



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 242 OF 2018

GIDEON KILUNDO.....1ST PETITIONER

DANIEL KILUNDO MWENGA.....2ND PETITIONER

VERSUS

THE NAIROBI WOMEN'S HOSPITAL.....RESPONDENT

JUDGMENT

1. The 1st and 2nd petitioners are son and father respectively. On 29th May 2018, the 2nd petitioner was involved in a road traffic accident and was rushed admitted to the respondent hospital's intensive care unit section upon the 1st petitioner's undertaking to settle the hospital bills.

2. On 25th June 2018, the 2nd petitioner was discharged from the hospital after gaining full recovery but was detained in the same hospital due to nonpayment of the hospital bill which stood at kshs 1,033,196/-thereby precipitating the instant petition.

Petitioners case

3. In the petition dated 5th July 2018, the petitioners seek the following orders:

- a) A declaration that the continued detention of the petitioner by the respondent is arbitrary and unlawful and a breach of Articles 29 and 39 of the Constitution of the Republic of Kenya 2010.**
- b) An order compelling the respondent to release the petitioner from the unlawful detention.**
- c) General damages for the violation of the petitioner's fundamental human rights.**
- d) Costs be awarded to the petitioners.**

4. The petitioner's case is that the detention of the 2nd petitioner in hospital for a debt is illegal and infringes on his constitutional and fundamental rights and enshrined under Articles 28, 29 and 39 of the Constitution as well as Articles 13 of the Universal Declaration of Human Rights.

5. The petitioner's case is that to the extent that the 2nd petitioner's detained by the respondent for a contractual debt, then his freedom of movement has been infringed contrary to Article 39 of the Constitution and Article 12 of the International Convention on Civil and Political rights.

6. At the hearing of the petition, **Mr Wetaba**, learned counsel for the petitioners submitted that the question before the court is whether the respondent has a legal mandate detain persons for failure to pay bills. Counsel relied on the decision in the case of **Veronica Nyangai vs Nairobi West Hospital Ltd [2017] e KLR** wherein it was held that a hospital bills.

7. Counsel also relied on the case of **Christine Kidha vs Nairobi Women's Hospital [2016] e KLR** wherein it was held that detention of a person to compel the person to perform a contractual duty is an insult to the right and liberty and a violation of that right under the Constitution.

Respondent's case

8. The respondent opposed the petition through the replying affidavit of its Chiefs Finance Officer **Reuben Waweru** sworn on 19th July 2018. He confirms that 2nd petitioner was admitted at the respondents facility in critical condition and that the respondent duly complied with the law and its duties under Article 43 (1) (e) of the Constitution by offering him treatment until he fully recovered. He further states that upon admission, the 1st petitioner undertook, in writing to settle any outstanding hospital bills. He attached a copy of the written undertaking to the replying affidavit as annexure "**RW1**". He avers that the respondent's policy was to admit patients requesting intensive care unit services without demanding any fees/deposit but that during the treatment period. It was constantly demanded it fees from the petitioners who continued to assure the hospital that the bill shall be settled in full and that at no time did the petitioners advise the hospital that they would not be in a position to settle the said bill.

9. According to the respondent, it could have advised the petitioners to transfer to another facility had they indicated that they would be unable to settle the bill. The respondent contends that the petitioners have to date not made any proposal to settle the bill or offered any form of security on how the same would be settled.

10. It is the respondent's case that the petitioners have acted fraudulently and in bad faith by accessing medical care and attention only to disclose at the point of discharge that they cannot afford to settle the bill which stands at kshs 1,033,196/=. The respondent maintains that its incurred substantial costs in terms of medicines, laboratory services, imaging, doctors costs and nursing care towards the treatment of the 2nd petitioner and hence, the hospital is entitled to recover its costs in order to meet its financial obligations.

