

III. MATERNAL HEALTH CARE AND SERVICES

The facts of the cases in this chapter point to failures of governments to ensure every aspect of the definition of reproductive health and rights under the 1994 Programme of Action (PoA) of the International Conference on Population and Development.²⁹ The PoA states that reproductive health includes the right of women to access appropriate health care services so that they are able to go safely through pregnancy and childbirth and have the best chance of having a healthy infant.³⁰ Additionally, the Convention on the Elimination of All Forms of Discrimination Against Women (1979) requires states to ensure that women have appropriate services in connection with pregnancy, confinement and the postnatal period, and that they are granted free services where necessary.³¹ The cases also remind us that the target to reduce the global maternal mortality ratio to less than 70 per 100,000 live births by 2030 under Sustainable Development Goal (SDG) 3 (Good Health and Well-Being)³² cannot be met without fully protecting, promoting, respecting and fulfilling the right of all women to access reproductive, maternal health care and services. States further have an obligation to meet SDG 5 (Gender Equality), which pursues the agenda to ensure universal access to sexual and reproductive health and reproductive rights.³³

The cases in this chapter reveal different facets of violations of women's maternal health rights. *The Center for Health, Human Rights and Development (CEHURD) and others v. Attorney General*³⁴ confirms that maternal health is compromised by the government's failure to provide basic health services for pregnant women, resulting in maternal deaths. The fact that the plaintiffs lost the case in a Constitutional Court, only to get a favourable ruling from an appellate court in *The Center for Health, Human Rights and Development and Three Others v. Attorney General*³⁵ is a good illustration of how courts can influence the fulfilment of maternal health rights. On the other hand, *The Center for Health, Human Rights and Development and Four Others v. Nakaseke District Local Administration*³⁶ suggests that maternal deaths can not only be prevented by the availability of appropriate health care and services, but also by ensuring that the available services are actually accessible when pregnant women need them. *Ntsele v. MEC for Health, Gauteng Provincial Government*³⁷ is a vivid example of how the failure to provide adequate maternal health care transcends the problem of maternal deaths. Rather, such failures can also have an actual and adverse lifelong impact on neonatal or child health. *Millicent Awuor Omuya alias Maimuna Awuor and Another v. The Attorney General and Four Others*³⁸ exposes the dangers and violations that low-income women can encounter in health care facilities when there free or affordable maternal health care and services are not available.

Center for Health, Human Rights and Development and 3 Others v. Attorney General
[2012] UGCC 4, Constitutional Petition No. 16 of 2011
Uganda: Constitutional Court

COURT HOLDING

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

Summary of Facts

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

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

Issues

The Court was therefore asked to determine the following issues:

1. Whether the right to the highest attainable standard of health is a constitutional right by virtue of Article 45 of the Constitution.
2. Whether the inadequate human resources for maternal health, lack of essential drugs, and lack of emergency obstetric care services at health centres are infringements of the right to health.
3. Whether non-provision of basic maternal healthcare services in health facilities contravenes Article 8A or Objectives XIV and XX of the Constitution.
4. Whether non-provision of basic maternal healthcare packages in government hospitals, resulting in the deaths of pregnant women and their children, is a violation of the right to life as guaranteed under Article 22 of the Constitution.
5. Whether health workers’ failure to attend to pregnant women subjects women to degrading and inhuman treatment, in contravention of Articles 24 and 44(a) of the Constitution.

6. Whether the high rates of maternal mortality in Uganda contravene Articles 33(1), (2), and (3) of the Constitution.
7. Whether the families of Sylvia Nalubowa and Jennifer Anguko, who died in hospital due to non-availability of basic maternal commodities, are entitled to compensation.

Court's Analysis

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

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

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

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

Conclusion

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

Significance

Uganda, like many African countries, adopted a constitution that recognises social and economic rights including the right to health. For instance, Objective XIV (b) of the Ugandan Constitution says

that “The State shall endeavour to fulfil the fundamental rights of all Ugandans to social justice ... and shall ... ensure that all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.” Further, the provisions of these constitutions are rarely read individually and in isolation. For instance, the provision stated above, read with Article 33 (3)—which says that “The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society”—creates legal obligations on the state to ensure that all expectant mothers receive basic maternal healthcare.

The petition brought before the Constitutional Court of Uganda depicts a scenario that is perhaps all too common in Sub-Saharan Africa. Government-run health facilities are frequently if not chronically underfunded, understaffed, lacking the basic commodities, and failing to provide the requisite standard of care. The petitioners’ case arose out of a legitimate expectation that the state be held accountable for meeting the obligations stipulated in the Constitution. Their case was based upon evidence of two maternal deaths that they argued could have been avoided if only the government had fulfilled its duty to provide basic maternal healthcare and services. However, while acknowledging the fact that there was government failure, the Court chose to rely on the political question doctrine and declined to rule on the merits of the case.

