1st Respondent had taken several initiatives to improve the condition of the dumpsite.

Issue for determination

Whether this was a proper case for the grant of the interlocutory orders sought.

Determination

The Court observed that the Petitioners had made a prima facie case with a likelihood of success and that they were likely to suffer prejudice as a result of the violation of their right to a clean and healthy environment. However, noting that the Gikeu dumpsite was the only one in Othaya Sub-County, an order prohibiting delivery of waste disposal at the site would mean that the waste collection or removal from the entire Sub-County would be stopped, to the greater prejudice of the area residents, and thus not be in the public interest. In the event, the Court ordered the 1st Respondent to immediately comply with the Statutory Improvement Notice issued to it by the 4th Respondent and submit a Report to the Court within 60 days on the status of compliance with the directive.

The significance of the case:

Even if the right to health was not specifically considered in the ruling as an issue for determination, it is clear that the health hazards as a result of the ineffective solid waste management was an issue that the Court at the main hearing would have to consider. The case demonstrates the impact of pollution, not just on the environment but also on the health of citizens.

Ligue Ivoirienne Des Droits de L'Homme (LIDHO) and Others v Republic of Cote d'Ivoire Application No. 041/2016 [2023] AfCHPR 21

African Court on Human and People's Rights

Imani D. Aboud, President; Modibo Sacko, Vice-President; Ben Kioko; Rafaâ Ben Achour;

Suzanne Mengue; Tujilane R. Chizumila; Chafika Bensaoula; Blaise Tchikaya; Stella I. Anukam; Dumisa B. Ntsebeza; Dennis D. Adjei JJ;
5 September 2023

Summary of the facts

The case concerned the dumping of toxic waste in Abidjan and its suburbs. A cargo ship which had been chartered by a multinational company known as TRAFIGURA Ltd docked at the port of Abidjan with 528 cubic meters of highly toxic waste and began discharging it at several sites in Abidjan. None of the sites concerned had chemical waste treatment centres.

The effect of the dumping was air pollution that affected the health of the residents of the areas where the dumping took place. There were complaints of headaches, nausea, vomiting, rashes and nosebleeds. There were also reports that about 17 people had died of toxic gas poisoning. In addition, there was severe ground water contamination. One of the violations they claimed was that their right to enjoy the best attainable state of physical and mental health, protected under Article 16 of the African Charter and Articles 11(1) and 12(1) and 2 (b) and (d) of the International Covenant on Economic Social and Cultural Rights had been violated.

Issues for determination

The Applicants alleged that the Respondent State violated:

1. The right to respect for life and physical and moral integrity;
2. The right to an effective remedy and to adequate compensation for damages;
3. The right to physical and mental health;
4. The right to a satisfactory general environment; and
5. The right to information

Determination

The African Court observed that since Ivory Coast was a signatory to the Bamako Convention, it had made a commitment and declaration to 'be mindful of the growing threat to human health and the environment caused by transboundary movements of hazardous waste.' The State was obligated to prevent the importation into their territory of toxic wastes whose impact on human life they should be aware of. If such toxic wastes were on the territory of a State, it had the obligation to act and limit and repair the harmful consequences on human life.

The Ivory Coast was therefore ordered to establish, in consultation with the victims, a compensation fund from the amounts that TRAFIGURA Ltd had paid, and also that the perpetuators be prosecuted.

Significance of the case

The case underscores the responsibility of States to protect the health and well-being of their citizens by taking measures to prevent and address environmental hazards that can harm public

health. The ruling highlights that the right to enjoy the best attainable state of physical and mental health is not only an individual right but also an obligation of states to safeguard. By ordering the establishment of a compensation fund for the victims and the prosecution of those responsible for the toxic waste dumping, the case sets a precedent for holding both States and corporations accountable for actions that jeopardize the right to health of communities. It reinforces the principle that environmental harm resulting in health hazards must be addressed through legal mechanisms to protect public health and well-being.

Climate Change

Climate change affects health both directly and indirectly.[118] For example as a result of floods, there is an increase of vector-borne and water-borne diseases. weather-related naturual disasters, also lead to disrupted access to health services and medicines as a result of destruction of infrastructure, mental and physical health is also affected. The raised levels of pollution contribute to cardiovascular and respiratory diseases. The current estimates by the World Health Organisation (WHO) are that by 2030, the global health costs of climate change may be up to USD 2-4 billion annually and 2.5 million additional deaths are estimated to occur between the period of 2030 and 2050. [119] Climate Change is therefore inextricably linked to the realisation of the right to health.[120] Globally, there is an increase in climate change litigation. The number of climate cases that have been brought before Courts have more than doubled since 2017 when there were around 884 cases, to 2180 cases in 2022.[121]

[118] https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health#:~:text=Climate%20change%20is%20impacting%20health,diseases%2C%20and%20mental%20health%20issues. See also: IFRC, Report: 'Climate Change Impacts on Health: Kenya Assessment' (April, 2021) available at https://www.climatecentre.org/wp-content/uploads/RCRC_IFRC-Country-assessments-KENYA.pdf ; see also article: Johanne Greibe Andersen, Per Kallestrup, Catherine Karekezi, Gerald Yonga and Christian Kraef, 'Climate Change and Health Risks in Mukuru Informal Settlement in Nairobi, Kenya: Knowledge, attitudes and practices among residents' available at https://reliefweb.int/report/kenya/climate-change-and-health-risks-mukuru-informal-settlement-nairobi-kenya-knowledge-attitudes-and-practices-among-residents#:~:text=Chronic%20respiratory%20conditions%2C%20vector%2Dborne,as%20climate%20related%20health%20risks. Climate changeWHO fact sheet on climate change and health: provides key facts, patterns of infection, measuring health effects and WHO response.

[119] Ibid

[120] David W. Patterson, 'The Right to Health and Climate Change Crisis: The Vital Role of Civic Space' (2021) 23(2) Health and Human Rights Journal 109-120 available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8694289/pdf/hhr-23-109.pdf ; Lancet Newsdesk, 'Does Climate Change threaten Human Rights to Health?' available at https://www.thelancet.com/action/showPdf?pii=S2542-5196%2823%2900058-X

[121] Global Climate Litigation Report 2023: Status Review available at https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3

Courts in Kenya can be strategically moved to consider right to health arguments in climate change litigation. Specifically, Courts may be called upon to determine whether the State has met its obligations in responding to climate change challenges. One of the most recent cases that is still pending in Court is the case of Legal Advice Centre T/A Kituo Cha Sheria & Anor v Attorney General & 7 Others.[122] In this case the Petitioners, who were adversely affected by the flooding in Lake Baringo, claim that they are victims of climate related flooding which has caused massive displacement and loss of life and property. In this case they argue that that the flooding has been caused by hydro-metereological variables due to climate change. Among the orders that the Petitioners are seeking are declaratory orders that there neglect and/or refusal by the relevant government officials to discharge their duties under the Climate Change Act 2016 and in particular, that they failed to take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate the adverse impacts of these causes. They are also seeking an order for the rehabilitation, relocation and restoration of damaged infrastructure and an order for resettlement.

Many of the cases on climate change and health in this section are foreign cases which are cited for instruction and guidance on the approaches that other jurisdictions are taking.

Urgenda Foundation v State of the Netherlands (2015) HAZA C/09/0045689

Supreme Court of Netherlands

20 December 2019

Streefkerk (vice – president), Snijders, Polak, Tanja – van den Broek, Wattendorff, JJJ

Right to life, health, family and private life – Reduction of Greenhouse Gas Emissions – Climate Change - Obligations of Dutch Government – Power of Courts

Summary of the facts

The Urgenda Foundation and 900 citizens sued the Dutch government requiring it to do more to prevent global climate change. They sought a Court order that directing the State to reduce the emission of greenhouse gases so that by the end of 2020, those emissions will have been reduced by 40% or in any case by at least 25% compared to 1990.

Issues for determination

1. Whether the Dutch State was obliged to reduce by the end of 2020, the emission of greenhouse gases originating from the soil by at least 25% compared to 1990.
2. Whether the Court had the power to give the State the order to reduce these emissions.

[122] Petition No. 007 of 2022 (Environment and Land Court at Iten)

Determination

The Supreme Court upheld the District Court's decision allowing the claim by Urgenda. The Court held that Courts have the power to give orders to the State to reduce emissions. The Supreme Court thus orderd the State to reduce emissions by at least 25% compared to levels they were at in 1990.

Significance of the case

Although not directly linked to the realisation of the right to health, it is clear that the reduction of greenhouse gas emissions has an impact on the overall levels of climate change which in turn have an impact of the health of citizens. Therefore, when Courts give orders to States or governments to fulfil their obligations to reduce the adverse effects of and factors contributing to climate change, those orders have an effect on the right to health of citizens.

Shrestha v. Office of the Prime Minister et al, Decision No. 10210[123.]

Supreme Court of Nepal

Om Prakash Mishra (CJ), Tej Bahadur K.C, JJ

December 25 2018

Climate change law – Environmental Protection Act – Climate Change Policy - Greenhouse gas mitigation – climate adaptation - right to dignified life – Right to access healthcare services – right to healthy environment – fossil fuel – low-carbon technology – compensation for climate harm

Summary of the facts:

The applicant, Padam Bahadur Shrestha, sought to compel the government of Nepal to enact a new climate change law, arguing that existing legislation (Environmental Protection Act of 1997) did not adequately address climate change issues. He also claimed that the Climate Change Policy of 2011 had not been effectively implemented. When the government did not respond to the request for new climate legislation, Shrestha filed a petition with the Supreme Court of Nepal, asserting that the government's inaction on climate change violated his constitutional rights, particularly the right to access basic healthcare services, the right to a clean and healthy environment and the right to dignity. The gap in the law showed that there was no provision for climate change mitigation and adaptation.

[123] https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20181225_074-WO-0283_judgment-2.pdf: https://naturaljustice.org/wp-content/uploads/2022/03/Shrestha-v.-Office-of-the-Prime-Minister-et-al..pdf

Issues for determination:

1. Whether the government of Nepal was obligated to enact a new climate change law to address environmental concerns associated with climate change.
2. Whether the government's failure to take action on climate change violated constitutional rights and international agreements.

Determination

The Supreme Court of Nepal ordered the government to enact a new climate change law aimed at mitigating and adapting to climate change effects, reducing fossil fuel consumption, and promoting low-carbon technologies. The Court also instructed the government to establish scientific and legal mechanisms to compensate Nepalese residents affected by pollution and environmental degradation. The existing national climate policy was to be properly implemented until the new law came into effect.

Significance of the case

This decision is significant as it mandates the enactment of a new climate change law in Nepal to fulfill international commitments under the Paris Agreement and constitutional obligations. It underscores the importance of addressing climate change through legal mechanisms and protecting the rights of citizens to a dignified life and a healthy environment. Following this decision, the government of Nepal passed the Environment Protection Act of 2019 and the Forests Act of 2019 to address climate mitigation and adaptation measures.

The significance of the case of Shrestha v. Office of the Prime Minister et al. also lies in its determination regarding the right to health, the nexus between climate and environmental justice, and their impact on public health:

1. **Recognition of the Right to Health:** This case underscores the importance of recognizing the right to health as a fundamental human right. The Supreme Court of Nepal's decision to compel the government to enact a new climate change law demonstrates the Court's commitment to protecting the health and well-being of Nepalese citizens. It affirms that access to a healthy environment is an essential component of the right to health.
2. **Climate Change and Environmental Justice:** The case highlights the interconnectedness of climate change and environmental justice. It acknowledges that climate change disproportionately affects vulnerable communities and ecosystems. The Court's decision acknowledges that environmental justice is integral to addressing climate change and protecting the rights of marginalized populations.
3. **Protection of Public Health:** By ordering the government to mitigate and adapt to the effects of climate change, reduce fossil fuel consumption, and promote low-carbon

technologies, the Court explicitly addresses the link between climate action and public health. Climate change can lead to various health risks, including increased heat-related illnesses, vector-borne diseases, and food and water insecurity. The Court's determination recognizes the importance of safeguarding public health through climate action.

