REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 562 OF 2012

M A O

alias M A………….........................……………………1st PETITIONER

M A O……………….......................................………..2nd PETITIONER

VERSUS

THE ATTORNEY GENERAL………………………….....1ST RESPONDENT

MINISTER FOR LOCAL GOVERNMENT…...……...2ND RESPONDENT

CITY COUNCIL OF NAIROBI…………….………...3RD RESPONDENT

MINISTER FOR MEDICAL SERVICES….…………4TH RESPONDENT

PUMWANI MATERNITY HOSPITAL……………….5TH RESPONDENT

JUDGMENT

Introduction

1. This petition brings to the fore the challenges that citizens, particularly women, face with regard to accessing the right to health which is guaranteed to all persons under Article 43 of the Constitution. On 1st June 2013, the government issued a directive by way of a circular under which it removed all charges in respect of maternity services in public hospitals in Kenya. Prior to this date, however, patients were required to meet the cost of delivery in public hospitals. As a result, the practice of detention of indigent patients for inability to pay hospital charges was widespread. It is with respect to their detention at the Pumwani Maternity Hospital that the petitioners have approached this Court for redress.

The Parties

2. The 1st petitioner, M A O, also known as M A, describes herself as a HIV positive mother of six. She works as a casual labourer, washing clothes and cleaning houses. On a good day, she earns about Kshs300.00. Her daily expenses amount to approximately Kshs200.00 per day.

3. M A O, the 2nd petitioner, is a 35 year old mother of five. She works as a hair dresser and earns

between Kshs100-500 per day. Her income is not fixed and on occasion, she does not make any money. She is therefore unable to meet the cost of necessities for herself and her children.

4. The petitioners have lodged their claims against the respondents for various actions which they allege violated their right to, *inter alia*, health, dignity, liberty and their freedom from cruel, inhuman and degrading treatment. The 1st respondent is the Attorney General (AG) of the Republic of Kenya. He is sued pursuant to the provisions of Article 156(4) (a) of the Constitution of Kenya, 2010 as the principal legal adviser to the national government.

5. The 2nd respondent is the Minister then in charge of the Ministry of Local Government which was tasked with overall management and auditing of all the local authorities in Kenya. The 2nd respondent is sued for failure by the Ministry to regulate the services and management undertaken by the 3rd respondent in respect of the 5th respondent.

6. The 3rd respondent, the City Council of Nairobi (hereafter "the Council") was a local authority under the Ministry of Local Government and was tasked with the day-to-day running of the City of Nairobi. As part of this mandate, the Council was responsible for the running and management of the 5th respondent. The Council (whose mandate has now been taken over by the county government of Nairobi) is enjoined in this petition for its failure to appropriately manage the services undertaken by the 5th respondent.

7. The 4th respondent is the Minister then in charge of the Ministry of Medical Services of the Government of Kenya. The position is now held by the Cabinet Secretary in charge of health. His mandate then was to provide health services, create an enabling environment, regulate, and set standards and policy for health service delivery. The 4th respondent has been made a party to this petition for his failure to regulate and monitor the standards and policy framework for health delivery by the 5th respondent.

8. The 5th respondent, the Pumwani Maternity Hospital (hereafter "**Pumwani**") is the largest referral maternity hospital in East Africa. It was previously run by the City Council of Nairobi, but following the promulgation of the Constitution and the coming into existence of county governments, is now managed by the county government of Nairobi. Pumwani is joined in this petition on the basis that it is liable for the acts of commission and omissions by its staff against the petitioners.

The Petitioners' Case

9. The facts leading to the petition have been set out in the petition and affidavits in support, and are largely undisputed save with respect to the acts or omissions of the respondents. The petitioners also gave oral evidence at the hearing of the petition, and were cross-examined thereon.

