



**Omusundi & another v Superintendent of Nakuru Level Five Hospital & 2 others
(Petition E13 of 2021) [2022] KEHC 10535 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10535 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION E13 OF 2021
HK CHEMITEI, J
JUNE 23, 2022**

BETWEEN

LABAN OMUSUNDI 1ST PETITIONER

WALTER K MWANIA 2ND PETITIONER

AND

**SUPERINTENDANT OF NAKURU LEVEL FIVE HOSPITAL 1ST
RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER OF HEALTH – NAKURU
COUNTY 2ND RESPONDENT**

NAKURU COUNTY ASSEMBLY 3RD RESPONDENT

JUDGMENT

1. The petitioners herein moved the court through the petition filed on 28th May 2021 against the respondents seeking the following prayers:
 - a. A declaration that the act of arbitrary detention by the 1st and 2nd respondents in any health care facility in Nakuru County over unpaid medical bills is a violation of Articles 28, 29(B)(D) (f)/39(1) and 47 of *the Constitution* of Kenya.
 - b. An order that 1st and 2nd Respondents be permanently restrained from detaining any patient upon discharge as a result of their inability to pay medical bills in Nakuru County.
 - c. An order directed to the 3rd respondent under its constitutional obligation requiring them to take legislative and policy measures to eradicate the practice of detaining patients who cannot pay their medical bills upon their discharge and taking necessary steps to protect patients from arbitrary detention in any private or public healthcare facility and coming up with procedures



for implementing a transparent and accountable waiver system in all public health care facilities in Nakuru County.

- d. Cost of the petition.
2. The petitioners claim that the 1st respondent refused to disclose information that they sought from them through the letters dated 9th March 2021, 11th March 2021 and a reminder sent on 1st April 2021. The petitioners also stated that the 2nd respondent refused to disclose information sought from them through the letters dated 1st April 2021 and a reminder sent on 16th April 2021.
 3. The petitioners stated that the refusal by the 1st and 2nd respondents to disclose the information that they were seeking violates their rights of fair administrative action as provided for under Article 47 of *the Constitution* of Kenya.
 4. The petitioners state further that the 1st and 2nd respondents detain patients that have been unable to pay their medical bills which is contrary to Article 28, Article 29 (b)(d)(f), Article 39 (1) and Article 47 of *the Constitution* of Kenya. That the 2nd petitioner has sought for the release of some of the patients who are detained at Nakuru level 5 Hospital but the 1st and 2nd respondents failed to provide him 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.
 5. The petitioners stated that the bills of the detained patients doubled during the period of detention. That whereas patients ought to pay for services provided by the hospitals, there is a need for a policy framework to guide hospitals on how they can recover their medical bills while respecting the dignity of Kenyans as provided for under *the Constitution*. That there is no such policy to be relied on by the 1st and 2nd respondents in determining how long a patient should be detained.
 6. The petitioners averred that the 3rd respondent is under an obligation by *the Constitution* to provide oversight and legislate. That the 3rd respondent has failed to protect patients from unlawful detention in public healthcare facilities by not enacting laws and policies that would prevent arbitrary detention of patients who are unable to pay medical bills upon their discharge. That the 3rd Respondent has failed to create an accountability mechanism within health facilities that will monitor the detention of patients in both private and public healthcare facilities in Nakuru County.
 7. They also averred that the 3rd respondent does not act on public petitions as out of 35 public petitions filed since November 2017, only 10 have been dealt with.
 8. The petition is supported by an affidavit dated 10th May 2021 and sworn by the 1st petitioner which reiterates the above averments.
 9. The 1st and 2nd respondents filed a response to the petition dated 25th August 2021. They averred that they did not dispute the contents of paragraphs 3 of the petition but they challenged the locus standi of the petitioners. They also stated that they did not dispute the contents of paragraph 4 of the petition and that the present matter is not of public interest. They further stated that they dispute the contents of paragraphs 7 and 8 of the petition and reiterated that the hospital is not a detaining center but an institution that offers medical care. That under the Facility Improvement Regulations, the hospital runs a fund known as the Facility Improvement fund and in order to meet its day to day operations, it does not offer free health care.
 10. They denied the contents of paragraphs 9, 10, 11, 12, 13 and 19 of the Petition and stated that the petitioners are not entitled to the orders sought and prayed that the petition be dismissed with costs.



