



**CKN & another v Nairobi South Hospital (Petition E082 of 2021) [2022] KEHC 16497 (KLR)
(Constitutional and Human Rights) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E082 OF 2021

HI ONG'UDI, J

DECEMBER 20, 2022

**IN THE MATTER OF ARTICLE 22(2), 23(3)(F), 25(A), 28, 29, 39,
53(1)(C)(D)(F) & 53(2) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF SECTIONS 4, 6 & 18 OF THE CHILDREN'S ACT NO. 8 OF 2001

AND

**IN THE MATTER OF ARTICLES 12 & 13 OF THE
UNIVERSAL DECLARATION ON HUMAN RIGHTS**

AND

**IN THE MATTER OF ARTICLE 7, 9(1) & 12(1) OF THE
INTERNATIONAL CONVENTION ON CIVIL & POLITICAL RIGHTS**

AND

IN THE MATTER OF JRC & MMC (MINORS)

BETWEEN

CKN 1ST PETITIONER

VAO 2ND PETITIONER

AND

NAIROBI SOUTH HOSPITAL RESPONDENT



JUDGMENT

1. The petitioners herein have filed this petition on their own behalf and on behalf of their children (JRC & MMC). In the petition dated March 17, 2021 the petitioners seek the following orders:
 - a) A declaration that the Respondent conduct of holding onto the minors as lien as a condition for payment of the outstanding hospital medical bill is unlawful and unconstitutional violates the minors rights guaranteed under Articles 28, 29(1), 39(1), 53(1) (c) & (f) and (2) and the petitioner's' rights under Article 25(a).
 - b) That an order of Mandamus do and is hereby issued compelling the Respondent to immediately and unconditionally release the minors JRC & MMC
 - c) General Damages for violation of the petitioner's' and the minors fundamental human rights and freedoms in (a) and (b) above.
 - d) The cost of this petition be borne by the Respondent.

The Petitioners' case

2. In the petition, and the supporting & supplementary affidavits by the 1st petitioner, the petitioners assert that the minors' rights under the children's universal declaration on human rights and international convention on civil and political rights have been violated. It's deponed that the violation occurred when the children were detained in hospital by the respondent against the petitioners' will. The reason being that the petitioners had failed to pay an outstanding medical bill. They also claim that despite an order for release of the minors issued by the Court on March 17, 2021, the same was not complied with until March 22, 2021 after an application for contempt of court was filed against the hospital (respondent).
3. The petitioners have averred that by its actions the respondent violated their rights and those of the children to freedom from torture and inhuman treatment. That the holding of the minors as a lien exposed them and the petitioners' to untold emotional and psychological torment, distress and torture, which is against their best interest. They rely on Article 25(a) of the Constitution in support. They state that holding the minors in hospital for failure to pay the bill restricted their movement, hence violating Articles 29(1), 39(1), 53(1) & (2) of the Constitution, and section 18(1) of the Childrens Act.
4. On the conduct of the respondent it is averred that the same militates against the minors' rights and their best interest has been jeopardized.
5. In the supplementary affidavit, the 1st petitioner has averred that the replying affidavit ought to be struck out as it is not commissioned. Further that if the machines were specifically for use by his sons then the same ought to have been handed to them upon discharge. He does not deny the fact that the respondent undertook its professional duties in caring for his sons.
6. He denied being informed of the reason for the continued detention of his sons on March 5, 2021 when the 2nd petitioner was being discharged. He states that after March 5, 2021 no treatment was administered on the minors and so there ought not to be any charges for the same.



7. He averred that he was coerced into giving a commitment to clear all the outstanding arrears as a pre-condition for the release of the first two minors. He narrated the challenges he went through in trying to enforce the Court order of March 17, 2021 which he took to be deliberate avoidance by the respondent. That it was only after filing the contempt vide an application dated 2March 2, 2021 that the respondent released the minors. It's his averment that prior to this he had made several pleas which had been ignored by the respondent.
8. He deponed that neither him nor the 2nd petitioner made derogatory statements against the respondent. He added that it is the respondent's conduct that attracted public scrutiny, including the media. That it was not unlawful for them to seek medical attention from the respondent's facility.