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

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

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

The Ugandan decision is an example of how courts have not enforced human rights guarantees for many vulnerable persons in African countries, on the basis that these responsibilities lie with the other branches of government. Since the Court determined the issue before it was a political question, the Court did not raise questions for the Executive to address on why the two women died in circumstances that were avoidable, or inquire about what steps the government was taking to realise its obligations to provide adequate healthcare. The significance of this decision therefore lies in the Court’s inability to hold the government accountable due to its determination that the

failure to provide healthcare of expectant mothers was a political question, and therefore outside the Court's jurisdiction, even though the right to healthcare is guaranteed to the women of Uganda in the Constitution.

Center for Health, Human Rights and Development and 3 Others v. Attorney General
(2015), Constitutional Appeal No. 01 of 2013
Uganda, Supreme Court

COURT HOLDING

The petition raised competent questions for the Constitutional Court to determine under Article 137(4) of the Constitution. Therefore, the Constitutional Court should have heard, interpreted, and determined the issues raised by the petitioners as they implicated constitutional rights.

The Constitutional Court could not decline to entertain a petition under Article 137 of the Constitution on the pretext that this encroached on the discretionary powers of another organ of the state.

The doctrine of political question is of limited application in Uganda. The Constitutional Court had erred in dismissing the petitioners' claim without hearing the merits, on the ground that it raised a political question.

Summary of Facts

This was an appeal of the preceding case summary which was a ruling from the Constitutional Court rendered in Constitutional Petition No. 16 of 2011 in which the Appellants had challenged the Government of Uganda for failing to provide basic maternal health services. The petitioners claimed that the failure to provide basic maternal healthcare infringed on constitutionally guaranteed rights under Articles 22, 24, 33, 34, and 44, as well as the right of access to health services under Objectives XIV(b), XV, XX, and Article 8A of the Constitution of the Republic of Uganda 1995 (the Constitution).

The Constitutional Court dismissed the application without hearing its merits on the ground that the petition did not disclose competent questions that needed interpretation, and that the petition concerned a political question that it could not adjudicate upon.

The Appellants therefore filed the appeal on three grounds. The first was that the Constitutional Court did not correctly apply the doctrine of political question. Second, the Constitutional Court erred in law in holding that the petition did not raise competent questions requiring constitutional interpretation. Third, the Constitutional Court erred in law when it decided that the petition called it to review and implement health policies.

The Appellants argued that Article 137(1) of the Constitution vests the Constitutional Court with powers to interpret the Constitution, so that it had powers to review any Executive act that violated or threatened any rights guaranteed by the Constitution. The Appellants cited *Ismail Serugo v. Kampala City Council & Another*, (Constitutional Appeal No. 2 of 1998) to support the argument

that the Constitutional Court was obliged to entertain the petition. They further argued that no article of the Constitution was immune from interpretation. They cited *Uganda Association of Women Lawyers & Five others v. Attorney General, (Constitutional Petition No. 2 of 2003)* to advance the position that the Constitutional Court should always remain accessible to any person seeking interpretation of the Constitution.

In response, the respondent argued that the Constitutional Court could not hear the petition because it involved a political question, and would be contrary to the principle of separation of powers. The respondent cited Article 90(1) of the Constitution as read with Rules 133 and 161 of Parliamentary Rules of Procedure, to argue that these mandate the Parliament of Uganda to have oversight over the implementation of government policies and programs, such as health programs. The respondent also argued that courts cannot adjudicate on matters that implicate allocation of resources, as this would be contrary to Article 112 of the Constitution and Section 7(2) of the Budget Act, 2001.

The Appellants argued that the doctrine of political question, first articulated by the Supreme Court of the United States (US Supreme Court) in *Marbury v. Madison*, (5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)) was not the proper authority to guide interpretation and application of the Uganda Constitution. Rather, the Court should be guided by Article 132(4) of the Constitution. Further, the Appellants contended that the Constitution requires all government agencies and organs to respect, uphold, and promote the rights enshrined in the Constitution, so that no act or omission of Government was immune from constitutional scrutiny.

The Appellants argued that even if the doctrine of political question had application in Uganda, it could not apply in cases where constitutional rights of an individual or the constitutionality of the law were at stake. They cited the decisions of the US Supreme Court in *Zivotosfsky v. Clinton Sec of State* 32 S. Ct 1421 (2012) and the decision of the Supreme Court of Canada in *Bertrand v. AG of Quebec* [1992] 2 LRC 408, where Executive decisions were reviewed because they involved constitutional rights. The Appellants also referenced other court decisions that rejected arguments for immunity of Executive decision concerning health matters, such as *Minister of Health and Others v. Treatment Action Campaign*, 2002 (5) SA 721 (Constitutional Court of South Africa) and *Paschim Banga Khet Mazdoor Sanity v. State of West Bengal*, (1996) 4 S.C.C 37 (Supreme Court of India).

Issues

According to the Court, the application raised three issues for determination:

1. Whether the petition raised competent grounds requiring interpretation under Article 137 of the Constitution;
2. Whether the Constitutional Court properly interpreted and applied the political question doctrine; and
3. Whether the Constitutional Court properly exercised its jurisdiction in refusing to determine the matter on the grounds that it would interfere with the discretionary mandate of another arm of government.

