



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. 8 OF 2015

TRYPHOSA JEBET KOSGEY.....PETITIONER

VERSUS

ELGON VIEW HOSPITAL.....RESPONDENT

JUDGMENT

1. The petitioner was admitted at the respondent hospital on 18th April 2015. She claims she was due for a discharge on 2nd May 2015. Owing to a dispute over her medical bills, she did not leave the hospital until 22nd May 2015. Her petition is dated 14th May 2015. The gravamen of the petition is that her detention for ten days was meant to pile up pressure on her to settle the disputed account; and, that it violated her constitutional rights. Those matters are buttressed in two depositions sworn by the petitioner; and, by her father, Martin Chepkieng, on even date.
2. The petitioner deposes that the conduct of the respondent transgressed Article 29(a) of the Constitution of Kenya; Article 9 of the Universal Declaration of Human Rights 1948; and, Articles 9 (1) and 11 of the International Covenant on Civil and Political Rights 1966.
3. She also contends that failure by the respondent to give her an itemized bill or to charge reasonable fees violated her consumer rights enshrined in Article 46 (1) (c) and (d) of the Constitution. She also avers that the action contravened her rights to fair administrative action contrary to article 47 (2) of the Constitution.
4. The petitioner craves five reliefs: first, a declaration that her rights have been violated by the respondent; secondly, an order for her release from the hospital (now overtaken by events); thirdly, an order for accounts; fourthly, general damages; and, fifthly, costs of the petition.
5. The petition is contested by an answer filed on 10th July 2015. There is also a replying affidavit sworn by Dr. Bwombengi, the director of clinical services at the facility. The respondent admits that the petitioner was admitted at the hospital on 18th April 2015 but denies that its services were unsatisfactory. The respondent states that the petitioner incurred a medical bill of Kshs. 404,000 by the date of her discharge on 20th May 2015. The bill was for treatment and medical services rendered to the petitioner.
6. The respondent states that the petitioner was aware of the kind of treatment she was receiving; and, that all the records of treatment were made and billed by the hospital. In particular, the respondent denies that it detained the petitioner unlawfully. The respondent claims it only sought settlement of the bill before releasing the patient. Finally, the respondent states that the court would be acting in futility because the

entire bill was settled; and, the petitioner discharged from hospital on 22nd May 2015.

7. On 26th April 2016, the court directed that the petition be heard by way of oral submissions; pleadings; and, the depositions on record. The petitioner had also filed a list of authorities on 14th May 2015. Learned counsel for both parties made their submissions on 26th April 2016. I have considered the petition, the two supporting depositions, answer to the petition, replying affidavit, precedents and the rival submissions.

8. I will deal first with the prayer for release of the petitioner from hospital. Contemporaneously with the petition, the petitioner lodged a notice of motion to compel the respondent to discharge her from the hospital. She had also prayed for an order to deposit security by way of a title and log book in court pending settlement of the bill. I certified the matter urgent and set it for hearing on 19th May 2015. On the latter date, the parties took out the matter from the cause list by consent. On 14th July 2015, the petitioner abandoned the interlocutory motion; and, confirmed to the court that she was released from hospital on 22nd May 2015. I accordingly find that this prayer has been overtaken by events.

9. The second important matter is that the respondent is a private medical facility. At paragraphs 3 to 8 of her affidavit, the petitioner avers that two days before admission to the facility, on 16th April 2015, she gave birth to a baby boy at Iten Hospital. She then developed some pain in her stomach. On 18th April 2015, the medical personnel at Iten referred her for further treatment in Eldoret. She was admitted to the respondent's hospital as in-patient number IP. 109/15. As she was a lactating mother, she had to stay with her new born child in hospital. The petitioner concedes that she received treatment and recovered. All those facts are not disputed.

10. Trouble arose on 2nd May 2015 or thereabouts when she was presented with the bill of Kshs 404,000. Although the petitioner contends that she was meant to be discharged on that date, there is no clear evidence of her discharge. I have looked closely at the letter from the hospital dated 6th May 2015 annexed to her deposition and marked "B". That letter states "*that she has incurred a bill of Kshs 404,000 and [she] is still on treatment*". I am alive that the petitioner claims she had fully recovered by 2nd May 2015. I am also alive that she is not a medical practitioner. From the letter she has annexed, she was still on treatment as at 6th May 2015.

11. The petitioner had come from another hospital, Iten Hospital. I accept that she found the bill from the respondent high. But I am not able to judge from the nature of her treatment and facilities that it was *exorbitant* as urged by the petitioner. I have stated that the respondent is a private hospital; and, the petitioner voluntarily sought services there. In real terms, there is an underlying contractual dispute. That is why there is a prayer for accounts.