The respondent's case

9. In response to the petition the respondent filed a replying affidavit dated March 29, 2021 by Stephen Naulu Mutavi, its administrative manager, at the Nairobi south hospital. He deponed that the 2nd petitioner's four (4) sons were prematurely delivered through a C-section on February 11, 2021, at the respondent's facility. The respondent had to purchase two more CPAP machines to accommodate the four (4) minors. Since they were underweight they were kept at the Neonatal Intensive Care Unit. They therefore required specialized care and treatment which came with a considerable cost.
10. Two of the minors were discharged into their grandmother's care upon attaining the required weight, since their mother still needed medical care. This was on February 26, 2021. The 2nd petitioner was later discharged on March 5, 2021 but the two other minors remained behind due to their low weight. They were later discharged on 14th March on the recommendation of the Pediatric doctor. (SNM-1).
11. He averred that as 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 (SNM-2). At the time of discharge of the remaining minors (March 25, 2021) the outstanding bill was Kshs 3,137,848.83, which is yet to be settled.
12. He deponed that all along the petitioners have never been serious about settling the respondent's claim. Even the pledge the 1st petitioner made on March 15, 2021 (SNM-4) has never been honoured. It's his disposition that the respondent complied with Article 43(1)(e) of the Constitution by offering medical services to the 2nd petitioner and her four (4) babies. That the petitioners' medical insurance AAR undertook to only pay Kshs 200,000/= as the limit (SNM-5). The petitioners never notified the respondent that they were not able to settle the charges for a private facility. He further depones that before starting an online campaign to tarnish the respondent's name, the petitioners had never made any offer of settling the respondent's claim.
13. It's his averment that the petitioners have not shown how their fundamental rights have been violated by the respondent. He further averred that the respondent's relationship with the petitioners is contractual and upon the respondent rendering its services the petitioners are expected to pay for the same.

Submissions

The Petitioners' submissions

14. The petitioners submissions were filed by Mola Kimosop & Njeru advocates and are dated December 3, 2022. Counsel starts by submitting that there is no law that permits any hospital to detain a human being as a lien for payment of medical bills. That in this case those detained were minors who were



detained from 5th March to March 25, 2022. He submits that from the hospital bills annexed to the affidavits there was no treatment accorded to the minors besides the constant visit by doctors and nurses with a huge unexplained cost, implication. Thus a violation of Article 29 of the Constitution.

15. Counsel submitted that the detention of the two minors over an unpaid bill is unconstitutional. In support he relied on:

- (i) *Emmah Muthoni Njeri v Nairobi Women's Hospital [2021] eKLR*.
- (ii) *Sonia Kwamboka Rasugu v Sandal wood Hotel & Resort Limited T/A Paradise Beach Resort & Leon Muriithi Ndubai [2013] eKLR*
- (iii) *Tryphosa Jebet Kosgey v Elgon View Hospital [2016] eKLR*.

He also relied on Article 25(a) of the Constitution to buttress this point.

16. He contended that the dignity of the minors was degraded by this inhuman treatment. He stressed that the minors were unlawfully kept away from their mother. This he submits cannot be justified at all. To support this he relied on *Koigi Wamwere v Attorney General [2015] eKLR*.

17. In winding up on this point counsel referred to the case of *MAA v ABS [2018] eKLR* where it was held:

' 31. The Constitution of Kenya 2010 requires that in all matters concerning children, the best interest of the child shall be of paramount importance. Article 53(2) of provides

'(2). A child's best interests are of paramount importance in every matter concerning the child.'

Section 4(2) and (3)(b) of the Children Act echo the constitutional imperative:

'(2).In all actions concerning children whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.