11. The 1st respondent also filed a replying affidavit to the petition sworn by Dr. Aisha Maina on 21st September 2021. She deposed that vide the letter dated 15th March 2021, the petitioner wrote a letter to the County Executive Committee Member of Health- Nakuru County requesting for information on the persons detained at the Nakuru Level 5 Hospital. That Nakuru Level Five Hospital is an institution that offers medical care and requires funds to meet its day to day operations and does not offer free health care services.
12. She deposed further that the information sought by the 2nd petitioner in regard to the board resolution relied on by the department of health would infringe on the rights of the patients provided for under Article 31 of *the Constitution* since no consent would have been sought and obtained from those patients by the petitioners. That the laws and policies the petitioner sought were already in the public domain and can be obtained through the internet. That the hospital operates a fund called the Facility Improvement Fund under the Facility Improvement Regulations which grants waivers on a case by case basis.
13. She also deposed that the petitioners are not entitled to the orders sought since the hospital has not infringed or violated any provisions of the law as alleged and further the petitioners have not demonstrated any special circumstances for the grant of the orders sought.
14. There is an affidavit on record sworn by Daniel Murugu on 18th November 2021 and filed on 24th November 2021 and it appears the same is in support of the respondent's case.
15. When the matter came up for hearing the court directed the parties to file their written submissions which they have complied.

Petitioners' submissions

16. The petitioners in their submissions identified the issues for determination namely; whether the petition has locus standi, whether the petition has raised constitutional issues in the petition, whether the petitioners had the right to access information sought, whether there is a practice of detention of patients who are unable to pay medical bills upon discharge at Nakuru Level Five Hospital, whether there exists a transparent hospital bill waiver system guidelines to protect poor patients who are unable to pay their medical bills upon discharge, whether the 3rd respondent has slumbered in its constitutional mandate in coming up with regulatory laws to protect poor patients who are unable to pay their medical bills upon discharge and whether the petitioners are entitled to the orders sought.
17. On whether the petition has locus standi, the petitioners submitted that they had locus standi as this was a public interest matter and that the petitioners had an obligation to defend *the Constitution*.
18. On whether the petition has raised constitutional issues, it was submitted that the 1st and 2nd respondents have violated Article 28 and Article 35 of *the Constitution* and Section 96(1) of the County Government Act 2012. They relied on the cases of *Gideon Kilundo & Daniel Kilundo Mwenga vs Nairobi Women's Hospital* [2018] and *M A & Another vs Honorable Attorney General & 4 Others* [2016] eKLR.
19. On whether the petitioners had the right to access the information sought, it was submitted that the 1st and 2nd respondents had not indicated in their response how the several access to information applications made by the petitioners could not be provided for.
20. On whether there is a practice of detention of patients who were unable to pay medical bills upon discharge at Nakuru Level Five Hospital, it was submitted that Appendix 1, 2 and 5 of the Petition contains the details of the patients who had been detained at Nakuru Level Five Hospital.



21. On whether there existed a transparent hospital bill waiver system and guidelines to protect poor patients who were unable to pay their medical bill it was submitted that in response to the petition, the 1st and 2nd respondents stated that waivers are granted on a case by case basis which they argued demonstrated lack of a transparent hospital bill waiver system.
22. The petitioners then submitted on whether the 3rd respondent had slumbered in its constitutional mandate in coming up with regulations/laws to protect poor patients who were unable to pay their medical bills upon discharge, they submitted in the affirmative and stated that hospital bill waiver laws would enhance transparency and accountability in assessing needy cases deserving of waivers.
23. In conclusion they submitted that they are entitled to the prayers sought as they only intend to uphold the rule of law and constitutionalism.