Court's Analysis

The Court disagreed with the reasoning and conclusion of the Constitutional Court that the petition had not raised specific issues under the Constitution for its determination. The Court agreed with the Appellants that their petition had specified the acts and omissions and the particular provisions of the Constitution that were implicated. The Court found that the petition had raised competent questions for the Constitutional Court to have determined in accordance with Article 137(4) of the Constitution. The Court therefore held that the Constitutional Court had erred in holding that the petition did not raise competent questions for it to determine.

The Court then considered the first and third grounds of appeal together. The Constitutional Court had held that the issue it was called upon to determine concerned the discretion of the Executive to formulate and determine policy, and that it was therefore a political question which the Constitutional Court could not adjudicate. The Court reviewed the *Marbury* case and observed that the doctrine was an interpretive tool fashioned by courts, rather than provided for by the Constitution or legislation. The Court further observed that this tool was created to address particular political challenges in the American system of government and was in any case not applied consistently by the American courts.

The Court said that Article 137(1) of the Constitution was interpreted by a Ugandan Court in *Paul Semogerere and Two Others v. the Attorney General* (Constitutional Appeal No. 1 of 2002) to mean that the Constitutional Court is mandated to decide on any claim involving constitutional rights violations. The Court therefore held that the Constitutional Court could not decline to entertain a petition under Article 137 of the Constitution on the grounds that it infringed on the discretionary powers of another organ of the state.

The Court then turned to the argument that the Constitutional Court was barred from adjudicating matters that involved allocation of resources and therefore falling within the ambit of Article 111(2) of the Constitution. The Court found that Article 111(2) vests the power to determine, formulate and implement government policies in the Cabinet, while Article 137(3)(b) grants any citizen who alleges contravention of a provision of the Constitution the right to petition the Constitutional Court for redress. It therefore did not agree with the Constitutional Court's conclusion that it could not entertain the petition because it involved a political question, nor with the respondent's assertion that by virtue of being enacted lawfully by the Legislature, laws were therefore immune from constitutional scrutiny.

The Court also reasoned that if the Constitutional Court were to allow the argument that the political question ousted its jurisdiction, then all acts and omissions of the Executive would be beyond its scrutiny. This would be contrary to the spirit of the Constitution which demands that state actors respect, uphold, and promote the Constitution. The Court therefore held that the Constitutional Court had erred when it abdicated its constitutional duty to hear and decide on the allegations of violations of constitutional provisions by the Executive, because Executive acts and omissions are not protected from constitutional challenge. The Court also held that the political question doctrine was of limited application in Uganda, and that the Constitutional Court had erred in dismissing the petitioners' claim on the ground that it raised a political question without hearing the merits of the case.

In a separate concurring judgment, Kutereebe CJ, expressed the view that under a democratic dispensation, there is no such thing as absolute separation of powers among arms of the government. Rather, the Constitution provided a system of checks and balances, where the courts had the power to review constitutionality of Executive decisions. Kutereebe CJ was of the view that the petition had created an important opportunity for the Constitutional Court to decide on the content and application of the right to life and the right to health in Uganda. He also disagreed with the reasoning that the Constitutional Court could not intervene in policy issues that involve resource allocation. He cited several examples of cases where courts intervened in Executive decisions that involved resource allocation, including in *Minister of Health and others v. Treatment Action Campaign, (supra)* and the Indian court decision in *Pashim Banga Khet Mazdoor Samity and Others v. State of West Bengal and Another*, (1996) AIR SC 2426 (Supreme Court of India).

Conclusion

The appeal succeeded and the matter was remitted to the Constitutional Court for determination of the merits.

Significance

The African region has some of the highest rates of maternal mortality globally. Uganda's maternal mortality ratio is estimated at 343 deaths per 100,000 live births.³⁹ The causal factors may be complex, but governments have the mandate to ensure availability and accessibility of basic services so that women have appropriate care during pregnancy and childbirth. Many countries have adopted constitutions that recognise rights relating to access to maternal health services. Some constitutions, such as the Ugandan Constitution, do not explicitly provide for the right to access maternal health care in the Bill of Rights, but recognise policy objectives relating to health care services including maternal health. However, maternal deaths implicate other rights provisions of the constitution, for instance Article 22 on the right to life. This case sets important jurisprudential precedent in signalling that preventable maternal death is a human rights issue. Maternal mortality and other women's health issues have been regarded by other courts as "natural" phenomena that families or communities should privately deal with, and should not surface into the public domain of politics and economics. Too many women in Africa continue to lose their lives due to pregnancy and childbirth. The African Union adopted a resolution in 2008 on maternal mortality in Africa at the African Commission on Human and Peoples' Rights Meeting.⁴⁰ The recommendations that were made at this meeting are still pertinent. These included that African states:

- Ensure participation of women and civil society in the formulation, implementation, monitoring, and evaluation of policies and frameworks aimed at addressing maternal mortality;
- Take all appropriate measures including positive discrimination in providing funds for specific programs and projects to secure maternal health;
- Provide well-staffed and equipped maternity centres in rural areas;

- Employ and retain skilled health personnel and birth attendants in rural and semi-urban areas;
- Train and retain health workers in emergency obstetric care;
- Develop community-led emergency transport systems to cushion the effect of delays in getting medical attention;
- Develop adaptive training curriculum for the education of women and girls on rights to reproductive health.