10. On 20th September 2010, the 1st petitioner went to a clinic in Eastleigh in Nairobi in order to deliver her 5th child. She had chosen this facility because she knew that the cost of delivery would not exceed Kshs1,000.00. At the clinic, the staff member attending to her found that her baby was in breech position and surmised that the 1st petitioner would have a complicated delivery. She was therefore referred to the Pumwani Maternity Hospital. Upon arrival at the hospital, she was asked for Kshs3,600.00 but she only had Kshs1,000.00. She was also asked to purchase a cup, a plate and cotton wool, items she alleges that, to her consternation, were billed to her once more when she was discharged from the hospital.

11. Fifteen minutes after she was admitted at the hospital, the 1st petitioner gave birth to a baby girl, and did not have any of the complications that she had been told to expect. She spent the night at the hospital and was discharged the next day. Upon her discharge, the hospital asked her to pay Kshs3,600.00 which she did not have. The 1st petitioner decided to go and see a social worker at the hospital in order to seek help. However, the social worker asked her not to waste her time but to look for someone to settle her bill.

12. She states that her attempts to reach the hospital Matron to seek help were unsuccessful, and as she was unable to raise the amount demanded from her, she was detained by the hospital for a period of 24 days, between 21st September 2010 and 15th October 2010, during which time she suffered trauma. She states that she was rudely treated by the nurses, and she and other detained patients were forced to share beds. During the time of detention at the hospital, she noted that some of the detained mothers would elect to sleep on the floor and leave the beds for their babies, and she therefore slept on the floor on various occasions.

13. According to the 1st petitioner, the ward in which she was detained was next to a toilet that would occasionally flood, yet she only had one bed sheet and one thin blanket for protection. In addition, despite having recently given birth, she was never examined by the doctors to ascertain her health status. While she states that she never went without food during the period of her detention, she states that detained patients were always fed last and many times, the food would be insufficient.

14. The 1st petitioner also states that during the period that she was detained by the 5th respondent, she was worried about her other children whom she had left alone in her house. She had asked a neighbor to check in on them, but this was not constant, and due to the intermittent supervision, one of her children, who was on medication, discontinued her medication.

15. The 1st petitioner deposes that she was eventually released from the hospital when the Mayor of Nairobi at the time, Mr. Geoffrey Majiwa, visited Pumwani on 15th October 2010, and her friends reached out to him about her predicament. As a result, the Mayor wrote a cheque towards her medical bill, which led to her eventual discharge. The 1st petitioner alleges that after her release from Pumwani, she realized that she was suffering from pneumonia, which she believes she contracted from sleeping on the cold floor next to the flooding toilet.

16. The 2nd petitioner contends that she was first admitted, and detained, at Pumwani in 1991 when she was 15 years old. She was unable to deliver normally and therefore had a caesarian section. She regained consciousness ten days after the operation, upon which the hospital staff removed her stitches and then discharged her. Being just a young girl, she had no money to pay the bill, so the hospital detained her. She slept on the floor for a period of 7 days. During this time, the hospital had many patients, and the detained patients were always fed last and as such, she sometimes missed out on food.

17. After her husband had raised the money to have the 2nd petitioner discharged from the hospital, he took her home. She avers that her stomach continued to ache and she felt that something was pricking her in the stomach. Her husband decided to return her to the Pumwani Hospital for a checkup. At the hospital, she was rushed to theatre, where it emerged that a pair of scissors had been left in her stomach during the caesarian section.

18. In November 2010, the 2nd petitioner alleges that she had the misfortune of experiencing the Pumwani Hospital once more. At this time, she was expectant and was receiving antenatal care at a Nairobi City Council clinic. She states that she chose a City Council clinic since the cost of delivery would not exceed Kshs500.00. On 9th November 2010, she was on her way to an antenatal appointment when she started bleeding. She and her sister managed to find a taxi driver who drove her to the Pumwani Hospital. On arrival, the staff at the hospital instructed her sister and the taxi driver to place her on the floor. She was later informed by the nurses at the hospital that the hospital beds were fully occupied, and that she would have to wait for other patients to give birth before she could find a bed. She was told to wait on the bench in the reception area. All this time, she was still bleeding.