4. **Compensation for Harm:** The Court's instruction for the government to develop mechanisms to compensate Nepalese residents harmed by pollution and environmental degradation demonstrates a commitment to environmental justice and accountability. It ensures that those who suffer adverse health effects due to climate-related impacts have avenues for seeking redress.
5. **Fulfilment of International Commitments:** The case underscores the significance of fulfilling international commitments under agreements like the Paris Agreement. Nepal's obligation to enact climate legislation aligns with its commitments on the global stage. This decision emphasizes that addressing climate change is not just a matter of international obligation but also a domestic imperative linked to the right to health.

Rikki Held et al v. Montana et al Cause No. CDV-2020-307

Montana 1st District Court

Seeley, J

14 August 2023

Right to clean and healthy environment – Right to health, dignity and safety – Constitutionality of MEPA Limitation – Impact of Greenhouse Gas (GHG) Emissions on young people - Environmental Protection

Summary of facts:

The case involves a complaint by 16 young people between the ages of 2 years to 18 years against the State of Montana, challenging the constitutionality of the fossil–fuel-based state energy system arguing that it contributed to climate change and to the detriment of their health, dignity and safety. They also challenged the Montana Environmental Policy Act (MEPA) Limitation, which restricted the consideration of greenhouse gas (GHG) emissions and climate impacts in State decision-making by Courts. The Petitioners, represented by youth activists, argued that this limitation violated their constitutional rights to a clean and healthful environment. The Court was presented with evidence linking Montana's GHG emissions to the MEPA Limitation and asserting that the restriction contributes to environmental harm.

Issues for determination:

1. Whether the MEPA Limitation was constitutional.
2. Whether the fossil–based state energy system violated the rights to a clean and healthy environment, health and dignity.

3. Whether the Plaintiffs had standing to bring claims.
4. Whether Montana's GHG emissions were connected to the MEPA Limitation.
5. Whether the MEPA Limitation contributed to environmental harm.

Determination

The Court determined that the MEPA Limitation was unconstitutional, finding in favour of the Petitioners. The Court also established that the Petitioners had standing, that GHG emissions were traceable to the limitation, and that the restriction contributed to environmental harm.

Significance of the Case

1. **Constitutionality of MEPA Limitation:** The ruling declared the 2023 version of the MEPA Limitation as unconstitutional, emphasizing the importance of considering GHG emissions and climate impacts in State decision-making.
2. **Recognition of the Right to Health:** The case underscored the fundamental right to a clean and healthful environment. It affirmed that this right encompasses not only environmental well-being but also the health of individuals and communities. This recognition reinforces the idea that environmental protection is intrinsically linked to public health.
3. **Environmental Justice:** The case highlights the concept of environmental justice, which addresses the unequal distribution of environmental benefits and burdens among different communities. It recognizes that marginalized and vulnerable populations often bear the brunt of environmental harm, including the health consequences of climate change and pollution.
4. **Youth-Led Advocacy:** The involvement of youth Plaintiffs in this case underscored the growing global movement of young activists advocating for environmental justice and climate action. It demonstrated that young people were not only aware of the health and environmental challenges posed by climate change but are also taking legal action to protect their future well-being.
5. **Nexus Between Climate and Health:** The determination in this case directly established a nexus between climate change and public health. It recognized that climate impacts, driven by factors like greenhouse gas emissions, had tangible and adverse effects on the health of individuals and communities. These impacts could include more frequent and severe heatwaves, air pollution, infectious disease spread, and disruptions to food and water supplies, all of which have direct health consequences.
6. **Preventative and Equitable Relief:** The case's determination highlights the importance of preventative and equitable relief in environmental matters. By striking down the MEPA Limitation, the Court ensured that the government could no longer prevent the

analysis and remedies related to greenhouse gas emissions and climate impacts. This decision could lead to more proactive measures to protect public health in the face of climate change.

West Virginia et al. v. Environmental Protection Agency et al No. 20–1530 [124]

Chief Justice Roberts delivered the opinion of the Court, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett. Justice Gorsuch filed a concurring opinion, joined by Justice Alito. Justice Kagan filed a dissenting opinion, joined by Justices Breyer and Sotomayor.

Clean Power Plan-Affordable Clean Energy (ACE) rule, Section 111 of the Clean Air Act-Best System of Emission Reduction (BSER)-Environmental Regulation-Separation of powers-Generation Shifting-Major questions doctrine

Summary of facts

In 2015, the EPA implemented the Clean Power Plan to regulate carbon dioxide emissions from existing coal-and natural-gas-fired power plants under Section 111 of the Clean Air Act. The Clean Power Plan included three building blocks to reduce emissions, including generation shifting from coal to natural gas and renewables. The EPA's determination of the BSER, which allowed for such generation shifting, was challenged and stayed by the Supreme Court in 2016. The EPA later repealed the Clean Power Plan in 2019 and introduced the ACE rule as a replacement.

Issues for determination:

1. Whether the Petitioners had Article III standing to challenge the EPA's actions regarding the Clean Power Plan and ACE rule.
2. Whether the EPA had the authority under Section 111 of the Clean Air Act to set emissions caps based on a generation-shifting approach.

Determination

1. The Court found that the case was justiciable and that the Petitioners had Article III standing to challenge the EPA's actions, as they had experienced injuries traceable to the judgment below, which vacated the ACE rule and purported to bring the Clean Power Plan back into legal effect.

[124] Together with No. 20–1531, North American Coal Corp. v. Environmental Protection Agency et al., No. 20–1778, Westmoreland Mining Holdings LLC v. Environmental Protection Agency et al., and No. 20– 1780, North Dakota v. Environmental Protection Agency et al., 30 June 2022, available at <https://www.supremeCourt.gov/opinions/21pdf/20-1530_n758.pdf> (accessed 14 October 2023.

2. The Court determined that the EPA did not have the authority under Section 111 of the Clean Air Act to set emissions caps based on the generation-shifting approach used in the Clean Power Plan. It applied the major questions doctrine, emphasizing that the EPA's expansive interpretation of its regulatory authority required clear congressional authorization, which was lacking in this case. The Court noted that the EPA's approach was unprecedented, transformed the regulatory scheme, and involved policy matters of significant economic and political importance that were unlikely to be delegated to an administrative agency by Congress.

Significance of the case

The case of West Virginia v. Environmental Protection Agency (EPA) is significant for several reasons, particularly in its implications for the right to health in the following aspects:

1. **Environmental Regulations and Public Health:** The determination in this case has far-reaching consequences for public health. The Clean Power Plan, which was challenged in this case, aimed to regulate carbon dioxide emissions from power plants. These emissions are a major contributor to air pollution and climate change, both of which have direct and indirect impacts on public health. By limiting emissions from power plants, the Clean Power Plan sought to reduce air pollution, which is linked to respiratory diseases, cardiovascular problems, and other health issues. The determination of the EPA's authority in this context affects the ability to implement regulations that protect public health.

2. **Right to Health:** While the case did not explicitly address the right to health, the outcome has implications for this fundamental human right. The right to health, as recognized by international human rights instruments, encompasses access to clean air, safe water, and a healthy environment. Climate change, driven by greenhouse gas emissions, has been identified as a threat to the right to health, particularly for vulnerable populations. The determination of the EPA's authority to regulate emissions from power plants impacts the extent to which the U.S. government can fulfil its obligations to protect the right to health of its citizens.

3. **Climate Justice and Environmental Justice:** The case also has implications for climate justice and environmental justice. Communities disproportionately affected by environmental pollution and climate change tend to be low-income communities and communities of color. These communities often bear the brunt of the health impacts of air pollution and extreme weather events linked to climate change. The Clean Power Plan, by addressing emissions from power plants, aimed to reduce environmental injustices

and promote climate justice. The determination in this case can affect the ability to advance environmental and climate justice by regulating the sources of pollution that impact vulnerable communities the most.

4. **Future Environmental Regulations:** The determination sets a precedent for future environmental regulations and the extent of regulatory authority granted to the EPA. It clarified the need for clear congressional authorization for significant regulatory actions in the context of major environmental and health challenges like climate change. This decision may influence the approach taken by the EPA and other regulatory agencies in addressing environmental and public health issues in the future.

Food Security, Nutrition and Health

Access to quality and adequate nutritious food is inextricably linked to the right to the highest attainable standard of health. Nutrition security is a major determinant of public health of a nation. The main elements of food security are: availability, stability, utilisation and access.

Food insecurity refers to, "*a situation that exists where people lack secure access to sufficient amounts of safe and nutritious food for normal growth and development and an active and healthy life.*" [125]

Food security has moved away largely from being about production of sufficient amounts of food to being about the production of nutritious food. Nutrition is a basis for health. It is when, "*all people at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.*"[126]

Article 43(1)(c) provides that, "*Every person has the right to be free from hunger, and to have adequate food of acceptable quality.*"

An area of controversy when it comes to nutritious and adequate food in Kenya is the Genetically Modified Organisms (GMO) debate. In October 2022, the government lifted the ban on the importation and planting of GMOs in Kenya. This was in response to the drought situation that had hit various parts of the country. The ban had been in effect from November 2012. A Taskforce that had been set up in 2013 formulated a report that emphasised the need to prioritise human health by developing national guidelines and infrastructure for testing GMOs.

[125] https://socialprotection.org/learn/glossary/food-insecurity#:~:text=%22A%20situation%20that%20exists%20when,an%20active%20and%20healthy%20life

[126] https://www.fao.org/fileadmin/templates/faoitaly/documents/pdf/pdf_Food_Security_Cocept_Note.pdf

Currently Kenya is guided by the BioSafety Act 2009 and the regulations made under it. In 2015, a case was filed challenging an impending lifting of the ban at that time. The Kenya Small Scale Farmers Forum sought conservatory orders to prohibit the State from lifting the ban.[127] They argued that lifting the ban without involving the public and not making public the report of the Taskforce on GMOs was a violation of the Constitution. In as much as they did not obtain the orders they sought for, the case is a demonstration of the fact that the health effects of GMOs can be the subject of litigation.

Following the lifting of the ban, there were legal challenges that were brought in Court. While the the matter is still pending in Court, injunctive orders were granted pending the determination of the case. The Appeal by the government challenging the injunction was dismissed essentially leaving the ban in place until the case is heard. The case was filed by the Kenya Peasants League against the Attorney General and the Cabinet Secretary for Agriculture, Livestock and Fisheries. [128]

The Courts can play the role of drawing the interlinks between food nutrition and health and holding the government accountable for its obligations to ensure food security, nutrition and adequacy and in turn enable the realisation of health of its citizens.

Sanitation, Water and Health

Among the core obligations that are set out in General Comment No. 14 of the Committee on Economic Social and Cultural Rights (CESCR) on the right to the highest attainable standard of health, is the core obligation of States to, *"ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water."* [129]

The Constitution of Kenya recognises the right to sanitation and water as fundamental rights under the Bill of Rights. In Article 43(1)(b), it provides that, "*Every person has the right to accessible and adequate housing, and to reasonable standards of sanitation."*

Article 43(1)(d) provides that, "*Every person has the right to clean and safe water in adequate quantities."*

[127] Kenya Small Scale Farmers v Cabinet Secretary Ministry of Education, Science and Technology & 5 Others (Petition No. 399 of 2015) [2015] eKLR available at http://kenyalaw.org/caselaw/cases/view/114794/

[128] see https://www.citizen.digital/news/govt-temporarily-barred-from-importing-distributing-gmo-crops-food-n310168

[129] General Comment No. 14 para 43(c)

Poor sanitation and inadequate and unsafe water supply are major contributory factors to diseases and ailments amongst populations.The Sustainable Development Goals also envisage that States would ensure that there is access to water and sanitation for all. [130] Courts therefore have a responsibility to ensure that the State has put in measures to realise the right to sanitation and adequate access to safe water.