It is therefore important for advocates to continue to agitate for implementation of measures which will lead toward improved maternal health care, and toward elimination of preventable maternal deaths and ill-health in Africa.

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

COURT HOLDING

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.

Summary of Facts

The plaintiffs in the matter were the Center for Health, Human Rights and Development (CEHURD), the husband, and three daughters of Nanteza Irene (the deceased). They were suing the sole defendant, Nakaseke District Local Administration (Local Authority), the Local Government with oversight over Nakaseke District Hospital (Hospital). The deceased was brought to the Hospital to deliver a child when labour had started. The plaintiffs alleged that during labour, the deceased was diagnosed with a condition known as obstructed labour, making her unable to deliver her baby without the intervention of trained medical personnel. The only trained medical staff member who could manage the condition was a doctor who was supposed to be on duty during this time, but was absent. After some eight hours, the deceased developed complications and died as a result. The plaintiffs therefore claimed damages against the defendant, which had administrative responsibility over the Hospital. The basis of the plaintiffs' claim was that the health rights of the deceased were violated by the defendant, as well as the rights of the children she had left behind.

Issues

The issues before the Court were:

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; and
3. Whether the defendant was liable, and if so whether damages should be awarded.

Court's Analysis

The Court examined the timeline of the alleged events from the time the deceased was said to have arrived at the hospital until the time of her demise. The Court found that the deceased was in labour for some eight hours before she succumbed to a ruptured uterus resulting in blood loss. During this time, the doctor on duty who could have provided the appropriate care that the deceased required did not attend to her.

The Court inquired into the particulars of the care that the deceased received. The Court found that the deceased was admitted to the hospital at 1:35pm on the day of her demise, and according to the state of her labour, she was expected to deliver by 5pm. However, a review of her condition before then by the nurse tending to her detected a condition of obstructed labour, an emergency condition which required intervention that only a trained doctor could provide. At 4:30 pm, the staff started to look for the doctor who was on duty, as the person trained to manage the condition of obstructed labour. Unfortunately, the doctor was nowhere to be found before the deceased suffered a ruptured uterus and died.

The Court did not accept the doctor's argument that he had been around the precincts of the hospital. It also rejected the doctor's attempt to justify his absence on other grounds. In fact, the Court referred to paragraph 4.3 of the Code of Conduct and Ethics for the Uganda Public Service which required that public officers seek and obtain permission from a supervisor to be absent from duty, and report any absence from duty to the supervisor or relevant staff. The Court found that the doctor absented himself without communicating his absence to the relevant staff. The Court therefore found that due to the flagrant neglect of duty by the doctor, the deceased did not receive the care and protection she was entitled to under the Constitution of the Republic of Uganda, 1995 (Constitution), especially provided under Article 33(3) which says that "The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society."

The Court also referenced Article 34(1) of the Constitution, which protects the right of children to know and be cared for by their parents or other care-givers. The Court found that the surviving children were denied their mother's care and companionship which was an infringement of their rights. The Court therefore held that the constitutional rights of the deceased had been violated, as well as the constitutional rights of the surviving children and spouse.

The Court then turned to the issue of liability of the defendant. It referred to Section 30 of the Local Government Act, Cap 24 of the Laws of Uganda (LGA), which provides for the functions, powers, and services of a Local Government Council (Council.) It found that the functions of a Council included

provision of health and medical services. It also referred to Article 176(2)(g) of the Constitution which provides that:

The local government shall oversee the performance of persons employed by the Government to provide services in their areas and to monitor the provision of Government services or the implementation of projects in their areas.

The Court also found from testimony of the Local Authority that the defendant was responsible for the operations and management of the Hospital, including the provision of medical services. In fact, the Local Authority had been informed of the predicament of the deceased but failed to take action. The Court cited the principle that a defendant is vicariously liable for the negligent acts and omissions of its servants committed within the scope of the employee's employment. It referred to a decision of the High Court of Uganda in *Christopher Yiki Agatre v. Yumbe District Local Government* (HCCS No.22 of 2004) which applied this principle. The Court therefore held that the defendant was vicariously liable for the death of the deceased and her child, and the violation of the human rights of the deceased and her surviving children.

The Court went on to consider the issue of damages. The Court did not award punitive damages to the defendant because it considered the scarce resources of the Local Authority which are used to run its operations and are frequently in short supply. It however awarded general damages amounting to 35 million Uganda Shillings (equivalent to 10,000 USD).

Conclusion

The plaintiffs' claim succeeded.