19. According to the 2nd petitioner, as she was waiting in the reception area, a female doctor came by and the 2nd petitioner heard the doctor tell the nurses nearby that her case was serious, that the baby she was about to deliver was in breech position, and that she could die. The doctor ordered that the 2nd petitioner be taken in for immediate surgery. She therefore underwent surgery on 9th November 2010 at 11:00 am despite the fact that she had been admitted at 9:00 am on the same morning.

20. After the surgery, the 2nd petitioner was taken to a ward bed. She states that the nurses were all very rude to her. For example, when she wanted to urinate, the nurses attending to her told her that if she thought she could stand and go to the toilet on her own, then she could do so by herself. Eventually, the nurses came and when they attempted to move her they noticed that the 2nd petitioner was bleeding heavily and therefore called a doctor. Upon examining her, the doctor informed her that she suspected that her bladder had ruptured. The 2nd petitioner was therefore taken back to theatre, where the doctors put in a catheter which she had to use for the next ten days. After the surgery, the 2nd petitioner noticed that her wound was infected and the stitches were badly done.

21. The 2nd petitioner states that she was discharged five days later. At this time, her wound still looked septic, and she still had the catheter, which was subsequently removed, according to the 2nd petitioner, five days too early. She did not have adequate money to pay her entire bill on discharge, and her offer to pay the Kshs6,000.00 that she had with her was rejected.

22. The 2nd petitioner states that she was never shown an itemized bill. She was due to leave the hospital on 13th November 2010, but was detained for failure to pay her medical bill. For the period of her detention, she was relegated to sleeping on the floor, and when she complained about being put on the floor, the nurses stopped dressing her wound. She was also not given a blanket, although her new born child continued to receive treatment as she had swollen limbs.

23. As was the case during her previous detention, she and other mothers who were detained and sleeping on the floor only received food after other paying patients had received their portions. She complains that in addition, during the period of detention, she was always locked in and would not even be allowed to go outside the ward to bask in the sun as the staff feared that she along with other detained patients would run away. She was eventually released on 19th November 2010 after her relatives managed to raise the Kshs12,300.00 demanded by the hospital.

Petitioners' Submissions on the Law

24. The petitioners contend that various violations of their constitutional rights occurred as a result of their detention. They state that the practice of detention in health care facilities occurs when patients are officially discharged but are unable to pay their medical fees. They are then detained against their will until they pay or until the health care facility is satisfied that they cannot pay. In addition to their original bill, those detained are often charged daily bed charges for each day of detention.

25. The petitioners contend that the practice of detention of patients as a result of their inability to pay their medical bills is a common practice, which has been documented in numerous reports by the media and non-governmental organizations working on social and economic rights in Kenya. They state that detention when giving birth in Kenyan health institutions and arbitrary detention for inability to afford the cost of medical services is not only possible, but a general standard of practice.

26. The petitioners allege that the practice of detention is a violation of the right to freedom of movement guaranteed under Article 39 of the Constitution of Kenya. It is their contention, further, that the said detention was a violation of their right to freedom and security of the person guaranteed under Article 29(d) and (f) of the Constitution. They contend that when they were unable to pay their medical fees, they were immediately secluded in a separate ward and continuously monitored by the hospital staff and guards so that they would not escape.

27. It is their case further that their detention without due regard to their recent deliveries placed their physical and mental well-being at risk and amounted to cruel, inhuman and degrading treatment contrary to Article 25(a) and Article 29 (f) of the Constitution. They argue that this was further compounded by the fact that they were in a position of vulnerability having recently given birth. The actions of the staff of the 5th respondent was contrary to Article 10(2) of the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** with regard to the obligation of state parties to accord the widest possible protection and assistance to families, especially to mothers, before during and after birth. The petitioners

have also alleged violation of other provisions of international instruments with respect to the family, to which Kenya is a party, which I shall revert to later in this judgment.