12. I have then looked at the *five* payment receipts annexed to her affidavit marked "C". They are for a total of Kshs 130,000 all paid on 8th May 2015. It is thus beyond dispute that as at 8th May 2015, the petitioner had not paid the sums demanded by the respondent. From that evidence, I cannot say with confidence that the petitioner did not receive any treatment after 2nd May 2015 or at any rate after 6th May 2015. From an evidential standpoint, the claim that she was detained prior to those dates is on a weak platform. The burden of proof fell squarely upon her shoulders. See sections 107 (1) and 109 of the Evidence Act. See also *Margaret Wanjiru Ndirangu & 4 others v Attorney General* Nairobi, High Court Petition 210 of 2013 [2015] eKLR.

13. But I am prepared to accept that on 14th May 2015, she *opted to leave* the hospital but the hospital insisted on payment of the disputed bill. I say so because on that date, the petitioner filed the interlocutory motion that I mentioned earlier for her release. The petitioner claimed she offered security of a title and log book which was declined by the respondent. Unfortunately, there is no concrete evidence of such an offer to the respondent. What the petitioner did was to pray to the court to compel the respondent to accept such security. The petitioner was obligated to meet her contractual duties to the hospital. But the hospital could not enforce it by detaining her against her will.

14. The replying affidavit has not annexed an *itemized bill* or the patient's *discharge summary*. Nothing would have been easier than to exhibit the final statement of account and the details of services delivered. If a discharge summary was annexed, there would be no dark corners regarding the time the patient was discharged. I got the distinct impression that the respondent wanted to leave the petitioner; and, by extension the court, in a blind spot. But I am not satisfied that failure to render an itemized bill *ipso facto* was an unfair administrative action as urged by the petitioner. The facts here do not neatly fit into an action under Article 47 of the Constitution. I am not also satisfied on the evidence that the action of the petitioner contravened her consumer rights enshrined in Article 46 (1) (c) and (d) of the Constitution.

15. Notwithstanding the fact that the petitioner has met the charges, she is still entitled to a full account. The prayer for an account is allowed. I must however throw some caution to the petitioner: the prayer for an account is a double edged sword.

16. From my analysis, I cannot say that the petitioner's rights were violated until *after* 14th May 2015. The petitioner was held against *her will* for about *seven days* until 22nd May 2015. The hospital could have released her and recovered the debt in the manner provided by the law. But it chose the easier and perilous route of *detaining* the patient. That was a violation of her constitutional rights enshrined in article 29 (a) of the Constitution. See Ndegwa v Republic [1985] KLR 534, Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort and another, Nairobi, High Court, Petition 156 of 2011 [2013] eKLR.

17. Article 23 (3) (e) of the Constitution empowers a court to make *compensation* in any action brought under Article 22. I am prepared to award the petitioner damages. I have considered recent trends. In Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort and another, supra, the petitioner was detained in a hotel to enforce payment of bills incurred during a conference. In a well-considered judgment, Majanja J. awarded general damages of Kshs 1,000,000.

18. In other cases of serious violations including torture, inhuman and degrading treatment, loss of liberty and so forth, the courts have made higher awards. For example, in Koigi Wamwere v Attorney General, Court of Appeal, Nairobi, Civil Appeal 86 of 2013 [2015] eKLR the damages awarded by the High Court were reviewed upwards to Kshs 12,000,000. In Wachira Weheire v Attorney General, High Court, Nairobi Misc. Civil Case 1184 of 2003 [2010] eKLR, general damages of Kshs 2,500,000 were awarded. In Cornelius Onyango & 8 others v Attorney General, High Court, Consolidated Petition 233 to 243 of 2009, the general damages awarded were between Kshs 500,000 and Kshs 2,500,000.

19. All those cases can be distinguished here. The claimants in some of the cases had been held by State organs for long periods in deplorable conditions. In majority of those cases there were serious violations including torture, inhuman and degrading treatment and loss of liberty. I have found that the petitioner here was held against her will in a private hospital for about *seven days*; and, that she still had a bill pending. I have found there was no evidence that she tendered security for payment which was declined by the respondent. General damages are not meant to enrich a party. Article 23 (3) (e) of the Constitution in fact uses the term *compensation*. Granted the circumstances, an award of Kshs 100,000 is more than sufficient in this case.

20. The upshot is that the petition succeeds only in part. I declare that the petitioner was unlawfully detained at the respondent's hospital from 14th May 2015 to 22nd May 2015 in breach of Article 29 (a) of the Constitution. I award her general damages of Kshs 100,000. Interest shall apply on that sum from the date hereof until full payment. I order that accounts shall be taken on the medical bills incurred by the petitioner at the respondent's hospital. The accounts shall be furnished to the Deputy Registrar of the High Court who shall make a report to this court. The accounts shall be filed within *thirty days* of today's date. Either party shall be at liberty to apply. Considering the nature of the dispute, and that the petition succeeded only in part, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 19th day of May 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open Court in the presence of:-

Mr. Kigamwa for the petitioner instructed by Wambua Kigamwa & Company Advocates.

Ms. Odwa for the respondent instructed by Nyairo & Company Advocates.

Mr. J. Kemboi, Court Clerk.