Adrian Kamotho Njenga v Council of Governors & 3 others Petition No. 37 of 2017 [2020] eKLR

Court: Environment and Land Court at Nairobi

Coram: Bor, J

16 January 2020

Right to a clean and healthy environment – Right to reasonable standards of sanitation - Provision of free public sanitary amenities for members of the public – Obligations of the Counties

Summary of the facts

The Petitioner sought a declaration that the Respondents had breached Article 42 of the Constitution and a prohibitory order against the Respondents from charging any fee, or obstructing citizens from accessing or using existing public sanitary facilities or toilets, and an order of mandamus to direct the Respondents to set up and operate hygienic sanitary facilities including functional public toilets within their lawful jurisdictions throughout the Kenya`s road network within 60 days.

The Petitioner averred that due to lack of options for proper sanitary facilities, motorists and commuters urinated, defecated and excreted human waste on the streets, road reserves, adjacent bushes or open spaces, yet the Respondent had failed to provide critical sanitary amenities to the users of public roads. He sought an order of mandamus to direct the Respondents to set up and operate hygienic sanitary facilities including functional public toilets within their lawful jurisdictions and throughout Kenya's road networks within 60 days.

Issues for determination

1. Whether the Court should grant the order sought in the petition for mandamus

[130] Sustainable Development Goals (SDG) 6 available at https://www.un.org/sustainabledevelopment/water-and-sanitation/ ; see also Kenya National Commission on Human Rights, 'Framework for Monitoring Realisation of the Right to Water and Sanitation in Kenya' (March 2017) available at https://www.knchr.org/portals/0/ecosocreports/phe-framework.pdf

Determination

The Court first observed that a clean and healthy environment for persons using a road means one that is devoid of dirt or anything harmful which may interfere with the physical or mental well-being of persons using the road. Moreover, the Court found that it was the County Government that had the mandate to deal with water, sanitation and solid waste disposal, while the broad function of road transport was conferred on both the national and County Governments. Taking into account Section 120 of the County Governments Act, the Court declined to grant prohibitory orders restraining the Respondents from charging fees for the use of existing public sanitary facilities. Further, it found that was impracticable for the Respondent to set up and operate functional public toilets within their jurisdiction and throughout the road network in Kenya within 60 days. However, the Court directed the Cabinet Secretary in charge of transport to constitute and chair the Working Group to formulate the policy for the provision of toilets and other sanitation facilities on the country's road network to give effect to the right to a clean and healthy environment on the roads. The policy had to consider the need to have the toilets and other sanitation facilities maintained properly by the County Governments once constructed. Further, the policy had to consider with the overall objective of guaranteeing every person using the country's road network reasonable access to decent toilets and sanitation facilities.

Significance of the case

While addressing the provision of sanitary facilities on public roads, the Court underscores that access to hygienic sanitation facilities is crucial for preventing the spread of diseases and maintaining the physical and mental well-being of citizens. The Court's directive to formulate a policy for providing toilets and sanitation facilities on the road network recognizes the government's obligation to ensure reasonable access to such facilities, ultimately contributing to the realization of the right to health. This case highlights the importance of infrastructure and policies that support public health and underscores the government's responsibilities in safeguarding the right to health through environmental and sanitation measures.

Adequate Housing and Health

Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) Petition No. 3 of 2018 [2021] eKLR

Supreme Court of Kenya
Maraga, (P), Mwilu, Ibrahim, Wanjala, Ndung'u, SCJJ
11 January 2021

Summary of the facts

The Petitioner was a registered society composed of residents of Mitumba Village. The Village and Mitumba Village Primary School were situated near Wilson Airport. On September 15, 2011 a notice was published in the newspaper by the Attorney General giving the residents of seven days within which to vacate the premises. On November 19 2011, the village was demolished notwithstanding the conservatory orders obtained by the Petitioner from the High Court to restrain the same. The Petitioner sought various declaratory reliefs, including those that asserted their ownership of the premises, and also stated that the forceful eviction and demolition without a relocation option was illegal, oppressive, and a violation of the Petitioner's rights.

The Respondent explained that the village was situated on property owned by the Kenya Airports Authority, the 1st Respondent and that it was under a statutory duty to maintain air safety by removing any informal settlement which was on a flight path. The village posed a threat given the on-going war in Somalia.

The High Court found that the Petitioner (appellants) was not the owner of the suit premises. The newspaper eviction notice requiring vacation of the suit premises within 7 days was also found to be unreasonable, unconscionable and unconstitutional by the High Court since there was no other notice preceding it. The Court noted the lack of legislation or guidelines developed in Kenya for the eviction of persons occupying land that they were not legally entitled to occupy. The High Court made the determination that the right to property included the protection of goods and personal property and it extended to goods and building materials that had been destroyed during the demolition.

The High Court also found that the eviction and demolition of the premises pursuant to a seven-day notice and the failure to provide alternative accommodation was a violation of the appellant's rights to housing and other socio-economic rights recognized under the Constitution of Kenya, 2010 (Constitution). Further, the High Court found that evictions could be necessary, but the due process had to be followed. The due process included the issuance of reasonable notice and the conduct of consultations among those affected by the eviction. Additionally, the High Court determined that the demolition which left other nearby multi-storied buildings intact was discriminatory.

The High Court noted that the demolitions included the demolition of a school and there was no evidence that measures were put in place to protect the needs of vulnerable groups, particularly children and that children's rights were violated. The Petitioners appealed to the Court of Appeal then Supreme Court.

Issues for determination:

1. The place of structural interdicts (if any) as forms of relief in human rights litigation under the Constitution.
2. The effect of Article 2(5) and 2(6) of the Constitution regarding the applicability of international law in general and international human rights in particular.
3. To what extent Guidelines by UN bodies were relevant in the interpretation and application of socio-economic rights by Kenyan Courts under the Constitution.
4. Under what circumstances a right to housing may accrue (if at all) in accordance with the provisions of Article 43(1) (b) of the Constitution.

Determination:

In the determination of the issue as to when the right to housing accrues, the Supreme Court ruled that the right accrued to every individual or family, by virtue of being a citizen of Kenya. It was an entitlement guaranteed by the Constitution under the Bill of rights. As per Article 21 of the Constitution of Kenya 2010, being a socio-economic right, the right to housing could only be realised progressively. The expression "progressive realisation" was well defined in the Matter of the Principle of Gender Representation in the National Assembly and Senate; (supra). Therefore, the right to accessible and adequate housing, just like any other right under Article 43, required the State to take legislative, policy and other measures towards its achievement. Furthermore, Article 20(5) clearly empowers a Court or tribunal, presiding over a dispute, in which the Petitioners are claiming that the State has either neglected, or failed in its responsibility to effectuate a socio-economic right, to demand evidence that would exonerate the latter from liability.

The right to housing over public land crystallised by virtue of a long period of occupation by people who had established homes and raised families on the land. This right derived from the principle of equitable access to land under Article 60 (1) (a) of the Constitution of Kenya 2010. The Court noted that the State had cited policy and legislative formulation and lack of adequate resources as the reasons hindering the realisation of Article 43 rights. The Court noted that in the case above, although the Petitioners were faced with an eviction on grounds of public interest, they could petition to the Court for protection. The protection would not be in the form of preventing the eviction, since it was in public interest but in the form of orders aimed at protecting the right to housing including compensation, issuance of an adequate eviction notice and the observance of humane conditions during eviction (UN Guidelines), the provision of alternative land for settlement, among others as per Article 23(3) of the Constitution.

Significance of the case

The Court's recognition of the right to housing and access to proper sanitation facilities underscores the interconnection between housing, sanitation, and public health. Ensuring access to hygienic sanitary facilities and adequate housing is essential for preventing the spread of diseases and maintaining the physical and mental well-being of citizens. This case emphasizes the government's obligations to safeguard the right to health by providing essential amenities and addressing environmental factors that impact public health.

Republic v Cabinet Secretary Ministry of Transport and Infrastructure & 3 others ex parte Francis N. Kiboro & 198 Others Misc. App. 130 of 2014 [2015] eKLR

In the High Court at Nairobi

G.V Odunga

30 July 2015

Forced evictions - Right to adequate housing

Summary of the facts

The Applicants stated that they are engaged in various businesses and some of them are residents on the parcel of land in question having been residents for over 30 years. That on 26 February 2014, they received notices of intended eviction from their premises allegedly due to the intended construction of Accra Road Extension (Ngara market–Kirinyaga Road) to which notice was attached a map indicating that all the applicants would be evicted from their premises without any proper discussions on the best way forward. They averred that they would suffer displacement and stood to lose their rights to own, use or otherwise benefit from their premises permanently thus rendering them destitute. Further, although the Respondents had set out the legal requirements necessary before implementation of the project in their resettlement action plan, none of them had been undertaken.

The Respondent argued that the persons affected by the project (PAPs) on the Ngara Market Section of the proposed project were on the road corridor; and what was being worked out was the manner and or mode of relocation and or resettlement. That various options including relocation to available spaces within the city county markets or in lieu thereof ex-gratia payment or disturbance allowances were under consideration by the resettlement committee.

Determination

The Court opined that the State had a duty to bridge the gap between those who have and those who did not in the society to avoid situations where people who lived in intolerable conditions were tempted to invade the lands of others so as to enable them eke a living. The government's

duty is not only to protect property but also to take proactive measures to ensure that social and economic rights of the people are given meaning and not to merely adopt a position of non-interference.

On the right to adequate housing, the Court opined that when the State permitted individuals to seize land, whether it be government-owned or privately-owned, for an extended period of time, to the point where said individuals considered the land to be their abode, it would be cruel and inhumane for the State to expel them without warning and without giving them an opportunity to seek alternative lodging. It was imperative to remember that under Article 21, it is a fundamental obligation of the State and each State organ to take note of, show respect for, and protect, advance, and fulfil the rights and basic freedoms set out in the Bill of Rights. The State was therefore required to take legal, policy, and other steps, including the establishment of norms, to achieve the gradual realisation of the rights ensured under Article 21(2) of the Constitution.

However, those who were truly landless had the right and could legitimately expect that the State would provide them with sufficient housing and shelter. Further, those who were undertaking the evictions in question had to take into consideration the following factors:

(i) at the time of eviction, impartial onlookers should be allowed entry to the properties in question to ensure that they are compliant with international human rights principles;
(ii) there must be a mandatory presence of governmental officials and security personnel;
(iii) the dignity, life, and security of the evictees must be respected;
(iv) evictions must not take place at night, during inclement weather, during celebrations or holidays, before an election, during or just before school exams, and preferably at the conclusion of the school term or during school holidays;
(v) nobody should be subjected to indiscriminate attacks.

Significance of the case

The Court's ruling is significant for the right to health as it underscores the interconnectedness between the right to adequate housing and public health. The Court recognizes the government's duty not only to protect property but also to ensure that individuals are not left destitute and exposed to intolerable conditions during forced evictions. The ruling emphasizes the need for the State to take proactive measures to protect and advance the social and economic rights of its citizens, which includes providing adequate housing and shelter. Additionally, the Court outlines essential safeguards to be followed during evictions to protect the dignity, life, and security of evictees, which are vital for safeguarding their right to health.

Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others Petition 65 of 2010 [2013] KEHC 6003 (KLR) (Constitutional and Human Rights) (30 August 2013) (Judgment)

In the High Court at Nairobi

Isaac Lenaola, Mumbi Ngugi

30 August 2013

Adequate housing - Right to water and sanitation

Summary of the facts

The Petitioner averred that they were lawfully occupiers of the suit land as tenants and not squatters, and that she had lived in Block C2 door 11 for 50 years. She stated that on 12 July 2010 a 15-year-old child informed her that he found 8 bulldozers which belonged to Kenya Railways Corporation (KRC) with lights on focused on the estate at Block 8 A which had around 20 houses. She inquired and was told that the drivers of the said bulldozers had been sent by KRC and the 2nd Respondent. Further, the Petitioner argued that before the purported evictions, they were not given any reason as to why they were being evicted and were not served with the notices personally as the notices of eviction had been pinned on trees all over the estate. She averred that the evictions would leave them homeless and that since the fence of the estate had been removed, they have been exposed to insecurities as hawkers had invaded the estate. Moreover, she sought orders that the Respondent connect water and restore sanitation and the fence and that in case any evictions had to be undertaken, the tenants be involved in all discussion towards that end, and the residents of the estate be given the first option to purchase the suit premises in case they were to be sold to other parties.