28. The petitioners also contend that their treatment at the hands of the Pumwani staff was a violation of their protection against cruel and degrading treatment. They contend that they underwent cruel treatment, which included being denied medical treatment by the hospital staff, experiencing verbal abuse, and being deprived of food on some occasions. They went through extreme discomfort in sharing beds with fellow detainees, and were not provided with appropriate bedding to keep them warm.

29. It is their submission further that these actions also amounted to a violation of the petitioners' right to dignity provided for under Article 28, their contention being that their detention in abysmal conditions failed to protect and respect the inherent dignity guaranteed to all under the Constitution as well as international and regional instruments. It is their contention further that the abuse they experienced was clearly carried out for the purpose of humiliation, and the said humiliation, as well as the harsh conditions under which they were detained, constitute cruel and degrading treatment which violates Article 29 of the Constitution and Article 10(1) of the **International Covenant on Civil and Political Rights (ICCPR)**. It is their contention that Pumwani could have employed other measures that are not extreme and that take into consideration the petitioners' dignity and freedom.

30. The petitioners submit that as part of the realization of the goal of provision of equitable and affordable health care at the highest affordable standards to her citizens, the government, through the Ministry of Health announced on May 5, 2007 that from 1st July 2007, maternity fees would no longer be charged in public hospitals. However, no action was taken to implement this initiative. It is their contention therefore that the cost of essential maternal health services in Kenya is still prohibitive, for both the rural and urban poor, and health institutions resort to the practice of detaining women who cannot pay for services within the health care institutions. The plight of the detained women is compounded by the fact that they continue to be charged a daily bed charge, which, as was the case with the petitioners, results in a daily increase in the medical bills. The petitioners submit that this state of affairs constitutes a violation of the right to health, and in particular the right to reproductive health care enshrined in Article 43 of the Constitution.

31. They further submit that the government of Kenya has failed to take appropriate action to implement a comprehensive strategy that provides women with affordable health care, particularly to those, like the petitioners, who live below the poverty line. As a result, women continue to experience detention and the attendant psychological trauma.

32. The petitioners submit that they recognize that there may be challenges of available physical and human resources. They contend, however, that the government has a duty to respect the right of its citizens to attain the highest standard of health care. In their view, the failure by the government to take appropriate measures or strategies to implement free maternity services and the fact that the petitioners expressed their fear of detention, ill-treatment and delayed medical treatment, demonstrates that the government is failing to uphold the constitutional provision articulated under Article 43 of the Constitution as well as in regional and international covenants.

33. The petitioners further view their detention and mistreatment from a gender perspective. They contend that the abuse that they were subjected to constitutes discrimination on the basis of gender, because only women require health care services for pregnancy and childbirth; and consequently, the rights violations associated with pregnancy and childbirth have a disparate and disproportionate adverse effect on women's health. This is particularly so with respect to indigent women.

34. According to the petitioners, poor patients are generally more affected by detention in health facilities since they do not have the means to cover their hospital bills. As hospitals like the 5th respondent have a policy to detain patients who cannot pay their medical bills, this amounts to indirect discrimination on the basis of social origin, which is in violation of Article 27(4) of the Constitution, as well as **Article 12** of the **Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)**, and **Article 2(1) of ICCPR** which imposes an obligation on states to ensure that there is no discrimination on

any basis within its territory.

35. The petitioners further submit that their detention was also in violation of the rights of the child. Their submission was that the practice of detention is particularly cruel in the context of new mothers, because their babies are oftentimes either separated from the mother or also kept in horrific detainment conditions. The petitioners contend that detaining a mother with a new born child is tantamount to abuse, and is not only a form of inhuman treatment or punishment to the mother but also to the child. Their submission therefore is that the respondents' actions violated the right of their newborn children to be free from abuse, neglect and all forms of inhuman treatment and punishment which is protected under Article 53 (d) of the Constitution.

36. The petitioners also fault the respondents for violating their right to the family, which they allege is a violation of Article 45 of the Constitution, as well as Article 5 of the Convention on the Rights of the Child (CRC). They contend that the family is the fundamental basis of society, and that the arbitrary detention amounted to an unlawful interference with the family because women who are detained are separated from their home life and that often includes their other children, for whom they may be the primary caregiver. It is also their case that such detention in hospital, moreover, restricts a mother's ability to provide the best care for any child she is detained with, which in turn may negatively affect the child's health.