(3) All judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this Act shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to-

- (a) Safeguard and promote the rights and welfare of the child;
- (b) And promote the welfare of the child
- (c) '

32. What is stated in Section 4 (3)(b) of the Act is the paramountcy principle which is vital in all matters concerning children and must be given prominence. While considering this matter, this Court was alert to the welfare of the child herein who is of tender years. The matter is not about the Appellant and the Respondent and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the



interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the child, I am of the view that his welfare will best be served if he remains with his mother the Respondent.'

He thus submitted that the minors rights under Article 53(1) as read with Article 53(2) were violated.

18. Still on the issue of separation between the petitioners and the minors, counsel argued that the petitioners were psychologically tortured by this inhuman treatment. In support he cited *Charles Mwenda v Inspector General of Police, National Police Service & 2 others; Law Society of Kenya, interested party & 3 others [2021] eKLR*, and prayed for compensation.

19. Counsel relying on the authorities cited above submitted that once the dignity of a human being has been trampled on, no amount of money can bring it back. It is a simple warning to the owing party against a repeat. In the Emma Muthoni case an award of Kshs 3,000,000/= was made by Justice W Korir (as he then was), who stated thus:

' The Petitioner has no obligation to pay any expenses that may have been incurred by the Respondent in connection with her unlawful detention. No person should be compensated for costs or expenses incurred in the commission and perpetuation of unconstitutional acts.

77. In the circumstances, I find merit in the cross-petition and enter judgement in favour of the Respondent and against the Petitioner for the sum of Kshs 1, 784,634.39. The amount shall be set off against the Kshs 3,000,000 awarded to the Petitioner as general damages. That translates to Kshs 1,215,365.61.'

20. Counsel therefore prayed for a sum of Kshs 36,000,000/= as general damages broken down as follows:

- a. Kshs 12,000,000/= as general damages to the minor JRC for being illegally detained for 20 days.
- b. Kshs 12,000,000/= for as general damages to the minor MMC for being illegally detained for 20 days.
- c. Kshs 12,000,000/= as general damages to the minor 1st petitioner for the mental and psychological torture caused to him when the minors were unlawfully and illegally detained for 20 days.
- d. Kshs 12,000,000/= as general damages to the minor 2nd petitioner for the mental and psychological torture caused to her when the minors were unlawful and illegally detained for 20 days.

Further that the respondent should be condemned to pay costs of the petition and application.

The respondent's submissions

21. The respondent's submissions are dated June 4, 2022 and filed by Sallah & company advocates. Counsel submitted that the respondent being a medical institution of repute and which employs qualified and skilled personnel to provide medical care only relied on the Judgment of its medical staff to discharge patients. It is his submission that the minors were kept in hospital since their weight was very low and they were too small. Their mother could not also feed them as she was admitted and



treated for numerous complications. It was therefore only the doctors who decided when to discharge them.

22. Counsel has submitted that there is no evidence to show that the minors were ready for discharge on March 5, 2021 as claimed by the petitioners. That the respondent's record shows that the minors were ready for discharge on March 14, 2021 evening. He further submitted that the two remaining minors were provided with utmost care and services and were closely monitored by the respondent's doctors and nurses between 14th March – March 25, 2021 when they were physically discharged.
23. He submitted that the petitioners had failed to show how their rights and those of the minors were violated. He referred to [*Isaac Ngugi v Nairobi Hospital & 3 others \[2013\] eKLR*](#) and what Majanja J said about the burden of proof. He contended that the respondent offered good services to the 2nd petitioner and the minors. Further that the petitioners were well updated on the status of the outstanding bill. At no point did they notify the respondent of their inability to settle the bill. In justifying the need for payment of the pending bill, counsel outlined all the services that the respondent rendered to the 2nd petitioner and the minors. He cited the case of [*Gideon Kilundo & Daniel Kilundo v Nairobi Women hospital \[2018\] eKLR*](#) where the court stated:

' While it is true that the relationship between the petitioners and the respondent was a contractual one for which the respondent should pursue other lawful means of recovering the debt other than detaining their former patient, this court is of the view that it does not augur well for dispensation of justice for persons to walk into private hospitals for treatment and expect to walk out without paying a single cent under the guise of the constitutional protection of liberty and freedom of movement. My take is that it amounts to gross abuse of the process of court and a misinterpretation of the [*Constitution*](#).'
24. Counsel submitted that the 1st petitioner had on March 14, 2021 promised to bring a down payment of Kshs 1,000,000/= on March 15, 2021 and clear the balance by payment of Kshs 50,000/= monthly. He failed to honour the promise and instead filed this petition. There was no security offered by the petitioners for payment of the pending bill of Kshs 3,137,848/83.
25. He further submitted that in the court order dated March 17, 2021 the respondent was ordered to release the minors on condition that a security was provided. The petitioners without providing for security were demanding for discharge of the minors. They then filed an application for contempt which they later withdrew as it was them who had refused to comply with their own orders. He argues that even getting the security (motor vehicle) valued was an uphill task. It was eventually valued at only Kshs 800,000/= against the outstanding amount of Kshs 3,137,848/83. The balance is to be paid by monthly instalments of Kshs 50,000/= though the petitioners refused to enter into an agreement guaranteeing payment of the balance. It is therefore his submission that the petitioners have all along acted in bad faith. See *Veronicah Nyagai v Nairobi West hospital Petition No 63 of 2017 [2017 eKLR]*. In this counsel argues that the petitioners only acted following the Court orders of March 17, 2021.
26. Counsel while relying on [*Stephen Wanjau Karanja v The Nairobi Women Hospital Pet No 484 of 2017*](#) and Emma Muthoni Njeri (supra) submitted that before any award for damages is made the court should consider the background of each peculiar case. Further that each case depends on its own peculiar facts. He argued that in the cases relied on by the petitioners e.g Koigi Wamwere case (supra) Emma Muthoni Njeri case (supra) the petitioners had been detained for quite some time. In fact for Koigi Wamwere it was several years. In Tryphosa Jebet Kosgey (supra) it had been for seven (7) days only. In all the said cases the petitioners had been subjected to deplorable conditions but in the present case



the 2nd petitioner and two minors had been very well taken care of. That even the petitioners had been allowed to visit and stay with the minors in the course of their treatment at the respondent's facility.

27. It is counsel's submission that the petitioners have failed to prove the alleged violations of Articles 25, 28, 29, 39, 53(1) & (2) of the *Constitution*. That no evidence was adduced to show that the petitioners were tortured, nor treated in a cruel and inhumane manner (Article 25(a)). That they have also not shown any factual evidence on how their dignity and freedoms and security and those of the minors have been violated.
28. To sum up all this he cited Stephen Wanjiku (*supra*) where Mativo J (as he then was) stated:

' Granting the orders sought in this petition on the strength of the material and circumstances disclosed in this petition, would, in my view amount to being obsessed with the protection of a person who has lawfully incurred a Bill by allowing sympathy to shut our eyes in total disregard of the position of the Respondent who professionally and in good faith rendered services to a patient and in the process incurred an enormous costs which the petitioner himself undertook to pay at the time the patient was admitted. This would amount to flirting with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion.'

Also see *David Nyareru Bosire v Simon Njuguna t/a Bella Vista Lounge & another [2019] eKLR* where Ougo J stated:

' It is most probable that in the prevailing circumstances then, the petitioners were subjected to physical beating, torture, detention without trial among other violations but the court is deaf to speculation and imaginations and must be guided by evidence of probative value. When the Court is faced by scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation. I have gone through the entire court record and there is absolutely nothing to support the allegations made by the petitioners.'

29. Finally counsel submitted that the courts and laws should never be used to aide a party in breaching and escaping their obligations to pay a lawfully incurred debt. That this petition has no merits and is an attempt to misuse the Court to evade a lawfully incurred debt and is a gross abuse of the process.