1st and 2nd Respondents Submissions

24. The 1st and 2nd respondents in their submissions identified the following issues for determination; whether the petition meets the set threshold for a petition, whether the petition has been instituted in the interest of the public, the right to access of information sought and who should bear the costs of the suit.
25. On the first issue, the 1st and 2nd respondents relied on the cases of *Anarita Karimi Njeru vs Attorney General and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] and submitted that the petition as drafted does not meet the threshold for a petition.
26. On the second issue, the 1st and 2nd respondents submitted that they had not infringed any provisions of the law and that the petitioners had failed to demonstrate any of the allegations against them. They relied on the cases of *Albert Ruturi, JK Wanywela & Kenya Bankers association vs The Minister of Finance & Attorney General and Central Bank of Kenya* and *Priscilla Nyokabi Kanyua vs Attorney General and the IIEC*.
27. On the third issue it was submitted that the information sought by the petitioners would infringe on the rights of the patients as provided for under Article 31 of *the Constitution*. In conclusion the 1st and 2nd respondents sought for the petition to be dismissed with costs to them.

Analysis and Determination

28. Upon analyzing the facts of the case, evidence and the submissions tendered by the parties, two issues arise for determination namely; whether the petition meets the set threshold for a petition and whether the petitioners are entitled to the prayers sought in the petition.
29. In addressing the first issue, whether the petition meets the set threshold for a petition the issue of competency of the petition was set out in the case of *Anarita Karimi Njeru vs. Republic* [1976-80] KLR 1272 which laid out the principle that a person who alleges a violation of his constitutional rights and freedom must plead such allegation with a degree of precision was laid out. This principle was restated by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance* [2013] eKLR the court stated as follows: -

“The principle in *Anarita Karimi Njeru* (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective. Principle under section 1A



and 1B of the *civil procedure Act* (Cap 21) and Section 3A and 3B of the *appellate Jurisdiction Act* Cap 9.

Procedure is also a hand maiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (Supra) that established the rule that requires reasonable precision in framing of issues in Constitutional petitions is an extract of this principle.”

30. The above decisions clarified the necessity of clarity in constitutional litigation. However, this court being a constitutional court has a duty to protect the rights of every individual as preserved in our Constitution and as such the court should not be quick to dismiss a petition on the ground that it has not been drafted with elegance. The strict approach established in the *Anarita Karimi Njeru* case has since been relaxed to some degree. in *Musili Mwendwa v Attorney General & 3 others* [2016] eKLR Petition No. 321 of 2013, where the court stated thus: -

“The rule in *Anarita Karimi Njeru vs Republic* (supra) ought not be applied hook line and sinker. It is not about absolute precision. If a party and, a priori, the court is able to painlessly identify the complainants’ case, then the matter ought to be determined substantively and on its merits.”

31. I have perused the petition together with the supporting affidavit and the written submissions by the petitioners and find that they have 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. They argue that there is violation of the right to freedom and security, the right to be detained without trial under article 29 (B) (D) (F), the right to freedom of movement under article 39(1) and the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair under article 47 of *the Constitution* of Kenya 2010.
32. The petitioners have however not specified the persons who the said rights have been infringed against. Further, there is no proof on the manner the said rights have been violated an example is proof of detainment at the 1st respondent facility. The persons allegedly detained have not neither their relatives demonstrated by any iota of evidence any such forceful detention. Although the petitioners may be true spirited constitutional protectors it would have been appropriate to get some input from the victims or their relatives.
33. At the same time even where there could be waiver the petitioners did not demonstrate any biasness or oppression on any of would be patients or their families. Considering the fact that the hospitals or such public facilities needs funding, the little resources must be shared equitably without any discrimination or at all. None was proved by the petitioners.
34. More importantly they have not denied that the respondents jointly and severally have not provided the policy guidelines in such unfortunate but true situations. My understanding is that the respondents ought and must have such framework indicating how indigent members of our society visiting hospitals for medical attention in the event they are unable to foot the bills are assisted through waiver. Nonetheless they have the obligation of making it public without compromising the privacy of the patient.
35. Other than what can be obtained in the public domain, what the petitioners demanded from the respondents would in essence compromise the privacy of the patience which runs contrary to the provisions of *the constitution* cited above unless of course they first obtain their consents.



36. The sum total of my finding is that though framed as a constitutional petition, the evidence in support does not specifically set out the articles violated by the respondents. As a matter of fact, the same could still be achieved through the other judicial means.
37. The petition is otherwise disallowed and without costs as the issues raised by the petitioners were for the interest of the public and not themselves.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 23RD DAY OF JUNE 2022.

H K CHEMITEI.

JUDGE