37. The petitioners ask the Court to find that the violations enumerated above have occurred, and to grant them the following reliefs:

> ***a) A declaration that the detention of the 1st and 2nd Petitioners was arbitrary.***
>
> ***b) A declaration that the act of arbitrary detention in a health care facility is a violation of the constitutional and human rights standards that Kenya prescribes to.***
>
> ***c) A declaration that under its constitutional and human rights obligations, the Kenyan Government must take the necessary steps to protect patients from arbitrary detention in health care facilities, which includes enacting laws and policies and taking affirmative steps to prevent future violations.***
>
> ***d) A declaration that the conduct of staff/workers of the 5th Respondent against the 1st and 2nd Petitioner as set out in paragraphs 41 to 51 of this Petition constitutes an unlawful and unreasonable infringement of the Petitioners' fundamental rights and freedoms as set out in Articles 24(1), 25(a), 27(4), 28, 29 (a-d, f), 39(1, 3), 43(1[a], 2-3), 45(1), and 53(d) of the Constitution.***
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> ***e) An order for general damages for physical and psychological trauma occasioned on the Petitioners due to the omissions and or actions of the 5th Respondent's staff and or workers.***
>
> ***f) An order directed at the 3rd, 4th, and 5th Respondents requiring them to take administrative, legislative, and policy measures that eradicate the practice of detaining patients who cannot pay their medical bills by implementing the Ministry of Health's commitment to offer free maternity services in public facilities.***
>
> ***g) The Respondents provide adequate budget allocations to public facilities making article 43 of the Constitution a reality.***
>
> ***h) The Respondents develop clear guidelines and procedures for implementing the waiver system.***
>
> ***i) An order requiring the Respondents to create an accountability mechanism within health facilities that will monitor and ensure that the practice of arbitrary detention in health care***

facilities does not continue.

j) Any other or further orders or direction as this Court may deem just to grant.

Responses to the Petition

The 3rd Respondent's Case

38. The City Council of Nairobi, the 3rd respondent, opposed the petition by way of a replying affidavit sworn by Ms. Violet Avoga Oyangi, Acting Deputy Director in the Legal Affairs Department of the 3rd respondent, on 17th September 2013, as well as written submissions. At the time of the hearing of the petition, the Council had been replaced by the county government of Nairobi.

39. The 3rd respondent's position is that the petition is frivolous, vexatious, lacks merit and is otherwise untenable and an abuse of the process of the Court for, *inter alia,* failing to raise any reasonable cause of action against the 3rd respondent. It states that while it was in charge of the running of Pumwani Hospital, its role was merely administrative and did not touch on the day to day running of the hospital. It also states that it never at any point had any control over the patient-staff relationship at the hospital. The Council also claims that it never received any complaints from anyone about the conduct of the staff of the hospital, and if it had, the complaint would have been acted upon by the appropriate department.

40. The 3rd respondent submits that the petition falls short of the established threshold of a constitutional petition as it fails to disclose, with a reasonable degree of precision, the manner in which the 3rd respondent has violated any of the petitioners' rights. It relies on the case of **Anarita Karimi Njeru vs Republic (No. 1) [1979] KLR 154** in which the High Court set out the considerations which should guide parties as they seek to file a constitutional reference in the High Court.

41. The 3rd respondent further submits that it has, together with the national government, worked towards progressive realization of the social and economic rights of expectant mothers. Since July 1st 2013, all maternity bills in public health facilities have been waived, and the petitioners' prayers have therefore been overtaken by events. In support of its argument that the right to health should be realized progressively, the 3rd respondent relies on a passage from the decision of the Court in **John Kabui Mwai & 3 Others vs Kenya National Examination Council & 2 Others (2011) eKLR (Pet. No. 15 of 2011)** in which the Court found that an obstacle to the realization of socio-economic rights was the lack of adequate resources.