The 1st Respondent averred that it was the registered proprietor of the suit premises and that the it has never entered any formal tenancy agreement with any of the tenants occupying the Muthurwa Estate houses. Further, it had applied to the City Council of Nairobi for change of user of the suit premises to enhance their market value as to offer the suit property for sale in order to raise money to pay its pensioners. Further, it was contended that the 1st Respondent had issued reasonable notices to its tenants to vacate the suit premises as required by the law and that no forced evictions ever took place on the suit property as alleged.

Issues for determination

1. Whether the 1st Respondent owed the Petitioners any guarantee of fundamental human rights and freedoms.
2. Whether the Petitioners' constitutional rights and freedoms had been violated.

Determination

The Court observed that the right to adequate housing was simply not a right to four walls and a roof but has other elements that included:

(a) Legal security of tenure. Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;

(b) Availability of services, materials, facilities and infrastructure. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) Affordability. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where, natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials;

(d) Habitability. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other

threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the Health Principles of Housing prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates;5 Geneva, World Health Organization, 1990.

(e) *Accessibility. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;*

(f) *Location. Adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;*

(g) *Cultural adequacy. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate, are also ensured.*

Eventually, the Court held that it was important to protect the Petitioners' right to adequate housing due to their long history on the suit premises, and due to their attachment. It mattered not whether those homes were informal settlements, dilapidated houses or shanties; they had to be protected.

Significance of the case

The Court recognized that adequate housing extends beyond four walls and a roof; it includes access to services, sanitation, and protection from environmental threats to health. The ruling emphasizes the importance of safeguarding the right to adequate housing for individuals, particularly those in informal settlements, as a means to protect their overall health and well-being. It reinforces the interconnection between housing and health, highlighting the need for governments to ensure that housing conditions are habitable, safe, and free from environmental health hazards, regardless of the type of housing or settlement.

Gidion Mbuvi Kioko v Attorney General & another Petition No. 223 of 2011 [2017] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Muriithi, Mwita, JJ

6 February 2017

Slum settlements - Right to clean environment and health - Right to housing - Relocations

Summary of the facts

There was a fire at Sinai settlement in which some people and their livestock were burnt to ashes, while others occasioned serious injuries. Some of the injured persons were hospitalised for a long time and required constructive surgery and post injury care and treatment with varying natures of extent. The Sinai settlements was located on an area reserved for power, pipeline and railway wayleaves. The fire was caused by burning fuel in storm drainage channels in wayleave reserved for the Kenya Pipeline Company Limited. The firefighting and rescue operations were hampered by the lack of adequate road access to the settlement since the Respondents had not provided roads, water and other social services at the settlement. Since March 2000, the 1st Respondent, Kenya Pipeline had sought to remove illegal squatters from its wayleave in Mukuru and surrounding slums.

Issues for determination

1. Whether the rights and fundamental freedoms of the Petitioner's then constituents had been threatened, infringed or violated as alleged in the Further Amended Petition; and
2. Whether the Petitioner was entitled to the reliefs sought in the Further Amended Petition for alleged breach of the said rights and fundamental freedoms.

Determination

The Court observed that since there was no positive evidence as to the cause of the fire that caused the destruction and injuries, the claim for violation of rights could not be established. Further, that one could not have a right to live on an area reserved for wayleaves for the various services such as power, railway and pipeline. The right to freedom of residence must relate to occupation of lands lawfully acquired by a person and there could not be lawful occupation on private property owned by another person or unplanned or un-alienated government or public property. Moreover, the Court held that there was no breach of Article 56 of the Constitution since people residing in slum settlements were not marginalised communities or groups. Most importantly, the Court held that the Respondent, while taking steps to remove the persons living in the various slums ought to provide them services necessary for the enjoyment of the rights to health, clean environment, dignity, and sanitation, and other rights under Article 43 of the Constitution. Further, while the Respondents were engaged in upgrading the slums and prevention programme for various slum settlements in the city and elsewhere in the country, which could include relocation, they had to take measures to ensure that the residents of such slums enjoyed their rights to clean environment, health and housing in order to live with dignity.

Significance of the case

The case underscores the significance of the right to health within the context of slum settlements and relocations. The Court recognized that while addressing the issue of informal settlements and relocations, it is essential to ensure that the affected residents have access to the necessary services for the enjoyment of their rights to health, a clean environment, and housing. This ruling emphasizes the interconnectedness of health, housing, and the living environment. It highlights the obligation of authorities to protect the health and dignity of individuals during relocations and urban development programs, ensuring that their rights to health and a clean environment are respected and upheld throughout the process.

Sexual Violence and Health

Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission(Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae) Petition No. 122 of 2013 [2020] eKLR

High Court of Kenya at Nairobi, Constitutional and Human Rights Division

Korir, J

10 December 2020

Sexual violence – Rape - Forced circumcision - State actors - non-State actors - Rights and freedoms

Summary of the facts

The period between December 2007 and March 2008, several women, men and children were targeted for attack and were subjected to forms of Sexual and Gender Based Violence (SGBV) including rape, gang rape, sodomy, defilement, forced pregnancy, forced circumcision and mutilation or forced amputation of their penises. The Claimant petitioned against the Respondents for failing to anticipate and prepare adequate and lawful policing responses to the anticipated civil unrest that contributed to the SGBV, and failing to provide effective remedies to the victims of SGBV which violated the fundamental rights of the 5th to 12th Petitioners and other victims.

Specifically, the Petitioners claimed that the staff and or employees of the 5th and 6th Respondents failed to provide emergency medical services, particularly where the perpetrators were public officials such as police officers, to the victims of the SGBV, thereby imperilling their lives and health and violating their fundamental rights.

Issues for determination

1. Whether the Petitioners have locus standi
2. Whether the petition is res judicata
3. Whether the 5th to 12th Petitioners` rights were violated, threatened, infringed upon or denied by virtue of the SGBV committed against them and the State`s failure
4. Whether the Petitioners are entitled to the reliefs sought.

Determination

The Court noted that the State had an obligation to prevent violations by State actors and non-State actors; the State had to protect citizens from threats to their rights. Moreover, it found that rape and forced circumcision were forms of torture. Thus, the State could not escape liability for the violation of the 5th, 6th and 9th Petitioner`s rights to life, protection from torture, inhuman and degrading treatment and the right to security of the person which was violated when they were raped by GSU officers.

On the issue of violence and whether it could have been anticipated and remedied thereafter, the Court found that the State had taken into account any intelligence that it may have received on impending violence and put in place police officers to maintain peace. The Court further opined that there was no possibility of the magnitude of the 2007-2008 post-election violence being foreseen or avoided, and that it was not possible to have a police officer protect every citizen of Kenya from harm, particularly due to the low ratio of police officers to the population of the country.

Significance of the case

The ruling highlights the responsibility of the State to protect the health and well-being of its citizens, especially during periods of civil unrest and violence. The Court's recognition that sexual and gender-based violence, including rape and forced circumcision, amount to forms of torture and that the State cannot escape liability for such violations, highlights the importance of ensuring the health and safety of individuals even in conflict situations. This case reinforces the principle that governments have an obligation to anticipate and respond to threats to their citizens' rights to health, security, and protection from torture, irrespective of whether the harm is caused by State actors or non-state actors.

MENTAL HEALTH

Mental health is a significant part of the overall realisation of the right to health in Kenya and globally. The Special Rapporteur on the right to the highest attainable standard of health acknowledges that everyone requires an environment that supports their mental health and wellbeing. There can be no health without mental health. [131]

Figure 8 below highlights the mental health context in Kenya.

Figure 8: Mental Health Context in Kenya

Highlights on Mental Health in Kenya

At least 25% of outpatients and 40% of inpatients in different health facilities suffer a mental illness.

Approximately 1% of the general population in Kenya suffer from Psychosis.

The common mental illnesses in Kenya are depression and suicide, substance use disorder, bipolar disorder, schizophrenia, and other psychoses.

The national crude suicide mortality rate is estimated at 3.2 per 100,000 of a population.

Currently, 75% of Kenyans are NOT able to access mental health care despite the heavy burden of mental ill health in the country.

The government expenditure on mental health is estimated at 0.01% of the total expenditure.

There is only one National Referral Mental Hospital in the country, Mathari Hospital.

The Constitution of Kenya, 2010, Kenya Mental Health Act 1989, Counsellors and Psychologists Act 2014, The Health Act 2017 (Section 73) and the Kenya Mental Health Policy 2015-2030 provide a framework for strengthening Mental Health Services in Kenya.

Source: MOH [132]

[131] Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/35/21, Thirty – fifth session, 6-23 June 2017).

[132] Republic of Kenya. Mental Health and Wellbeing Towards Happiness & National Prosperity: A Report by the Taskforce on Mental Health in Kenya.; 2020. http://www.health.go.ke

Mental health is not merely the absence of a mental disorder, but it is the facilitation of the conditions that enable one to have a psychosocially fulfilled life.

In the Kenyan context, where mental health is not well prioritised, and the burden of mental illnesses is on the rise, the Judiciary has a crucial role in improving mental health outcomes.

The Judiciary can advocate for the rights of individuals with mental illnesses, ensuring that their access to mental health services and treatments is protected and upheld in accordance with the Constitution and relevant laws. Court decisions can reinforce the importance of de-stigmatizing mental health conditions and promoting mental health as a fundamental aspect of overall well-being in the country. By preventing the various violations of the human rights of persons with mental health issues, the Courts enhance the realisation of the right to mental health. Moreover, the Judiciary can also play a role in addressing the social determinants of mental health in the Kenyan context such as housing, employment, and education that can influence mental well-being.

The case law in this section highlights how the Judiciary in Kenya, through advocacy for mental health rights, non-discrimination, and equitable access to mental health care, can contribute to destigmatizing mental health conditions and promoting a more inclusive and supportive mental health care system that caters to the specific needs of the Kenyan population.

Kenya Society for the Mentally Handicapped v Attorney General & 5 others Petition 155A of 2011 [2011] eKLR

The High Court of Kenya

Majanja J

18 December 2012

Mental and intellectual disabilities

Summary of facts

The Kenya Society for the Mentally Handicapped filed a petition alleging that the government of Kenya violated the rights of persons with mental and intellectual disabilities by discriminating against them in the provision of support and services. They accused the government of failing to formulate policies to protect people with mental and intellectual disabilities from discrimination, neglecting to establish sound legal policy frameworks governing education for mentally and

intellectually disabled children and failing to establish sufficient structures to promote adequate provision of mental health care in public health institutions. The state of persons with mental health disabilities in Kenya was not in dispute, and the study conducted by the Kenya National Human Rights and Equality Commission documented the entrenched stigma and discrimination against mental illness and persons with mental disorders.

Issues for determination

Whether the State violated the rights of persons with mental and intellectual disability by discriminating against them in the provision of support and services.

Determination:

This case highlighted the insufficiency of Kenya's policy framework concerning individuals living with mental disabilities and their ability to exercise their fundamental rights. The Petitioner sought a declaration that the rights of persons with mental disabilities had been violated due to unequal treatment, emphasising the need for a robust legal framework addressing their specific needs, including their health. However, the Court, while acknowledging the challenges faced by persons with mental disabilities, deemed the petition inadequate to conduct a comprehensive inquiry based on the available facts and evidence.

Significance of the case

The case underscores the challenges faced by individuals with mental and intellectual disabilities in accessing adequate healthcare services and protection from discrimination. While the Court did not provide a comprehensive resolution, the case drew attention to the need for a stronger legal and policy framework to safeguard the health and rights of this vulnerable population. It highlighted the importance of addressing mental health as an integral part of the right to health and the broader efforts to combat discrimination and stigma associated with mental disabilities.