Significance

This relatively short judgment appears to be a hybrid between a cause of action in negligence and an action based on violation of constitutionally guaranteed rights. In an action on negligence, the plaintiff is supposed to prove that he or she suffered injury which is attributed to the negligence of the defendant who owed a duty of care to the plaintiff. Actually, the Court could have probably disposed of the matter on this cause of action alone. Indeed, its most important finding was that the doctor on duty caused the death when he neglected the duty of care owed to the deceased. The Court however added that the neglect causing death was a violation of the human rights of the deceased as well as of her children. It referred to constitutional rights only minimally.

The Court's opinion was more focused on the issue of neglect than human rights. The Court said that "the human and maternal rights of the deceased and the rights of the children and surviving spouse, arising under the constitution were violated." It is not clear which provision related to the rights of the surviving spouse. Further, elsewhere in the judgment it uses the language "human and health rights" and "the right to basic medical care," but does not really elaborate on the content of the health rights or right to basic medical care. Overall, the Court was clearer on the neglect of duty causing death than on human rights. It may have been useful if the Court, or indeed counsel, had referred to the international and regional human rights framework and jurisprudence, which may have resulted in a clearer human rights discourse.

Uganda is a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which issued the first decision from an international body on an individual maternal death, in the case of *Alyne da Silva Pimentel Teixeira v. Brazil* (Communication No. 17/2008 CEDAW/C/49/D/17/2008). In this case, the Committee on Elimination of Discrimination Against Women (CEDAW Committee) considered the case of a woman who had died of complications of pregnancy as a result of delays in being provided with appropriate care by the health system. The CEDAW Committee found that the state violated Article 12 on the right to health, and under Article 2(c) in relation to access to justice, amongst others. It made several recommendations to address the systemic factors leading to her death and discrimination in the health system, which would apply to the Ugandan context, including that the state:

- (a) Ensure women's right to safe motherhood and affordable access for all women to adequate emergency obstetric care, in accordance with General Recommendation No. 24 (1999) on women and health;
- (b) Provide adequate professional training for health workers, especially on women's reproductive health rights, including quality medical treatment during pregnancy and delivery, as well as timely emergency obstetric care;
- (c) Ensure access to effective remedies in cases where women's reproductive health rights have been violated and provide training for the judiciary and for law enforcement personnel;
- (d) Ensure that private health-care facilities comply with relevant national and international standards on reproductive health care; and
- (e) Ensure that adequate sanctions are imposed on health professionals who violate women's reproductive health rights.

This judgment is an important signal that preventable death of women during pregnancy, labour, and childbirth is a human rights issue. Unfortunately, the tragic demise of Nanteza Irene is not uncommon in Africa. Sub-Saharan Africa has some of the highest maternal death rates in the world. Institutional factors such as neglect of duty and delay of care can be contributing factors in these maternal deaths. Public interest court advocacy is therefore one means of bringing attention to such protracted issues concerning the public health system and to hold duty-bearers to account. Future court advocacy on this prevalent problem in Uganda and elsewhere should make use of existing regional and international jurisprudence to assist the courts in crafting useful judgments and effective remedies to advance the reproductive health and rights of women throughout Africa.

Millicent Awuor Omuya alias Maimuna Awuor & Another v. The Attorney General & 4 Others
(2015), Petition No. 562 of 2012
Kenya, High Court, Constitutional and Human Rights Division

COURT HOLDING

The detention of the petitioners by Pumwani Maternity Hospital (Pumwani Hospital) because of their inability to pay their medical bills was arbitrary, unlawful, and unconstitutional. Nothing in the law mandated or authorised health institutions to detain patients or clients for non-payment of medical bills.

Detaining the petitioners under poor conditions including making them sleep on the floor, and with poor sanitary conditions amounted to cruel, inhuman, and degrading treatment.

By refusing to treat the petitioners and/or subjecting them to ill-treatment on account of their inability to pay for maternal health services, the state had failed to implement its obligation to provide maternal health services to women in a manner that was non-discriminatory and respectful of their dignity.

Summary of Facts

The two petitioners were women who at various times were admitted and treated at Pumwani Maternity Hospital, a respondent in the matter. Pumwani was previously run by the City Council of Nairobi (City Council), another respondent, but was now managed by the county government of Nairobi. The petitioners alleged that they had been detained at Pumwani Hospital for several days, and treated in a cruel, inhuman and degrading manner by staff, for failing to pay the medical bills incurred for receiving maternal health services. This detention included restricted movement, being made to sleep on the floor, deliberate lack of attention including failure to provide medical treatment, and verbal abuse. They claimed violation of various rights guaranteed under the Constitution of Kenya, 2010 (Constitution). They also referred to rights recognised in international human rights treaties to which Kenya is party, including the International Covenant on Civil and Political Rights (ICCPR).

Issues

The Court isolated three issues for its determination:

1. Whether the petition failed to state with a reasonable degree of precision, the manner in which the petitioner's 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; and
3. Whether the petitioners were entitled to the remedies they sought.

Court's Analysis

The Court agreed with the petitioners that the Constitution guarantees the right to health, including reproductive health care, under Article 43, and the right to non-discrimination and equality before the

law under Article 27. The Court added that Article 21(2) of the Constitution imposes on the state the obligation to take appropriate measures to achieve progressive realization of the rights, as guaranteed under Article 43.