42. It is also the 3rd respondent's submission that the prayers sought cannot be granted in the manner sought by the petitioners since they all hinge on budgetary allocation, over which the Court cannot have purview. They again place reliance for this submission on the decision in **John Kabui Mwai & 3 Others vs Kenya National Examination Council (supra).** I shall revert later in this judgment to the views of the Court relied on by the 3rd respondent.

43. With respect to the petitioners' claim of discrimination, the 3rd respondent submits that the petitioners have not demonstrated in what way they were discriminated against, as they have provided no evidence that Pumwani provided a higher standard of service to other patients than it did to them. In its view, their claim cannot stand as the complaint is on the general provision of services, yet all those who go to seek medical assistance at the hospital are required to pay the sum of Kshs3,000.00. It was its prayer therefore that the petition should be dismissed.

The Case of the 1st, 2nd and 4th Respondents

44. The case for these respondents, which was presented by the office of the Attorney General, is set out in a replying affidavit sworn by the Cabinet Secretary for Health, Mr. James Macharia, and a further affidavit by Professor H. K. Segor, the Principal Secretary in the Ministry of Health. These respondents

oppose the petition, deny the allegations contained therein, and submit that the prayers sought by the petitioners cannot be granted as they have been overtaken by events as the government has since waived maternity fees in all public hospitals. They rely on a circular, which they have produced in evidence, to this effect and submit that this is evidence that the government is making all efforts to ensure that maternity services are accessible to all women.

45. It is their submission that the government is taking measures to ensure the progressive realization of the right to health. They enumerate these measures as including the development of the Kenya Health Policy 2014-2030 whose goal is to achieve the highest standards of health in a manner that responds to the needs of the Kenya population. One of the key objectives of the policy is to ensure that there are comprehensive maternal and reproductive health services which will be accessible by all Kenyan citizens. Other objectives of the policy include the reduction of the burden of violence and injuries, providing essential health care, minimize exposure to health risks, strengthen collaboration with other sectors that have an impact on health, and adequate and equitable distribution of health workforce.

46. The AG submitted that the measures being undertaken to strengthen reproductive health services across the country include maternal education and advocacy efforts which has led to improvements in service delivery in the health sector, partnering with non-state actors in provision of access to public health commodities and medical supplies and giving tax exemptions for donations in some of the health facilities. In addition, the government has begun facilitating provision of health promotion and targeted disease prevention and curative services through community based initiatives.

47. The respondents therefore aver that these steps are indicative that the government is committed to attaining the right to health, and intends to employ a human rights based approach in health care delivery by integrating human rights norms and principles in the design, implementation, monitoring and evaluation of health interventions and programmes, and that it will implement all the objectives of the policy to ensure that there is delivery of efficient, cost effective and equitable health services; that there is devolution of health service delivery, administration and management to the community level, stakeholders' participation and accountability in health services delivery, administration and management.

48. The respondents agree with the submission by the 3rd respondent that the petition has been overtaken by events since the government has waived all maternity fees in public hospitals, and that there is ample evidence that the government is doing all it can to ensure that all women can access maternity services.

49. While they concede that Article 43 of the Constitution provides for economic and social rights, it is their submission that these rights are progressive in nature and are not capable of instantaneous implementation due to the availability of resources. Their contention is that despite this, the government has made steps towards their progressive implementation, as is evidenced by the waiver of maternity fees in public hospitals from 1st June 2013. They contend that the reason why the waiver of fees, which, according to the petitioners had been declared since 2007, had not been implemented before 1st June 2013, and presumably why the petitioners did not benefit from it, is because the government lacked adequate resources to ensure the said services are realized.

50. The respondents submit further that Kenya is a small, third world country with an overwhelming population, and the state is only able to implement the economic and social rights with due regard to the available resources. They urge the court to consider Article 20(5) of the Constitution which provides the principles to be considered by a Court in applying any right under Article 43, among which are the principles that it is the responsibility of the state to show that the resources are not available, and that the court may not interfere with a decision by a state organ concerning the allocation of available resources solely on the basis that it would have reached a different conclusion.