HWK v Rachel N. Kang'ethe and Karen Hospital [2019] eKLR [133]

High Court at Nairobi

Civil Case 337 of 2014

L Njuguna J

28 November 2019

Illegal detention-confinement-Mental Health Act-Admission-Treatment- Professional medical practice

Summary of the facts

The Plaintiff filed a lawsuit against Dr. Rachel N. Kang'ethe and Karen Hospital Nairobi seeking special damages and general damages for trespass by intrusion into her body and privacy, assault for illegal injection and oral drugs, illegal detention and/or confinement costs and interest against the defendants. The Plaintiff claimed that she was abducted by a group of more than five men and women who claimed to be acting under the instructions of the 1st defendant who forcefully injected her with unknown drugs. The 1st defendant denied the allegations and stated that the Plaintiff was admitted to the hospital as an involuntary patient upon application by her adult son. The 2nd defendant also denied the allegations and stated that the Plaintiff was taken to its hospital on the 12 October 2011 accompanied by her relatives and a police officer for medical attention and was referred to 1st defendant's hospital for medical attention.

Issues for determination

1. Whether the Plaintiff's rights were violated by the defendants.
2. Whether the Plaintiff was forcefully injected with unknown drugs by the first defendant.
3. Whether the Defendants exercised proper care and skill in administering treatment to the Plaintiff.

Determination

The Court was satisfied that the defendants had acted in good faith and with reasonable care. They had disclosed to the Court the drugs that were prescribed to the Plaintiff, the treatment that she had been given, and that it had been in her interest to receive treatment. No bad faith or ill motives had been attributed to the defendants in their treatment of the Plaintiff. None of the drugs prescribed by the defendants had been proven to be harmful to the Plaintiff's health, as she had alleged. Despite her insistence on being mentally sound, she had not produced any evidence before the Court to support that contention. On the contrary, there had been ample evidence to prove that she had been suffering from a severe psychiatric condition for which she had needed treatment.

Significance of the case

The case underscores the balance between an individual's right to refuse medical treatment and the duty of healthcare professionals to provide necessary care in cases of mental health issues. It highlights the importance of ensuring that mental health patients receive proper and ethical treatment and care, even if it involves involuntary admission. The case emphasizes that

healthcare providers should act in good faith, exercising reasonable care in their treatment, and respecting the rights and well-being of patients, especially in the context of mental health, ultimately contributing to the protection of the right to health.

Centre for Health, Human Rights and Development and Iga Daniel v. Attorney General (2015), Constitutional Petition No. 64 of 2011 Uganda, Constitutional Court

The Constitutional Court of Uganda

Remmy Kasule JCC, Eldad Mwangusya JCC, Faith Mvvondha JCC , Richard Buteera JCC, Solomy Balungi Bossa JCC

Mental health - Sexual offences

Summary of the facts

CEHURD, the applicant in this case, filed a petition seeking to challenge the constitutionality of Sections 45(5) and 82(6) of the Trial on Indictments Act, as well as Section 130 of the Penal Code Act. The main argument put forth by CEHURD was that these provisions contained language that was derogatory and prejudicial towards individuals with mental disabilities, thereby violating several constitutionally guaranteed rights, including the right to dignity, non-discrimination, liberty, and presumption of innocence.

Issues for determination

1. Whether Sections 45(5) and 82(6) of the Trial on Indictments Act contravened the right to liberty and freedom from discrimination of the persons with mental disabilities guaranteed under Articles 23 and 21 of the Constitution.
2. Whether Section 130 of the Penal Code Act contravened the right to dignity of persons with mental disabilities guaranteed under Article 24 of the Constitution.
3. Whether Section 130 of the Penal Code Act contravened the right to freedom from discrimination guaranteed under Article 21 of the Constitution.

Determination

The language used in Section 45(5) of the Trial on Indictments Act, which labels defendants with mental disabilities as “criminal lunatics,” is deemed unconstitutional as it undermines their dignity. Furthermore, this labelling created differential treatment, which went against the principle of presumption of innocence and infringes upon their right to liberty. Section 82(6) of the Trial on Indictments Act needed to be modified to ensure compliance with the Constitution, particularly to prevent indefinite detention of individuals based on reasons of

insanity. Additionally, the usage of the terms “idiot” and “imbecile” in Section 130 of the Penal Code Act, which criminalized attempts at sexual relations with mentally disabled females, was considered derogatory, dehumanizing, and degrading. Consequently, it was deemed unconstitutional.

Significance of the case

The Court’s determination underscores the importance of upholding the dignity, non-discrimination, and liberty of persons with mental disabilities in legal provisions. By declaring some sections unconstitutional due to derogatory language and discriminatory practices, the Court acknowledges the need for a rights-based approach in mental health legislation. This decision sets a precedent for respecting and protecting the human rights of individuals with mental disabilities, promoting their well-being and ensuring that legal frameworks align with constitutional principles.

LEADERSHIP AND GOVERNANCE IN HEALTH

In the context of a developing economy with devolved governance, the Judiciary's role in anchoring best practices in leadership and governance is crucial for achieving Universal Health Coverage (UHC).

The significance of the Judiciary's involvement in the health system lies in its ability to address cases related to mismanagement or corruption within the healthcare sector. By adjudicating such cases, the Judiciary emphasises the need for effective and transparent governance, ensuring that healthcare resources are utilised efficiently and in the best interest of the population.

Effective leadership and governance are vital for the successful implementation of UHC and the delivery of quality healthcare services. Legal decisions can act as a deterrent against malfeasance and unethical practices, encouraging responsible leadership that supports evidence-based policies and decisions in healthcare. By upholding principles of accountability and integrity, the Judiciary contributes to the establishment of sound governance mechanisms that prioritise the health and well-being of the population.

Devolved governance presents unique challenges and opportunities in healthcare management. In a decentralised system, the Judiciary plays a critical role in resolving disputes and conflicts that may arise between different levels of government and stakeholders involved in healthcare provision. Legal decisions can help clarify roles and responsibilities, ensuring that all actors work in harmony towards the common goal of achieving UHC.[133]

Moreover, the Judiciary's involvement in addressing cases related to governance issues can foster public trust and confidence in the healthcare system. Transparency and accountability in decision-making processes are essential for garnering support from the public and maintaining credibility in the health sector. [134]

By anchoring best practices in leadership and governance, the Judiciary helps create an environment where effective policies are enacted, resources are optimally utilised, and healthcare services are equitable and accessible to all. In the context of a devolved governance system, the Judiciary's role in upholding principles of accountability and transparency is essential for achieving UHC and building a resilient and responsive healthcare system.

[133] Lucy Gilson, Irene Akua Agyepong, Strengthening health system leadership for better governance: what does it take?, Health Policy and Planning, Volume 33, Issue suppl_2, July 2018, Pages ii1–ii4, https://doi.org/10.1093/heapol/czy052

[134] https://healthworks.ti-health.org/research/transparency-and-accountability-in-kenyas-health-financing-models/

Republic v The Transition Authority & Another ex parte Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU) & 2 others High Court of Kenya at Nairobi [2013]eKLR

The High Court of Kenya at Nairobi
Coram: W Korir, M Ngugi, G V Odunga JJJ
Devolution - County Governments

Summary of facts

The applicants raised objections to the transfer of health services to County Governments. They argued that the Respondent, the Transition Authority, failed to involve the members of the applicants, particularly medical practitioners and other key stakeholders, in the transition process and policy-making. They also claimed that the Authority disregarded the need for a legislative framework to support the transfer of the health component, which violated Sections 7 and 24 of the Transition to Devolved Governments Act 2012. Additionally, they argued that the Authority did not assess the readiness of counties to assume devolved functions, specifically regarding the devolution of Health Services as outlined in Sections 24 (d), (f), and (g) of the Transition to Devolved Governments Act.

The applicants further contended that the Authority acted in contradiction to the County Governments Act of 2012 and failed to consider the provisions of Section 106 of the Act. They questioned whether their members, many of whom were employed by the Public Service Commission, were being laid off for rehiring by the counties and whether they would receive any terminal benefits.

The applicants also highlighted the lack of standardisation in personal emoluments and promotions, as well as concerns regarding the handling of pensions in the absence of the Public Service Superannuation Service Scheme Act. Lastly, they pointed out the absence of a clear plan for inter-county transfers.

Issues for determination

Whether the Transfer of Health Services to County Governments was lawful

Determination

The Court recognized that Section 30(1) of the Intergovernmental Relations Act, 2012 specifically applied to disputes between the national government and a County Government, or among County Governments. It did not explicitly cover disputes brought by ordinary citizens

arising from the actions or omissions of the Authority. Interpreting the provision to include disputes from individuals aggrieved by the Authority would be stretching it too far. Therefore, the ex parte applicants did not have a viable remedy under the Intergovernmental Relations Act, 2012 since they did not fall under the category of the National Government or the County Government.

The Court clarified that the fact that the Respondent, the Transition Authority, was alleged to have completed its duties did not prevent the Court from reviewing its decision. If the decision made by the Authority was still enforceable, it could be challenged through orders of certiorari to annul or invalidate the decision if it was flawed. As long as judicial review orders remained the only practical legal remedies for controlling administrative decisions, and considering the evolving principles of good governance that demanded transparency and the obligation of decision-making bodies to act judicially, the scope of judicial review orders would continue to expand to meet changing conditions and demands.

The Court noted that once public participation was achieved and the decision-making authority, after considering the expressed views, made a decision, the question of whether or not the decision should have been made could no longer be subject to judicial review. The decision could only be challenged on its merits, which fell outside the realm of judicial review. While the adequacy and extent of public participation could be challenged, the applicants failed to demonstrate that the consultative process was insufficient.

The Court concluded that according to Part 1 No. 28 of the Fourth Schedule to the Constitution of Kenya, 2010, health policy remained the responsibility of the national government. The shortcomings in the provision of health services were a matter of national concern, and it was the duty of the national government to ensure that every person's right to the highest attainable standard of health, as stated in Article 43 of the Constitution, was realised. Therefore, the delay in devolving health services would not change the situation regarding poor health services in the short term since the issues of personnel shortage and inadequate infrastructure existed regardless of whether the health services were devolved or not. As a result, the Court dismissed the application.

Significance of the case

The ruling in this case is significant for the right to health as it addresses the challenges associated with the transfer of health services to County Governments in Kenya. The Court's determination highlights the complexities of devolving health services and underscores the importance of ensuring public participation and proper decision-making in the process. It also

emphasizes that the right to health remains a national concern and that the national government has a duty to ensure the realization of this fundamental right, particularly in addressing issues such as personnel shortages and inadequate infrastructure. This case serves as a reference point for the governance of health services in the context of devolution and underscores the need for careful planning and coordination to protect and promote the right to health.

Okiya Omtatah Okoiti & another v Attorney General & 6 others Petition 593 of 2013 [2014]eKLR

The High Court of Kenya at Nairobi

Coram: Lenaola J

6 August 2014

Devolution - County Governments - National Government

Summary of facts

The Petitioners brought forth a request for clarification regarding the definitions of "national referral health facilities" and "county health facilities." They argued that the Respondents had misinterpreted these terms and proposed a different interpretation. According to the Petitioners, national health referral facilities should not only include Kenyatta National Hospital and Moi Teaching and Referral Hospital but also encompass all public hospitals from Level 2 to Level 6 as designated by the Ministry of Health. They further explained that county health facilities and pharmacies should refer to health facilities previously managed by local authorities or those that counties would reasonably be expected to establish.

In response to the petition, concerns were raised regarding the Court's jurisdiction to hear the case and its capacity to adjudicate on the complex matter of healthcare provision. Regarding jurisdiction, it was argued that the issue had already been decided in a previously concluded lawsuit (JR No 317 of 2013) and that it also involved an intergovernmental dispute, which should be resolved through the dispute resolution mechanisms outlined in the Intergovernmental Relations Act, No 2 of 2012.

Issues for determination

The distribution of Functions in the Provision of Healthcare Services by the National and County Governments

Determination

The Court determined that the plea of res judicata (previously decided matter) was not applicable in this case because the concluded suit, JR No 317 of 2013, focused on different issues such

as violations of specific laws, failure to adhere to constitutional requirements, irrationality, and abuse of statutory powers. In contrast, the current petition dealt with the proper interpretation of the terms "national referral health facilities" and "county health facilities." Although both cases concerned healthcare provision, they addressed distinct matters.