The Court found the respondents in violation of Article 29 of the Constitution, which protects the right to freedom and security of the person, for detaining and preventing the petitioners from leaving the Pumwani Hospital for failing to pay hospital bills. It also referenced Article 9(1) of the ICCPR which provides that “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

The Court referred to General Comment No. 35 of the UN Human Rights Committee (HRC) which indicates that states are obligated under the ICCPR to protect persons against violations of the right to liberty by third parties including lawful organizations, such as employers, schools, and hospitals.

Following a review of several decisions including *Isaac Ngugi v. Nairobi Hospital and Three Others* (Petition No 407 of 2012, High Court, Kenya), *Sonia Kwamboka Rasugu v. Sandalwood Hotel and Resort and Another* ([2013] eKLR (Petition No. 156 of 2011, High Court, Kenya), and *Malachi v. Cape Dance Academy International and Others* ((2010) CCT 05/10 ZACC 13 (South Africa Constitutional Court)), the Court found that there was nothing in the law that mandated or authorised health institutions to detain patients or clients for non-payment of bills. It therefore held that the detention of the petitioners by Pumwani Hospital because of their inability to pay their medical bill was arbitrary, unlawful, and unconstitutional.

The Court also held that the petitioners were treated in a manner that was cruel and degrading. It referenced the decision of the Inter-American Court of Human Rights in *Miguel Castro-Castro Prison v. Peru*, ((2006) ser. C, No. 160) and also *RR v. Poland*, ((2011) No. 27617/04), in which the European Court of Human Rights held that the denial of essential reproductive health services to a woman caused mental suffering amounting to ill-treatment.

The Court also referred to the case of *Institute for Human Rights and Development in Africa v. Angola* ((2008) AHRLR 43 (ACHPR 2008)), wherein the African Commission on Human and Peoples’ Rights (African Commission) stated that conditions of detention where food was not regularly provided and detainees had no access to medical treatment was tantamount to cruel, inhuman, and degrading treatment and was a violation of Article 5 of the African Charter on Human and Peoples’ Rights (Banjul Charter).

The Court reiterated that the right to health and the right to dignity are inextricably linked, and that health care institutions ought to provide services and care that respect human dignity. The Court also said that even where detention would be lawful, the right to dignity would still have to be respected (Article 10(1) of the ICCPR). The Court therefore found that the petitioners had been treated in a manner that violated their right to dignity.

The Court then delved into the right to health specifically as guaranteed under Article 43 of the Constitution, but also recognised in Article 16 of the Banjul Charter and Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It referred to its previous decision in *PAO and Two Others v. Attorney General* (High Court Petition No 409 of 2009) where the

Court affirmed that the right to health is indispensable to the enjoyment of other rights, and that it encompassed the positive obligation to ensure that services are provided, and the negative duty not to do anything that would affect access to health care services.

The Court noted that in the same General Comment No. 14, the Committee on Economic, Social and Cultural Rights (CESCR) said that in order to realise rights under Article 12(2)(d), which requires states to take the necessary steps to achieve the full realization of the right to health, states must ensure that health providers are trained to recognise and respond to the specific needs of vulnerable or marginalised groups. The Court further noted that the CESCR said that the state has a duty to fulfil a specific right when it was beyond the means of persons to realise the right. The Court said that this was the case with the petitioners, who could not afford the health services. The Court stated that the state had the obligation to provide affordable reproductive health services.

The Court observed that despite Kenya's obligation, stemming from national and international law, to provide reproductive health services, this is not realised for a large number of women in Kenya. Having taken into account the arguments that the right to health could only be realised progressively, and that there were minimum core obligations that needed instantaneous implementation, the Court noted that although the government had taken measures toward making reproductive health care accessible and affordable, it had also taken retrogressive steps by requiring user-fees for health services. The Court had regard to a publication by Alfred Anagwe where the author showed that user-fees disproportionately impeded women's access to reproductive health care.⁴¹

The Court also considered whether the petitioners' right not be discriminated against, protected under Article 27(4) and (5) of the Constitution, was infringed. It also had regard to Article 2 of the Banjul Charter protecting the right to non-discrimination, and Article 18 requiring states to ensure the realisation of women's right to non-discrimination. It referenced Article 1 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, also known as the Maputo Protocol, which defines discrimination against women and Article 2, which requires states to combat all forms of discrimination against women through appropriate legislative, institutional, and other measures. The Court affirmed that these provisions obligate states to take corrective and positive action including reform of existing discriminatory laws and practices. The Court referred to the definition of discrimination in Article 1 of CEDAW, and Article 2's obligation that States take steps without delay to eliminate discrimination against women and ensure that the state and public authorities and institutions shall not engage in any practice or act that discriminates against women. It cited the African Commission's *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* where the African Commission said that:

States should recognise and take steps to combat intersectional discrimination based on a combination of (but not limited to) the following grounds: sex/gender, race, ethnicity, language, religion, political and other opinion, sexuality, national or social origin, property, birth, age, disability, marital, refugee, migrant and/or other status.⁴²

In conclusion, the Court found that the health system practised systemic discrimination against women by denying services to those who could not afford them. It therefore held that the state had

failed to implement its obligation to provide maternal health services to women in a manner that was non-discriminatory and respected their dignity, and the ultimate consequence was failure of poor women to realise the right to the highest attainable standard of health.