Analysis and Determination

30. Upon consideration of the petition, affidavits, submissions, cited cases and the law I find the main issue for determination to be whether the petitioners have met the threshold for proof of violation of their constitutional rights.
31. A brief background reveals that the 2nd petitioner was admitted as a patient on maternity related issues at the respondent's facility on February 1, 2021. Through a C-section she delivered four (4) male babies at 31 weeks (CKN – (a)(b)(c) & (d)). Due to the postpartum complications arising from the pre-term birth and C-section the 2nd petitioner and the babies were placed on further treatment and had to remain at the hospital for a while. The minors, M & T were discharged on February 26, 2021 while the 2nd Petitioner was discharged on March 5, 2021 leaving behind J & M who were eventually discharged on March 25, 2021.
32. There is therefore no dispute that the 2nd petitioner and the four (4) minors were admitted and were treated, at the respondent's facility. This naturally generated bills which must be paid. It is true that no



bills should be charged against M and T after the February 26, 2021 and there is no evidence showing there are any charges in their account after the February 26, 2021. The same goes for the 2nd petitioner.

33. In respect of JRC and MMC, the petitioners allege they were discharged on March 5, 2021 while the respondent insists they were discharged on March 14, 2021. From the annexures (CKN 2b 2c, 2d & 2e);

(i) Twin one's bill is upto February 23, 2021

(ii) Twin two's bill is upto March 11, 2021

(iii) Twin three's bill is upto February 25, 2021

(iv) Twin four's bill is upto March 11, 2021

From the said annexures there is none of the minors who was discharged on March 5, 2021 as claimed by the Petitioners.

34. However, from the discharge documents by the respondents (SNM-1) Twin No 2 & 4 who I believe are 'JRC & MMC' were formally discharged on March 14, 2021. This has not been rebutted by the petitioners. All that the 1st petitioner states in his supplementary affidavit is that the discharge was only done after a lot of pleas and human outcry. That does not change the fact that the two minors were formally discharged on March 14, 2021. Following the discharge, the 1st petitioner proposed a mode of payment (SNM-4) dated March 15, 2021.

35. Despite the discharge, and the request for payment plan (SNM-4), the two minors were not discharged until March 25, 2022. This is the big question. I have checked the record and I do not see any response by the respondent on this pertinent request of the payment plan by the 1st petitioner.

36. Furthermore this Court issued an order on March 17, 2021 directing the respondent to immediately release the two minors to the petitioners upon furnishing of a security. The order does not talk of a specific or a security equivalent to the outstanding amount, as claimed by the respondent. Had that been the case Korir J (as he then was) would have clearly stated that in the Order of March 17, 2021. Counsel for the petitioners did write a letter dated March 18, 2021 to the respondent in respect of the court order of March 17, 2021, (CKN-1(a)). Counsel forwarded to the respondent the original logbook for motor vehicle registration no xxxx in the 1st petitioners name. He also made the 1st petitioner's proposed mode of payment known to them.

37. There is equally no evidence of a response to this by counsel. Instead the respondent in its submissions at paragraph 27 states:

' From the March 17, 2021 until the March 25, 2021 the petitioner refused to submit any worthwhile security for the outstanding charges until finally the respondent accepted a motor vehicle registered to the 1st petitioner. The respondent conducted a search, valued the security and entered into guarantor agreement with the 1st petitioner.'

38. Which is this motor vehicle that the respondent finally accepted as security? Could it be the same one that counsel for the petitioners had offered to them on March 18, 2021? Which are the unworthywhile securities which the petitioners had initially offered? I ask all these questions because the respondent has not placed any evidence on record to support the allegation that the delay in release of the minors was caused by the petitioners.

39. The next issue is whether the detention of these minors was justified.



40. Article 28 of the Constitution provides:

' 28. Every person has inherent dignity and the right to have that dignity respected and protected.'

Article 29 of the Constitution provides:

' 29. Every person has the right to freedom and security of the person, which includes the right not to be-

- (a) Deprived of freedom arbitrarily or without just cause
- (d) Subjected to torture in any manner, whether physical or psychological
- (f) Treated or punished in a cruel, inhuman or degrading manner.'