The Court emphasised that the distribution of functions between the national government and County Government under the Constitution of Kenya, 2010 was different from the allocation of functions to local authorities under the repealed Local Government Act. The Constitution did not provide explicit definitions or categorizations for "national referral health facilities" or "county health facilities," nor did it classify hospitals into different levels. Determining the classification of hospitals and the categorization of health facilities fell within the realm of policy-making, which was the responsibility of the Executive and Parliament, as outlined in Section 15 of the Sixth Schedule to the Constitution of Kenya, 2010.

Ultimately, the Court clarified that its jurisdiction was limited to interpreting the law and that it could not engage in policy-making or enact legislation. The Court lacked the ability and mechanism to establish criteria for hospital categorization or evaluate equipment, facilities, and manpower for such categorization purposes. As a result, the Court dismissed the petition.

Significance

The Court's determination emphasizes the separation of powers and limitations on the Judiciary's role in interpreting and implementing healthcare policies. It highlights that the categorization and classification of health facilities are primarily matters of policy-making and legislative action, falling within the domain of the Executive and Parliament. This case reaffirms the importance of clear policy development and intergovernmental cooperation in ensuring the effective provision of healthcare services while respecting the constitutional framework of devolution in Kenya.

PUBLIC PARTICIPATION

In a developing economy advancing towards Universal Health Coverage (UHC), public participation is essential for shaping health policies that respond to the population's needs. The Judiciary plays a key role in anchoring best practices by ensuring that citizens' right to participate in healthcare decision-making is upheld. Legal decisions can enforce the establishment of mechanisms for public engagement, leading to more inclusive and responsive health policies.

Public participation fosters a sense of ownership and empowerment among citizens, making them active stakeholders in the healthcare system. By upholding the principles of democracy and inclusivity, the Judiciary strengthens public trust in the healthcare system and supports the implementation of policies that cater to the diverse healthcare needs of the population.

Furthermore, public participation promotes transparency in healthcare decision-making, ensuring that policy choices are guided by the collective interests and priorities of the people. Legal rulings that advocate for public input and consultation can lead to the incorporation of community perspectives in health planning, resource allocation, and service delivery, thus enhancing the relevance and effectiveness of healthcare policies. [134]

By anchoring best practices in public participation, the Judiciary reinforces the principle that healthcare is a collective responsibility, involving active engagement and input from the public.[135] In a developing economy, where healthcare resources may be limited, public participation becomes even more critical in prioritising health needs and ensuring equitable access to essential services.

The case law in this section demonstrates that public participation is vital for achieving UHC in a developing economy, and the Judiciary's role in anchoring best practices in this regard is instrumental. By upholding citizens' right to participate in healthcare decision-making, the Judiciary contributes to the creation of a more inclusive, responsive, and accountable healthcare system that places the well-being of the population at the forefront.

[134] McCoy DC, Hall JA, Ridge M. A systematic review of the literature for evidence on health facility committees in low- and middle-income countries. Health Policy Plan. 2012;27(6):449-466. doi:10.1093/heapol/czr077

[135] Haldane, Victoria & Chuah, Fiona & Srivastava, Aastha & Singh, Shweta & Koh, Gerald & Seng, Chia & Legido-Quigley, Helena. (2019). Community participation in health services development, implementation, and evaluation: A systematic review of empowerment, health, community, and process outcomes. PLOS ONE. 14. e0216112. 10.1371/journal.pone.0216112.

Pharmaceutical Society of Kenya & another v Attorney General & 3 others (Petition 85 of 2018) [2021] KEHC 85 (KLR) (Constitutional and Human Rights) (22 September 2021) (Judgement) Petition 85 of 2018

In the High Court at Nairobi

Coram: WK Korir, J

Public Participation

Brief Facts

The Petitioners contended the constitutionality of Sections 16, 19, 33, 45, and the First Schedule of the Health Act, 2017 which they argued to have essentially placed health professionals with equal competence on unequal platforms. They argued that these provisions bar pharmacists and nurses from holding certain administrative posts which they had previously been able to hold. Moreover, that the requirements that holders of such positions should be registered under the Kenya Medical and Dentists Board meant that professionals that were regulated under the Pharmacy and Poisons Board and the Nurses Council were not eligible for such posts.

The Petitioners argued that there was no public participation before the Health Act, 2017 was passed as the time within which the Bill was passed was not sufficient to enable Kenyans express their views on the extensive and complex legislation. Moreover, that the views on these impugned provisions were not considered by the Legislature thus did not meet the procedural and substantive constitutional requirements for the enactment of legislation.

Issues for determination

- Whether the High Court had jurisdiction in relation to a claim where it was alleged that certain professionals in the healthcare system, including nurses and pharmacists, had been discriminated against by being barred from holding certain administrative posts.
- Whether the provisions of Article 119 of the Constitution, which allowed any person to petition Parliament for any matter concerning an enactment, ousted the High Court's jurisdiction to entertain a matter about the alleged unconstitutionality of a statute, in the first instance.
- Whether there was adequate public participation in the enactment of the Health Act, 2017.
- Whether an issue that was not pleaded could be introduced for the Court's consideration through submissions.
- Whether the provisions of Sections 16, 19 and 33 of the Health Act, 2017 and the first schedule to the Health Act, 2017, which limited the holding of certain administrative posts to members of the Medical Practitioners and Dentists Board, discriminated against other health care professionals, including nurses and pharmacists.

Determination

The Court first observed that the Petitioners did not specifically demonstrate the lack of public participation in the enactment of the Health Act, 2017 as they casually stated the same in their pleadings. The Court held that although the Parliament is required to consider the views of the public, such views are not binding to it. The Court further stated that being involved does not mean that one`s views must necessarily prevail, and that there is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of the Government.

Significance of the case

This case is significant to the right to health as it elevates the importance of public participation in the legislative process to ensure that healthcare laws and policies are comprehensive and reflective of the diverse needs of healthcare professionals and the public. The judgment reaffirms that while public views should be considered, they are not binding on the legislature if they conflict with government policies. This case highlights the need for a balance between professional interests and government regulations in the healthcare sector, emphasizing the importance of constitutional principles in shaping health policies that affect various healthcare professionals, ultimately impacting the right to health.

Association of Kenya Medical Laboratory Scientific Officers v Ministry of Health & Another [2019] eKLR

In the High Court at Nairobi

Coram: J.A. Makau

Public participation-elaborative consultations

Summary of the facts

The Petitioner claimed that the 1st Respondent spearheaded the development of the Task Sharing Policy Guidelines 2017-2030, without the involvement of the Petitioner. This violated the principle of public participation and further allowed non – laboratory staff to conduct tests that are meant to be conducted by skilled laboratory staff. The Petitioner argued that this violated the right to the highest attainable standard of health.

Moreover, the Petitioner contended that there were already cases of misdiagnosis of patients since the policy guidelines were in the process of implementation. That the guidelines jeopardised the right of Kenyans to access the highest attainable standards of health care and demoralised trained medical laboratory professionals who felt discriminated against.

The Respondent contended that the Government of Kenya has the constitutional duty to provide an enabling environment for the realisation of the rights to health under Article 43, that the number of health practitioners did not commensurate the Kenyan population thus the need to address the acute shortage. It further argued that the policy guidelines were developed through a wider consultation and collaborative process involving a broad number of institutions in various sectors in Kenya and abroad.

Issues for determination

1. Whether the Task Sharing Policy Guidelines (2017-2030) met the constitutional parameters of public participation under Article 10 of the Constitution of Kenya
2. Whether the said guidelines subjected the Petitioner to unfair labour practices under Article 41 of the Constitution of Kenya 2010 and whether the Task Sharing Policy Guidelines (2017-2030) is inconsistent with Section 19(1) of the Medical Laboratory Technician and Technologist Act
3. Whether the provisions of Article 43(1) (A) and 46 of the Constitution have been violated
4. Whether the Task Sharing Policy Guidelines (2017-2030) met the constitutional parameters of public participation under Article 10 of the Constitution of Kenya

Determination

The Court began by emphasising that public participation is not mere consultation or public relation exercise without meaningful purpose. The Court went ahead to observe that the Respondent did not demonstrate that it complied with Section 5(3)(a) of the Statutory Instrument Act that requires regulation-making authority to make appropriate consultations with persons who are likely to be affected by proposed instrument or that it issued notifications, nor did they demonstrate that they discharged their duties to consult.

The Court stated that it was not enough for the Respondent to aver that the Task Sharing guidelines were developed through wider consultation and collaborative process and fail to show indeed that there was notification either directly or by advertisement to the bodies who are likely to be affected by the same. Further, that any public participation should meet the test of meaningful and qualitative public participation and not just mere cosmetic one. Consultation should also be qualitative and meaningful and not just cosmetic.

While observing that the mere fact that the Petitioner was a private and amorphous group and that its input was allegedly not sought did not per se nullify the policy guidelines, it held that the failure to conduct direct or indirect public participation by the Respondent denied the Petitioner and the general public the opportunity to participate in the deliberations conducted by the Respondent and raise their concerns on the guidelines thus violating an important constitutional step.

Significance of the case

The ruling reinforces the importance of inclusive consultations in shaping healthcare policies, ensuring that the perspectives of relevant stakeholders, such as medical professionals, are considered to safeguard the right to health. In this context, the judgment sets a precedent for promoting transparency and accountability in healthcare decision-making processes, recognizing that effective public participation contributes to the realization of the highest attainable standards of healthcare for all citizens.

British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party) [2019] eKLR

In the Supreme Court of Kenya

D.K Maraga (Chief justice), P.M Mwilu (Deputy Chief Justice), J.B Ojwang, S.C. Wanjala, Njoki Ndungu

Summary of the facts

This was an appeal against the judgement of the Court of Appeal that held that there was adequate consultation and public participation in the formulation of Tobacco Control Regulations 2014 and that except for Regulations 1, 13(b) and 45, the provisions are neither unconstitutional nor unlawful nor do they violate any right of the Appellant, the affected party or the Tobacco industry players. Further, the Appellants argued that the Regulations impose significant costs on the Tobacco industry generally and the community at large, yet there was no evidence of a Regulatory Impact Statement obtained by the Board as provided by Section 6 of the SIA.

The High Court had observed that the Tobacco Control Act has very clear objectives safeguarding individuals and the public from the dangers posed by consumption of Tobacco, which has been implicated in causing debilitation, disease, and death. That the Regulations are intended to safeguard the public, those who smoke and those who do not, and to provide certain information with regard to the contents of Tobacco products. In that vein, the Court held that there was sufficient public participation and consultation in the formulation of the Regulations and the process was therefore in accordance with constitutional requirements on public participation. The Court of Appeal upheld the decision of the High Court.

Issues for determination

- Whether the process leading to the making of the Tobacco Regulations 2014 was unconstitutional for lack of public participation.

- Whether specific provisions of the Regulations are unconstitutional for being discriminatory as against the Appellant.
- Whether specific provisions of the Regulations violate the Appellant's right to privacy and infringe on Intellectual Property rights.
- Whether the imposition of the Solatium compensation contribution amounts to unlawful taxation.
- What are appropriate reliefs.

Determination

The Court observed that, having been entrenched in the Constitution, the legislative mandate delegated to the Parliament calls upon the Parliament to facilitate public participation as the onus of ensuring public participation rests with the Parliament. The Court underscored that public participation and consultation is a living principle and goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. While considering the Court of Appeals finding that the stakeholder meetings, discussions and communications constituted public participation and consultation, the Court opined that there was nothing of constitutional interpretation and/or application thus it could not delve further into the issue.

Significance

The Court's emphasis on the constitutional principle of sovereignty of the people through public participation highlights that policies and regulations impacting public health must be developed with meaningful engagement of all stakeholders, including the general public. By upholding the sufficiency of public participation in the formulation of tobacco control regulations, the judgment affirms the government's role in safeguarding public health, especially concerning products that are linked to severe health risks, like tobacco. This decision reinforces the notion that health-related regulations should prioritize public welfare over commercial interests, setting a significant precedent for public health matters in Kenya.