51. With regard to the allegation by the petitioners that they were detained at the Pumwani Hospital, the respondents argue that the petitioners have not discharged the evidential burden under section 107 and 109 of the Evidence Act which imposes a burden on the person alleging the existence of certain facts to prove their existence. In the absence of evidence to prove the allegations made by the petitioners

regarding their detention and mistreatment by the staff of the 5th respondent, the respondents submit that the petition has no merit. They also dismiss the petitioners' allegation of torture in violation of Articles 25(a) and 29(d) of the Constitution. They ask the Court to be guided by the definition of torture and cruel and inhuman treatment in **Black's Law Dictionary (Gardner, Ed.) 8th Edition**, which was relied on in the decision of this Court in **Harun Thungu Wakaba vs Attorney General** ***[2010] eKLR*** **(Miscellaneous Application 1411 of 2004)**, as well as the definition of torture found in the **UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment**, adopted by the UN General Assembly in 1984. It is their submission that, on the basis of the said definitions, the petitioners' allegation of being subjected to torture and inhuman treatment does not hold as it does not amount to the definition of torture set out in these definitions. They therefore submit that the petition has no merit and pray that it be dismissed with costs.

The Case for the 5th Respondent

52. Pumwani Hospital, the 5th respondent and in respect of whose staff conduct this petition primarily arises, relies on an affidavit sworn by Dr. Lazarus Omondi Kumba on 13th June 2014. Dr. Kumba also testified orally at the hearing of the petition.

53. The position taken by the 5th respondent as captured in Dr. Kumba's evidence is that the petitioners are lying about the detention and abuse that they claim they underwent at the Pumwani Hospital. He deposes that if the petitioners were abused as they have alleged, there is a complaints procedure in place at the hospital under which patients can present their grievances. He states further that there is a complaints box at the entrance to the hospital, that patients are allowed to walk around the hospital and are free to drop a complaint in that box, which is opened every day, and the Sister- in-Charge compiles the complaints and then forwards them to the Matron who takes up the issue. Dr. Kumba further avers that once the hospital Matron is appraised of the complaints, she will visit the patient or call the patient to her office so the patient will know that her complaint is being addressed.

54. Dr. Kumba further deposes that should a patient not wish to use the complaints box, then she can complain to the nurse in charge, or lodge a complaint to the incoming nurse when there is a shift change. It was his evidence that the petitioners should have lodged their complaints as the nurses are easily identifiable; that while handling patients in the wards, nurses wear uniforms and have badges which indicate their names, and the petitioners would have been able to identify the nurses or doctors from their badges.

55. It was the 5th respondent's position, further, that there is a disciplinary procedure for nurses, which includes transfers to other wards in the hospital, demotion, withholding of promotions, dismissals or escalation to the county, and that the disciplinary committee has the mandate to give a warning, recommend demotion, or withhold a promotion.

56. With respect to the payment or waiver of maternity fees, the 5th respondent states that it has a waiver committee which meets weekly, but can meet urgently if there is need, to consider and determine who can access the fee waiver. It does not, however, inform patients in advance about the waiver system due to the potential for abuse.

57. According to Dr. Kumba, upon discharge, patients are shown an invoice which contains the total amount due, and the patient or a relative can then go and pay the bill. When a patient has delivered but has not gone home, the social worker is informed and she makes inquires including visiting the mother's home, to assess the level of poverty, and if the patient qualifies for a waiver. In determining whether there should be a waiver, the social worker interviews the mother and visits the Chief of the area where the mother is resident to determine whether the mother is poor. Such investigations can take up to one week.

58. Dr. Kumba's testimony was that the hospital has two social workers who deal with waivers for patients who are unable to pay their bills. These social workers also deal with matters involving abandoned babies, and also attend court for adoption cases. Where the social workers are not able to

investigate the circumstances of a patient, other hospital staff perform the work of the social workers.