Conclusion

The petition succeeded. The petitioners were awarded global damages taking in account the conditions in which each petitioner was detained. The first petitioner was awarded Kshs 1,500,000 (equivalent to 15,000 USD) and the second petitioner Kshs 500,000 (equivalent to 5,000 USD)

Significance

This very important and revealing judgment is quite comprehensive in addressing the rights that are violated when health systems deny maternal health services to women or treat them badly because they do not have the means or resources to pay for services. Indeed, while maternity is generally thought to be a celebrated status for women in Africa, women who are indigent have a great deal more to worry about when they encounter the modern health system. One of the greatest barriers to sexual and reproductive health care may be the attitudes of health care workers, coupled with health care systems that are inaccessible to those who cannot afford their services.

In this case, the state raised the argument that resources are a challenge. But the way in which the women were treated was not just about resources. Actually, the hospital utilised its resources to keep the women detained there. Secondly, the ill-treatment and the verbal abuse were not about resources. They were indicative of a bias against women of a lower socio-economic status or class. The Court in its judgement emphasised that it was not all about lack of resources. It was also in a very significant way about discrimination. It did not require allocation of resources to address this discrimination. It required the staff to treat every person in a manner worthy of their dignity, and human dignity, one of the core values of human rights, does not depend on one's social location or economic status.

Ntsele v. MEC for Health, Gauteng Provincial Government
[2012] ZAGPJHC 208
South Africa, High Court

COURT HOLDING

The defendant health clinic and hospital was liable for the brain damage suffered by the plaintiff during birth and while in their care, and therefore for infringement of the plaintiff's right to the highest attainable standard of health protected under Section 27 of South Africa's Constitution.

Summary of Facts

The mother sued, on behalf of her minor child plaintiff, for brain damage suffered by the child allegedly arising from negligent medical treatment provided by the defendant's employees. The mother alleged that when she was giving birth to the child at a clinic and hospital run by the

defendant, the nursing staff at the clinic, and the doctor and nursing staff at the hospital, respectively, were in breach of their duty of care for having failed to provide the requisite medical attention and care the mother required during the delivery of her child.

The mother maintained that the defendant's employees failed to execute their statutory duty pursuant to Section 27 of the Constitution of the Republic of South Africa, Act 108 of 1996 (the "Constitution"), which mandated them to provide reproductive health care to her and her child with reasonable skill and diligence, as a result of which her child sustained brain damage due to deprivation of oxygen during the process of birth.

The plaintiff's evidence revealed that the mother had endured prolonged labour due to the failure of the clinic and hospital staff to take the necessary measures to assist her in the delivery. The plaintiff submitted that the brain damage was a consequence of the defendant's employees' breach of the duty of care, because they failed to monitor the progress of the pregnancy, as well as the health of the foetus in the process of birth.

The defendants responded that negligence had not been proven and asked the Court to dismiss the matter. The defendant submitted that the plaintiff had not shown that the defendant's employees had failed to take reasonable steps to prevent the injury. The defendant further argued that the plaintiff had not shown that the plaintiff's brain damage was foreseeable and due to the defendant's employees' negligence.

Issue

The issue before the Court was whether the defendant ought to be held liable in negligence for the damage to the brain sustained by the plaintiff child during birth, when under the care of the employees of the defendant.

Court's Analysis

The Court reminded the defendant that once the plaintiff had established a *prima facie* case of negligence, it was up to the defendant to disprove that the brain damage of the child was due to the negligence of the defendant's employees.

The Court agreed with the plaintiff that the circumstantial evidence regarding the nature of the brain damage justified drawing an inference that it was caused by the negligence of the defendant's employees. It further said that in the absence of evidence disproving the probability of negligence, the Court would conclude that the defendant's employees had failed to accord the plaintiff the treatment to which she was lawfully entitled.

The Court also considered whether the doctrine of *res ipsa loquitur* could apply. The Court could draw an inference of negligence if the defendant had within its grasp the means of knowing the crucial facts of how the clinic and hospital staff administered treatment to the plaintiff, but failed to explain why they should not be held liable.

Following the review of the evidence before it, the Court was of the view that the brain damage suffered by the plaintiff justified inference on the balance of probabilities that it was due to the

defendant's employees' negligence. In the absence of evidence to rebut this, the Court would draw the conclusion that the defendant was negligent. The Court found that the defendant was not able to explain how the damage to the child's brain could have occurred if not for the employees' negligence.