41. There is no dispute that the respondent had discharged and released the 2nd petitioner and the first two minors with no struggles despite there being a pending bill. However when it came to the two (JRC & MMC) they refused to release them upon their being discharged. The petitioners have interpreted the detention to mean they were being held as a lien for the outstanding bill.

42. The respondent has not come out clearly to explain its reason for detaining these innocent minors. Even with the court order it still held onto them. It is true they were owed money by the petitioners to whom they had rendered services. Was detaining the babies the only way through which they would have been paid? Even when offers were made by the 1st petitioner and through his advocate the respondent never acted. Why?

43. I agree with Mativo J (as he then was) in Stephen Wanjau Karanja (supra) when he explains what the ratio of any decision should contain. In this case the 2nd petitioner had been admitted, delivered 4 babies through a C-section. Part of the medical bill was paid by the 1st petitioner. The reason the babies had to stay in hospital was because their weight was too low. The respondent worked on this and the 2nd petitioner's complications very well. The 2nd petitioner and the first set of twins were eventually discharged and released on February 26, 2021 and March 5, 2022, respectively.

44. The petitioners did not at any point refuse to pay the respondent's bill, and what was outstanding was the balance of the said bill. So, why were the innocent babies detained in hospital after their discharge on March 14, 2021 to March 25, 2021 if it was not because of the balance of the hospital bill including their mother's bill?

45. What the respondent did to the two babies by keeping them away from their parents (the petitioners) was inhuman. There were no natural conditions that would make the respondent keep away these minors from the petitioners. What kept them away from them were the artificial conditions set by the respondent, as a result of non-payment of the balance of the medical bill. Had the respondent acted on the 1st petitioners proposal (SNM-4) or counsel's proposal (CKN-1(a)), or the Court order of March 17, 2021, the babies would not have remained in the respondent's facility until March 25, 2021. I therefore find that any medical bills incurred between 15th March – March 25, 2022 by the two minors should be cancelled as they were not supposed to have been at the respondent's facility during that time.

46. The respondent denied the babies the right to be with their parents and in particular their mother for purposes of bonding and being breastfed. This obviously caused the petitioners psychological torture. The minors are not able to speak for themselves and that is why their parents are representing them.



47. On the issue of damages and having found as I have done above I would argue that the circumstances of each case ought to be taken into account separately. Counsel have referred to a number of cases which I have also considered like:

(i) *Akusala A Borniface v OCS Langata Police Station & 4 others [2018] eKLR*

(ii) Emma Muthoni Njeri (supra)

(iii) Koigi Wa Wamwere (supra)

48. The petitioners proposed an award totaling to Kshs 48,000,000/= for a detention of 20 days for both petitioners and the two (2) minors. For avoidance of doubt I wish to clarify that it is only the two minors who were detained and not the petitioners. Further the period of detention was 10 days i.e March 15, 2021 to March 25, 2021 and not 20 days as claimed by the Petitioners.

49. From the foregoing I find it appropriate to make a declaration of the rights violated and to award the petitioners and the minors general damages for the said violation. I find an award of Kshs 3,000,000/= for each minor to be appropriate. I award the petitioners Kshs 500,000/= each.

50. I therefore enter Judgment for the petitioners against the respondent as follows:

(a) I declare that the conduct of holding onto the minors as a condition for payment of the outstanding medical bill is unlawful and unconstitutional as it violates the minors rights under Articles, 28, 29(1), 53(1) (c) 7 (f) and the petitioners rights under Article 25(a).

(b) The order of mandamus sought has been overtaken by events as the minors were released on March 25, 2021.

(c) Each minor is awarded Kshs 3,000,000/= as general damages.

(d) Each petitioner is awarded Kshs 500,000/- as general damages.

(e) Costs to the petitioners.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 20TH DAY OF DECEMBER, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