TRADITIONAL, ALTERNATIVE AND COMPLEMENTARY MEDICINE

The World Health Organisation (WHO) has defined Traditional medicine as "the sum total of the knowledge, skill and practices based on the theories, beliefs and experiences indigenous to different cultures, whether explicable or not, used in the maintenance of health as well as in the prevention, diagnosis, improvement or treatment of physical and mental illness." Traditional medicine has also been termed ethno–medicine.

Complementary or Alternative Medicine has been defined as 'a broad set of health care practices that are not part of that country's own tradition or conventional medicine and are not fully integrated into the dominant health-care system. They are used interchangeably with traditional medicine in some countries.

The Health Act (Act No 21 of 2017) of Kenya, Part X provides some legislative guidance on the regulation of traditional and alternative medicine. The Act envisages a regulatory body which shall set the minimum standards of practice as well as the registration, licensing and standards compliance of practice in traditional and alternative medicine. The Act has adopted the definitions of traditional and alternative medicine that the WHO has set out.

An essential aspect of the realisation of the right to health, is access to medicines. The Judiciary can play a vital role in guiding the integration of Alternative and Traditional Medicine (ATM) into the healthcare system in Kenya. Legal decisions can address cases related to the recognition and regulation of traditional healers and their practices, ensuring that those who provide traditional healing services meet certain standards of training and competence. By enforcing regulatory frameworks for ATM practitioners, the Judiciary can help protect patients from unqualified or unethical practitioners while also allowing for the safe and controlled use of traditional healing methods.

Furthermore, legal rulings can promote the collaboration and coordination between modern healthcare providers and traditional healers. This can foster mutual understanding and respect for each other's roles in the healthcare system, ultimately leading to more comprehensive and culturally sensitive healthcare services for patients. [136]

[136] https://researchforevidence.fhi360.org/exploring-the-value-of-traditional-healers-in-modern-health-care-systems

Courts can enable the integration of non – conventional medicine into the AAAQ framework of the right to health – in order to ensure Accessibility, Availability, Acceptability and Quality. By linking the use of non – conventional medicine to other health related rights such as the right to life, the right to intellectual property, the right to work (in generating income for traditional medicine practitioners) and cultural rights, the Courts can generate a healthy conversation in integrating traditional medicine in mainstream conventional health facilities and practices.

The Courts can help prevent bio – piracy and enable sustainable practices of bio – prospecting that do not compromise the rights of communities. Bio – prospecting involves the 'exploration, extraction and screening of biological diversity and indigenous knowledge for commercial value' whereas bio – piracy 'consists of the exploration of and the use for commercial purposes of genetic and biological resources, as well as traditional knowledge, without adequately compensating local communities and States from which these resources arise.'

National Traditional Health Practitioners Associations vs Cabinet Secretary Ministry of Health & 2 others (2021) eKLR

High Court of Kenya in Nairobi (Constitutional and Human Rights Division)

Judge: J.A. Makau, J

Facts of the case:

The Petitioners in their case claimed that the third Respondent (the Pharmacy and Poisons Board) had been mapping members of the Petitioner with the intention of inspecting their premises in order to arrest and charge them. They argued that the third Respondent (the Pharmacy and Poisons Board) had violated their rights in failing to recognise, respect, and uphold the practice of traditional medicine in Kenya. They argued that the 1st and 3rd Respondents had failed to protect their intellectual property rights and had also failed to promulgate regulations under part X of the Health Act and the Protection of Traditional Knowledge and Cultural Expressions Act 2016. It was their contention that Article 43 of the Constitution had also been violated because of the Respondents failure to promote, support and protect the practice of traditional medicine as a viable alternative to conventional medicine. They challenged the constitutionality of Section 3 and 3B of the Health Laws Amendment Act and argued that they had been excluded from public participation in the enactment of the Amendment Act.

Issues for determination

- Whether the Petitioner had the legal standing to institute and prosecute the petition on its own behalf and on behalf of its members.

- Whether Sections 2, 3 and 3B of the Health Laws (Amendment) Act 2019 are inconsistent with the Constitution and discriminatory under Article 27 of the Constitution
- Whether the 3 Respondents failure to accord the Petitioners members an opportunity to be heard constituted a violation of the Petitioners rights under Article 47
- Whether the Respondents conduct constitutes a violation and contravention of the Constitution of Kenya

Determination

The Court dismissed the petition on the grounds that the Petitioner failed to prove the issues that it had pleaded.

Significance of the case

The significance of the case is that there is a demonstrable presence of traditional medicine practitioners in Kenya, and the Courts should consider the manner in which these practitioners are dealt with particularly in the duty of the State to ensure that there is regulation of health products, medicines and the regulation of standards, registration and licensing of these practitioners.

The Court's dismissal of the petition underscores the complexity of issues related to traditional medicine, including questions of legal standing, constitutional consistency, and the balance between regulation and the protection of cultural practices. This case emphasizes the importance of developing comprehensive and inclusive regulatory frameworks that recognize and safeguard the rights of traditional health practitioners, thereby contributing to a more holistic approach to healthcare in Kenya that respects diverse healing traditions.

Minister of Health and Another v Alliance of Natural Health Products (South Africa) (Case No 256/2021) [2022] Zasca 49 (11 April 2022)

Van Der Merwe, Schippers and Nicholls JJA and Tsoka And Molefe AJJA

Health - Medical Information Technology

Summary of facts

The case was brought to Court by the Alliance of Natural Health Products (South Africa) on behalf of its members, which include manufacturers and retailers of complementary medicines and health supplements. The Alliance believed that the regulatory measures implemented by the Minister of Health and the South African Health Products Regulatory Authority were invalid and adversely affected the rights of its members . The application sought to challenge the validity of these regulatory measures and establish their constitutionality.

Issues for determination

- Whether the application brought by the Alliance of Natural Health Products (South Africa) constituted an impermissible abstract challenge.
- Whether the regulations under the Medicines and Related Substances Act were ultra vires.
- Whether the regulations were substantively irrational.
- Whether there were procedural irregularities in the promulgation of the regulations.

Determination of court

The Court rejected the argument that the application brought by the Alliance of Natural Health Products (South Africa) constituted an impermissible abstract challenge. The Court found in favour of the Alliance and declared that the definition of "medicine" in Section 1 of the Medicines and Related Substances Act applies only to substances used or purporting to be suitable for use in the diagnosis, treatment, mitigation, modification, or prevention of maladies, in order to achieve a medicinal or therapeutic purpose in human beings and animals.

Significance of the case

The Court's determination that the definition of "medicine" in the Medicines and Related Substances Act applies to substances used for specific therapeutic purposes reaffirms the importance of clear and precise regulations in the healthcare sector. This decision can impact the availability and accessibility of natural health products, ensuring that regulatory measures are consistent with the right to health while upholding safety and efficacy standards.

SECTION THREE: JUDICIAL INTERVENTIONS

INTERPRETIVE APPROACHES

Interpretation is "the process of attributing meaning to the words used in a document, be it a Constitution, legislation, statutory instrument, policy or contract having regard to the context provided, by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence." [137]

The Constitution of Kenya obliges Courts to interpret its provisions in a manner that:

a) Promotes its purposes, values and principles;
b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights
c) Permits the development of the law; and
d) Contributes to good governance [138]

This section provides suggestions of the various interpretive approaches that Courts in Kenya can use in interpreting the right to health in order to ensure its effective realisation and implementation.

a) Human Rights Based Approach to Interpretation of the Right to Health

One of the approaches that judges who are faced with cases on the right to health can take, is the Human Rights Based Approach (HRBA). This approach acknowledges the right to health as a fundamental human right. It also acknowledges the inequalities, discriminatory practices and unjust power relations that occur when one wishes to exercise a right. The HRBA is thus an approach that seeks first to clearly define who the rights holders and duty bearers are. In other words, it defines those who have freedoms and entitlements that should be protected and those that are responsible for ensuring that rights holders are enjoying their rights.

The key elements of the HRBA with respect to the right to health are:

1. Elimination of discrimination in relation to access to the right to health. This aspect of the HRBA is buttressed by General Comment No 20 of the Committee on Economic Social and Cultural Rights [139]

[137] National Joint Municipal Pensions Fund v Endumeni Municipality 2012 (4) SA 593 (SCA), para 18
[138] Constitution of Kenya, 2010 Article 259(1)
[139] Committee on Economic Social and Cultural Rights, General Comment No 20 on Non – discrimination in economic, social and cultural rights (art. 2, para 2 of the International Covenant on Economic Social and cultural rights) E/C.12/GC/20 (2nd July 2009)

Discrimination 'constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of the Covenant rights. Discrimination also includes incitement to discrimination and harassment.' [140]

The Courts need to ensure the prohibition of both formal and substantive discrimination. Prohibition of Formal discrimination requires ensuring that laws, policies, programmes do not discriminate on the prohibited grounds.

Prohibition on substantive grounds entails considering that certain groups have faced historical or persistent prejudices and discrimination and need special attention when dealing with their cases. For example, sexual minorities, women, persons living with HIV, sex workers, etc.

By enforcing Constitutional and international human rights principles on equality before the law, health equity is promoted and the stigma and indignity that many people face in seeking to access health care and services will be reduced if not eliminated.

2. Participation and Inclusion

The Courts need to ensure that the rights of citizens to engage actively and freely and meaningfully in the decisions that directly affect them are upheld. Citizens need to participate in the design, implementation and monitoring of decisions and interventions so that these measures are responsive to their needs. The Courts thus need to ensure that relevant information has been disseminated to all relevant stakeholders in an accessible and understandable language and manner and that it is appropriate to the different demographic, ethnic, age, culture and religious groups.

3. Accountability and Transparency

Courts need to ensure that there is accountability and transparency in the decisions and programmes of the State. Accountability also entails having an effective mechanism of addressing any complaints and disputes that citizens may have. The OHCHR has flagged Court rulings as one of the ways in which accountability and transparency can be enhanced. The Courts are useful in holding the State responsible and accountable for its obligations under the Constitution and other relevant domestic, regional and international laws.

[140] Para 7 of General Comment No 20 CESCR

b. A Holistic Approach to the Interpretation of the Right to Health

A holistic approach to human rights enables one to consider human rights as unified and interdependent. It seeks to place all human rights on an equal footing so that all hierarchical distinctions between them are removed. Interdependency of rights is thus to be understood as being between rights and as between people. Protecting the rights of one group of people may very well affect the rights of another group of people.