11. The respondent's advocates submitted that it had not violated any of the 2nd petitioners rights as it had taken care of all his need while in the hospital premises. Counsel argued that the respondent's action was justified, under Article 29 of the Constitution in view of the fact that the hospital bill was not contested by the petitioners. He relied on the decision in the case of **Ludidi Venant & Another vs Pandya Memorial Hospital [1998] e KLR** wherein Waki J. (as he then was) issued a mandatory injunction subject to the plaintiffs filing an undertaking to pay damages limited to kshs 60,000/-.

12. On whether the petitioners are entitled to orders for mandatory injunction, counsel submitted that such an order can only be granted in an extra ordinary remedial process in exercise of judicial discretion and not as a matter of right in which case the court is entitled to take into account the nature and facts of the case, and the conduct of the parties.

13. It was submitted that the petitioners had not satisfied the requisite threshold for the grant of the orders sought as they had not shown the efforts that they had taken to settle the bill and neither had they demonstrated that they lacked the means to settle the bill.

14. Counsel further argued that rights and freedoms do not exist in isolation as Article 24(1) (d) of the Constitution provides for the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others. Counsel added that under Article 23(3) (e) of the Constitution, the respondent as a corporate individual is entitled to compensation for the good and selfless service that it had rendered.

15. It was the respondent's contention that it has proprietary rights over the fees that is being withheld by the petitioners under Article 40(1) and (2) (e) of the Constitution.

Determination

16. I have considered this petition, the response thereto, the submissions of counsel for both parties and the authorities that they cited. I note that the dispute before the court was precipitated by the petitioners failure/refusal to settle the hospital bill and in turn, the respondents refusal to release the 2nd petitioner upon his discharge from hospital on account of his failure to settle the hospital bills.

17. It was not in dispute that the 2nd petitioner was admitted at the respondent's hospital in a critical following his involvement in a road traffic accident. At the time of admission petitioner made a written undertaking to settle the hospital bills and on the basis of the said undertaking, the respondent proceeded to offer medical services to the 2nd respondent until he fully recovered. I have perused the declaration of commitment signed by the 1st petitioner and I note that at paragraph thereof, it is stated:

"I GEDION KILUNDO ID NO. 25936227 undertake to pay bills and expenses incurred by the above patient at Nairobi Women's Hospital. I understand that upon discharge the mode of payment will be cash or bankers cheque. The hospital does not accept company or personal cheques without prior arrangements."

18. The Constitution of Kenya provides for a wide array of rights under the Bill of Rights. Article 29 of the Constitution provides for the freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without a just cause. Article 28 provides that every person has inherent dignity and the right to have the dignity respected and protected while Article 39 provides that every person has the right to freedom of movement.

19. At the international front, there are international conventions and instruments which recognize human dignity, freedom, and respect. Article 2(6) of the Constitution stipulates as follows:

"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution".

Article 9(1) of the International Convention on Civil and Political Rights (ICCPR) which Kenya is a signatory to provide as follows:

“Everyone has the right to liberty of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”

The Article is clear that the right to liberty is no violable and that a person’s liberty can only be curtailed in accordance with procedural laws. Article 11 of the International Convention on Civil and Political Rights provides that no one shall be imprisoned merely for inability to pay a debt or discharge a contractual obligation. This refers to a situation where someone is committed to civil jail because he is unable to satisfy the decree. Article 6 of the Africa Charter on Human and Peoples Rights provides that every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by the law. In particular, no one may be arbitrarily arrested or detained. These international instruments support the protection of fundamental human rights that the right to liberty in inviolable except in accordance with the law.

20. Our courts have on numerous occasions been faced in cases revolving around detention of patients by hospitals for nonpayment of bills. Most courts have in such instances heeded the view that detention of the petitioner for their inability to pay their medical bills is unlawful, arbitrary and unconstitutional. (see **Christine Kidha v Nairobi Women’s Hospital** (supra), **MAO & another vs Attorney General & 4 Others [2015] eKLR** and **Tryphosa Jebet Kosgey v Eldogn View Hospital [2016]eKLR**.)