The Court also noted that the clinic and hospital records regarding the treatment procedures accorded to the mother and her child were missing, despite a legal duty for the Clinic and Hospital staff to ensure that hospital records were kept safe pursuant to Sections 13 and 17 of the National Health Act No. 61 of 2003. Further, there was no explanation from the defendant about the missing records. The Court's view was that the defendant's failure to explain the missing records would justify an adverse inference of negligence. In the absence of any evidence to explain how the child suffered brain damage, which could only result from oxygen deprivation during the process of birth, the Court held that the maxim of *res ipsa loquitur* could apply. The defendant would be presumed negligent because its employees were in control of and were completely knowledgeable of the circumstances under which the child sustained the brain damage. In the absence of any evidence disproving negligence, the only plausible explanation of the injury that occurred to the child would be that the defendant's employees caused it.

The Court agreed with the plaintiff that the obligations of the defendant also had a basis in the constitutional right to the highest attainable standard of health, recognised in Section 27 of the Constitution. The plaintiff had the right to receive adequate reproductive health care, and the defendants had the reciprocal duty to provide reproductive health care with the skill and diligence expected of the medical profession. The Court reiterated that the maxim of *res ipsa loquitur* was applicable where the plaintiff established a *prima facie* case of negligence and the defendant, under whose care the child had been placed, failed to explain why they should not be held liable. The Court therefore held that the defendant had failed to discharge the evidential burden to disprove the causal connection between the negligence of its employees and the brain damage suffered by the plaintiff.

Conclusion

The Court ordered the defendant to compensate 100% of the damages that the plaintiff proved.

Significance

The unfortunate event of women not receiving adequate reproductive health care, with adverse consequences to neonatal health is, sadly, a common occurrence on the African continent. In some countries, the issue is systemic. Poor and indigent women and their babies face a high risk of sustaining injury because of the inability of governments to ensure equitable access to quality reproductive health care. Poor quality reproductive health care, especially for women, is not an inevitability of nature. It is rather a result of socio-economic choices governments have made. Over time, these choices have deepened a sense of disenfranchisement especially amongst poor women.

In its judgment the South African Court perfunctorily paid attention to the issue of reproductive rights. However, the case was essentially decided on the private law of tort or delict. In order to address the challenges that women face in Africa, there is need to build strong jurisprudence to hold governments accountable for respect, protection and fulfilment of the reproductive rights of women in Africa.

HIGHLIGHT

MATERNAL HEALTH CARE AND SERVICES

Challenges related to inadequate resources, lack of gender responsive budgeting in the health sector, and lack of a rights-based approach to reproductive health service provision and to maternal health litigation are clearly discernible from the five cases in this chapter. More importantly, the cases have brought to the fore the power of impact litigation in holding governments accountable for the implementation of the right to maternal health, including women's right to go through pregnancy and childbirth safely and free from rights violations.⁴³

The case of *Millicent Awuor Omuya alias Maimuna Awuor and Another v. The Attorney General and Four Others* validates long-standing arguments about the need for all sectors, including health, to pursue gender responsive budgeting (GRB) and address mistreatment of women during childbirth. The absence of GRB in the health sector is reflected in policy decisions such as those regarding user fees. When policy makers fail to consider and/or mitigate the impact of user fees on poor women (especially since women are the ones who constantly use health services as primary care givers and as child bearers), development cannot be inclusive.

As governments grapple with prioritising spending in the context of scarce resources and competing needs, the worst thing that can happen to efforts to achieve the full realization of maternal health rights is for courts to resist holding the executive branch accountable for the violation of relevant constitutional rights. This has been done under the guise of claims that the judiciary cannot scrutinise political or policy questions. Therefore, by reversing an earlier decision from a Constitutional Court, the Supreme Court of Uganda in *The Center for Health, Human Rights and Development and Three Others v. Attorney General* [2015] took an important step to clarify that the doctrine of separation of powers does not put any state organ above the duty to respect, protect, and fulfil constitutionally guaranteed rights. As Kutereele CJ opined, "there is no such thing as absolute separation of powers amongst arms of government since the Constitution provided for a system of checks and balances where the court had power to review the constitutionality of executive decisions."

The Chief Justice's perspective that the Ugandan case was an important opportunity for the Constitutional Court to determine on the content of law and application of the right to life and right to health does not only hold true for Uganda, but also for any country on the continent that desires to move solidly towards improving maternal health. However, the activism of organizations such as The Center for Health, Human Rights and Development (CEHURD) in Uganda (as demonstrated by their litigation of three of the five cases in this

HIGHLIGHT continued...

Chapter) is evidence that impact litigation is an indispensable advocacy tool for influencing substantive changes regarding maternal health care and services. Sadly, the African continent seems to lack a critical mass of non-profit organization that are working on this agenda in their respective countries.

The Human Rights Council has recognised that applying a rights-based approach to the reduction of maternal mortality and morbidity is key to achieving desired milestones.⁴⁴ Thus the continent should guard against maternal health rights violations that are reinforced by blindness to a human rights-based approach in health facilities, goods, and services. Both lawyers and courts have to be savvy about basing arguments and rulings on human rights standards in reproductive health jurisprudence. Though the cases had positive outcomes, some of the judgments, such as *CEHURD v Nakaseke*, and *Ntsele v. MEC for Health*, missed the opportunity to apply a more robust human rights analysis.