The danger of considering the implementation of one human right in isolation to other rights is that other important actors within the particular sector concerned are ignored. This will in turn pose a challenge in identifying the challenges of implementation of the right. The measures that are taken by the State to implement or realise one right should recognize the importance of participation of other interconnected actors. [141]

This holistic approach finds its inspiration in among other international instruments, the Vienna Declaration in which it is stated, *"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat all human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."* [142]

The rights in the Constitution must thus be interpreted in a holistic, purposive and contextual manner. The Supreme Court of Kenya has said this of a holistic interpretation of the Constitution, *"it must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."* [143]

In the Matter of Interim Independent Electoral Commission No 2 of 2011[144], the Supreme Court also stated that, *"...The rules of constitutional interpretation do not favour formalistic or positivistic approaches* ***(Articles 20(4) and 259(1)).*** *The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction."*

[141] See Gillian MacNaughton & Paul Hunt, "Health Impact Assessment: The Contribution of the Right to the Highest Attainable Standard of Health" (2009) 123 Public Health 302 at 303; See also Paul Hunt & Gillian MacNaughton, "Impact Assessment, Poverty and Human Rights: A Case Study Using the Highest Attainable Standard of Health" 27 (WHO Health and Human Rights Working Paper Series) No. 6, May 31, 2006

[142] Vienna Declaration and Programme of Action, 5 UN Doc A/CONF. 157/23 (July 12, 1993)

[143] Advisory Opinion No 1 of 2012 (2014)eKLR para 26

[144] (2011) eKLR

The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the ***Preamble, in Article 10, in Chapter 6,*** *and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya.* ***Article 159(1)*** *states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts."*

Similarly in Apollo v Attorney General & 2 Others[145], it reiterated that, *"It is useful to restate the well-known general principles relating to constitutional interpretation, which are, in any event, incontrovertible. The first principle is that the Constitution of a nation is not to be interpreted like an ordinary statute. In his characteristic eloquence, the late Mahomed AJ described the Constitution as "a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government" The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion. In keeping with the requirement to allow the constitutional spirit and tenor to permeate, the Constitution must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner. Instead, constitutional provisions are to be 'broadly, liberally and purposively' interpreted so as to avoid what has been described as the 'austerity of tabulated legalism."*

A holistic approach to the interpretation of the right to health, is thus supported by this modern interpretive approach to the Bill of Rights within the Constitution. The interrelatedness and indivisibility of various rights is to be taken into account. There should be no segregation of provisions, where one provision is read alone and interpreted in exclusion to the others. But rather "all provisions bearing upon a particular subject are to be brought into view and be interpreted so as to effectuate the greater purpose of the instrument." [146]

Indivisibility and interdependence of human rights, as elaborated in the Vienna Declaration, is a concept that is necessary for the realisation of human rights. In other words "the full enjoyment of one set of rights is dependent on the realisation of the other." [147] The discussion of interdependence and indivisibility of human rights resonates with the holistic approach to the interpretation of the right to health. Many of the social and underlying determinants of health are recognised as stand alone rights which have their own normative content and interpretation.

[145] (2018) eKLR at para 34

[146] EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & Ano (Amicus Curiae) (Constitutional Petition No 156 of 2016 consolidated with Constitutional Petition No 234 of 2016) at para 250

[147] UN General Assembly Press Release of 9th November 1998 (GA/SHC3501)

These rights should thus be considered as "forming a whole set of legal rules for the protection of all dimensions of the human person, rules between which there is an ongoing dialectical relationship aimed at the achievement of justice, security and well – being of all." [148]

c. The Capabilities Approach to Interpretation of the Right to Health

The couching of human rights within Constitutional provisions, is arguably aimed at enhancing the capabilities and wellbeing of the citizens. The question that the capabilities approach seeks to answer is 'What do the citizens actually value? Are there opportunities to pursue and achieve what they actually value?' A contextualization of these questions in relation to the right to health supposes that a judicial interpretation of the legal norms contained within Constitutional frameworks can enhance or compromise the attainment of capabilities and particularly, health as a capability. Judicial interpretation should be able to translate normative standards that have been constitutionalized into realisable capabilities and entitlements.[149]

Courts would have to dismantle a silo approach to judicial decision making. This entails the consideration of issues before the Court without interconnecting the implications of those issues with others. For example, considering the right to vote without considering the right to security of person; or considering the right to life without considering the right to dignity; or even considering the right to health without considering the right to decent working conditions for health workers.

The second mindset that needs to be dismantled in order to apply the capabilities approach would be the judicial deference or more aptly described, judicial fear, of holding the State accountable for its obligations and violations of those obligations. [150]

Thirdly, the previous Constitution predominantly protected civil and political rights, violations of which were easier to adjudicate upon as they entailed the restriction of the State from violating these rights (which are mainly negative in nature). Socio – economic rights, including the right to health, which have now been entrenched in the current Constitution, carry with them the obligation not just to respect, but also to protect and fulfil which obligations are deemed to be positive in nature.[151] The judicial mindset has to be prepared to scrutinise laws,

[148] Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers. P696

[149] Mashele Rapatsa, Gaedupe Makgato and Tshepo Mashile, 'Legal Norms and the Capabilities Approach (CA): Reinterpreting Children's Right to Access to Basic Education.' (2016) 12 (2) Acta Universitatis Danubius 40; Supriya Routh, "Developing Human Capabilities Through Law: Is Indian Law Failing?" (2012) 3(1) Asian Journal of Law and Economics

[150] Kirsty Mclean (ed), Constitutional Deference, Courts and Socio-Economic Rights in South Africa(PULP 2009)

[151] Nicholas W. Orago, 'Limitation of Socio-economic Rights in the 2010 Kenyan Constitution: A Proposal for the Adoption of a Proportionality Approach in the Judicial Adjudication of Socio-Economic Rights Disputes' (2013) 16(5) Potchefstroom Electronic Law Journal 170

policies and actions in a bid to monitor and evaluate whether the State is indeed keeping with its constitutional and international obligations.

The Capabilities Approach would thus enable the Courts to take an interpretative approach that translates constitutional guarantees that are on paper to actual opportunities that citizens can benefit from. The rights that are entrenched in the Bill of Rights are not abstractions, but are enforceable guarantees for citizens. Indeed as the High Court in Kenya stated, *"The inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality."* [152]

By viewing and interpreting the right to health as more than a funded entitlement and more as an essential obligation on the part of the State, the Courts ensure that progressive steps are taken to maximise the available resources in order to realise the right to health.

Remedial Approaches

The Role of the Court in granting Effective Remedies for violations of the Right to Health

A right without a remedy is an ineffective right. Indeed one can argue that it is not a right at all. Remedies are needed to address violations of various rights, including the right to health. These remedies can lead to systemic changes that would enhance the realisation of the right to health. The realisation of socio-economic rights, which includes the right to health, goes beyond constitutional entitlements. It entails the crafting of an effective judicial remedy that will translate the rights beyond being parchment entitlements.

> *A weak judicial remedy reduces human rights provisions to mere statements of legal rhetoric and therefore weakens the substantive rights protected. The constitutional protection of socio-economic rights does not necessarily lead to their enforcement. There is, therefore, a need to craft appropriate judicial remedies in order to translate socio-economic provisions into a reality.* [153]

[152] John Kabui Mwai & 3 Others v Kenya National Examinations Council & Others (Nairobi, Petition No 15 of 2011) (2011) eklr

[153] William Kiema, 'A Case for Structural Interdicts in Emerging Socio-Economic Rights in Kenya' (2019) 7 (1) Kenya Law Review 136, 140-141; Emily Ling, 'From Paper Promises to Real Remedies: The Need for the South African Constitutional Court to Adopt Structural Interdicts in Socio – Economic Rights Cases' (2015) 9 Hong Kong Journal of Legal Studies 51

The Courts need to craft innovative remedies that would hold the arms and departments of government accountable for the manner in which they exercise their power and for the policies and programmes that they formulate, without usurping their roles.[154] In the South African case of Modder East Squatters and Anor v ModderklipBoerdery (Pty) Ltd (2004) ZASCA, it was stated that Courts should 'mould an order that will provide effective relief to those affected by a constitutional breach.' [155]

Article 23(3) of the Constitution of Kenya provides that in any proceedings that are brought for a violation, denial, infringement or a threat to violation, the Court may grant appropriate relief including –

(a) A declaration of rights
(b) An injunction
(c) A conservatory order
(d) 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
(e) An order for compensation; and
(f) An order for judicial review

What then is appropriate relief? According to Ackermann, J in the Fose case, an appropriate relief is defined in this way, "*In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and rights entrenched in the Constitution cannot properly be upheld or enhanced.*" [156]

At the heart of an appropriate relief is its effectiveness in protecting and enforcing the rights and entitlements contained in the Constitution. [157] The effectiveness of the remedy will depend on the nature of the violation and whether a corrective or distributive approach to justice is needed to remedy the situation. Mbazira seeks to distinguish the two approaches to justice by explaining that corrective justice mechanisms seek to restore the Petitioner to the position they were in before the violation or wrong took place. On the other hand, distributive justice recognizes that there are wider interests that the Court has to consider, other than that of the individual Petitioner or group of Petitioners before it. [158] The Court recognizes that there are "collateral interests" – interests that have community wide implications. The remedy that the

[154] Kate O'Reagan, 'Helen Suzman Memorial Lecture: A Forum for Reason: Reflections on the Role and Work of the Constitutional Court' (2012) 28 South African Journal of Human Rights 116,129
[155] Modder East Squatters and Ano v ModderklipBoerdery (Pty) Ltd, President of the Republic of South Africa and Others v ModderklipBoerdery (Pty) Ltd (2004) ZASCA at para 42
[156] Fose v The Minister of Safety and Security (CCT 14/96) para 69
[157] EWA and 2 others v Director of Immigration and Registration of Persons and Ano (2018) Eklr; Law Society of Kenya & 7 Others v Cabinet Secretary for Health & 8 Others; China Southern Co Airline Ltd (Interested Party) (2020) Eklr para 28
[158] Christopher Mbazira, 'Enforcing Socio-Economic Rights as Individual Rights: The Role of Corrective and Distributive Forms of Justice in Determining "appropriate relief" (2008) 9(1) ESR Review 1

Court would therefore choose would be one that recognizes that other parties and not just those that have initiated the suit will be affected by the outcomes of the suit. [159]

Violations of the right to health in many instances are based on systemic challenges and weaknesses. The solutions/remedies require a multi-sectoral, multi-stakeholder and dialogic approach in order to be effective. Corrective remedies may thus sometimes prove ineffective to deal with systemic violations as they focus on the victims at hand and not the structural and systemic weaknesses that have caused the violation of the right(s) in question.[160] It should be noted therefore that "distributive justice allows the Court very wide discretion to fashion causes of action and remedies as the needs of justice demand" and "allows for remedies to have a future direction and focuses on the needs of the community as a whole." [161]

Individual based litigation may be deemed too expensive by diverting much needed resources away from remedying systemic violations of socio-economic rights, such as the right to health, that would require inter sectoral and interdepartmental interventions. A meaningful implementation of the right to health should not merely focus on granting an individual Petitioner a remedy which would also, otherwise be beneficial to many other healthcare workers who are facing the same violation, but are unable, for whatever reason, to bring their cases to Court.

It is for the Court to then craft appropriate and effective remedies for the violations of the rights to health and safe healthy working conditions, as was observed by the Constitutional Court in South Africa in the Fose case. It stated that: 'The Courts have a particular responsibility, and are obliged to "forge new tools" and shape innovative remedies, if need be.'[162] The remedies must be effective in order for them to be suitable for their purpose, which in the case of positive obligations, would be to compel the State to remedy the violation of the rights. The Court further held that 'an appropriate remedy must mean an effective remedy.' [163] An effective remedy must be able to bring real transformation and not merely 'paper' transformation within society.

Kenyan Courts may wish to consider the utility of the Structural Interdict as an effective remedy for the violations of the right to health, particularly those violations that stem from systemic weaknesses and challenges.

[159] Ibid 5
[160] Ibid 4
[161] Ibid 5
[162] Fose v Minister of Safety and Security 1997 (7) BCLR 851 (CC) 888 -889
[163] ibid

CONCLUSION

In conclusion, this Bench Book stands as a valuable resource for legal practitioners, judges, and stakeholders involved in matters concerning the right to health within the Kenyan legal landscape. The fundamental human right to health, enshrined in the Constitution of Kenya, 2010, places substantial obligations on the State to ensure accessible, quality, and affordable healthcare for all citizens.

The case law section, explored in this document, delves into various dimensions of healthcare rights, covering critical issues such as access to healthcare services, patient safety, public health emergencies, sexual and reproductive health rights, and more. Through the lens of jurisprudence, the complexities surrounding the right to health are unraveled, providing valuable insights and guidance for those entrusted with upholding these rights.

Additionally, the section on judicial interventions underscores the essential role of the Judiciary in safeguarding healthcare rights. The Judiciary serves as a guardian of constitutional health-related rights, ensuring that justice prevails in matters of public health and individual well-being. Through their decisions, judges play a crucial role in shaping healthcare policies and practices that align with the principles of justice, fairness, and human dignity.

This Bench Book not only equips legal professionals with a deeper understanding of healthcare rights but also reinforces the importance of upholding these rights in the pursuit of a just and equitable society. As stakeholders move forward, the principles of progressive realization of the right to health should continue to guide legal and ethical considerations, contributing to the betterment of the health and well-being of all Kenyan citizens.

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