21. In the South African case of **Malachi v Cape Danle Academy International & Another [2010] CCT 05/COZ ACC 12** the court stated as follows:

“Freedom has two interrelated constitutional aspects; the first is a procedural aspect which requires that no one to be deprived of physical freedom unless fair and lawful procedures have been followed. Requiring deprivation of freedom to be in accordance with procedural fairness is a substantive commitment in the Constitution. The other constitution aspect of freedom lies in a recognition that in certain circumstances even when fair and lawful procedures have been followed, the deprivation of freedom will not be constitutional because the grounds upon which freedom has been curtailed are unacceptable.”

22. Courts have also held the view that detention of a person cannot be lawful if it is carried out by an unlawful authority and further, that even where such detention is carried out by a lawful authority, it must conform to procedural law.

23. It is an undisputed fact that the 2nd petitioner is being held in hospital because of non-payment of the hospital bill. The petitioners have not explained to this court, in a satisfactory manner or at all, the reasons why they have not settled the bill which they do not deny was incurred during the 2nd petitioners treatment by the respondent.

24. In this case, the court is undeniably faced with 2 competing interests, which are the 2nd petitioners right under Article 29 and 39 of the Constitution which are clear on the person’s liberty and freedom of movement and Article 40 on the respondent right to property.

25. My take is that in as much as the 2nd petitioner is entitled to his liberty and freedom of movement the respondent is equally entitled to its right to property and under these circumstances, the court is under a duty to balance both rights so as to dispense justice for both parties but at the same time bearing in mind the fact the rights and freedoms under Articles 29 and 39 of the Constitution are not absolute and cannot under Article 24(1) (b) be enjoyed at the expense of the fundamental freedoms of others.

Article 24(1) of the Constitution stipulates as follows:

“ A right of fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and ...”

26. In the instant case, the 1st petitioner admitted the 2nd petitioner to the respondent’s hospital with the full knowledge that the respondent is a private hospital where he will be required to settle the hospital bills. The respondent performed its part of the bargaining by treating the 2nd petitioner until he attained full recovery.

27. This court takes judicial notice of the fact that there are several public hospitals within Nairobi City including the biggest referral hospital in East and Central Africa, being Kenyatta National Hospital, where the petitioner could have admitted the 2nd petitioner for treatment at a cheaper cost but he opted not to do so and chose the respondent hospital only to decline to pay the bills upon discharge without offering any plausible explanation.

28. 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 the 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 for parties to wrong for the respondent to detain the 2nd petitioner.

29. From the wording of the undertaking that was made by 1st petitioner to settle the hospital bills, I do not find that there was any clause to the effect that failure to settle the bill will result in detention of the patient. What is evident, from the said undertaking, is that the

two parties entered into a contractual relationship in which the petitioners have failed to fulfil their end of the bargain. Under those circumstances, the respondent is at liberty to pursue the petitioner for the debt within the confines of the law governing the recovery of debts. I am not convinced that an illegal detention of a patient is one of the avenues for the recovery of a debt within our legal system, because the question which will arise is for how long the hospital will be expected to hold the patient. My take is that this is a classic example of a scenario where two wrongs will not make a right. In as much as the respondent is aggrieved by the failure by the petitioners to settle their debt. I find holding the patient is not one of the acceptable avenues or the debt recovery. Perhaps the respondents should relook at its debt recovery policy and admission of patients so as to avoid outcomes such as the one before the court.

Conclusion

30. Having regard to my findings and observations in this judgment I allow the instant petition in the following terms:

1. A declaration be an is hereby issued that the continued detention of the petitioner by the respondent is arbitrary and unlawful.
2. An order of mandamus is hereby issued compelling the respondent to release the 2nd petitioner from the unlawful detention.
3. Each party do bear their own costs.

Dated, signed and delivered in open court at Nairobi this 25th this September 2018

W. A. OKWANY

JUDGE

In the presence of:

Miss Were for the petitioners

Miss Wekesa for Mr Ngira for the respondents

Court Assistant – Kombo