59. It was the 5th respondent's position that it is only at the point of investigation that patients are informed of the waiver system at the hospital. Further, it contended that it is not the patient who goes to look for the social worker, the mandate being on the hospital and the social workers to investigate a matter. Where the patient is disabled or is a "street girl', according to Dr. Kumba, the matter does not require investigation by the social worker, and is sent directly to the waiver committee.

60. When cross-examined on his averments, Dr. Kumba denied that there was a practice of separating mothers or discriminating against them on the basis of ability to pay, or that any patient is detained, forced to sleep on the floor, or that any of them go without food. He conceded that before he joined the service of the 5th respondent in 2009, he would hear of such cases in the media, but in his time there, he has never witnessed anything like what the petitioners describe. In his estimation, the only time that a patient would remain in the hospital after she has been discharged is when their relatives promise to pay.

61. Dr. Kumba further testified that once the circular on free maternity care was announced in 2013, it was implemented immediately. As a result, currently, whether a mother undergoes a normal birth or a caesarian section, she is not required to pay any money, and the central government reimburses the hospital.

62. Dr. Kumba acknowledged that Pumwani faces various challenges, especially in staffing and handling a large number of patients, but stated that the situation was improving as the government was in the process of recruiting and redeploying nurses to the hospital. In addition, staff members are undergoing trainings on patient care.

63. Regarding the Changamka Card that the 2nd petitioner alleged she had intended to pay her bill with but was rejected by the 5th respondent, Dr. Kumba testified that it is an insurance plan provided by Changamka Micro-Saving Groups and is not a part of the services that the 5th respondent offers. In his view, if the 2nd petitioner experienced any problems with the card, then she should have approached the insurer. The only involvement of the hospital with the Chamgamka card is that the insurers were given premises at the hospital to operate out of.

Petitioners' Submissions in Response

64. The petitioners contested the allegations that this petition has been overtaken by events. They reiterated their position that their rights were violated as captured in their pleadings and submissions and stated that the government has an obligation to ensure the provision of the right to health, and in particular that even if there is now in place a directive on free maternity care which came into effect in June 2013, it does not negate the infringement of rights that they suffered.

65. The petitioners further argue that the presidential directive on the waiver of maternity fees is a temporary measure that does not address the substantive issue, that it has not been entrenched into the health care system, and there is no way to tell if the present or future government will continue to honour it as an obligation to the expectant women of Kenya. They further note that the respondents have not indicated how the directive will be implemented within the devolved health care system in liaison with the national government which issued it.

66. The petitioners contend that the 3rd respondent's assertion on progressive realization is not well founded as the county government of Nairobi recently increased various county service fees, which include maternity service fees at Pumwani, to Kshs3,750.00 for normal delivery, up from Kshs.3,000.00, while caesarian deliveries increased to Kshs7,500.00 up from Kshs. 6,000.00, their submission being that the issues they have raised have not been conclusively addressed.

67. It is the petitioners' contention therefore that the 3rd respondent has failed to address its obligation with regard to the management of and oversight role over the 5th respondent, which failure resulted in the

infringement of their constitutional rights as pleaded in the petition. They therefore urge the Court to grant the prayers sought in the petition.

Analysis and Determination

68. Through the Constitution promulgated on 27th August 2010, the people of Kenya gave to themselves a very expansive Bill of Rights, the purpose of which was to ensure the social transformation that they have been yearning for. The Constitution now guarantees to everyone, among others, the right to health, as well as the right to non-discrimination and equal protection of the law. At Article 43, it provides, inter alia, that everyone is entitled *to* ***"…the highest attainable standard of health, which includes the right to health care services, including reproductive health care."*** Article 27 contains the non-discrimination provisions, which decree that neither the state nor any person shall discriminate against any person either directly or indirectly ***"….on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth***." At Article 21(2), the Constitution imposes on the state the obligation to ***"take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43."***

69. The petitioners have approached this Court claiming that as a result of their detention by the 5th respondent for their inability to meet their medical bills after delivery, the respondents have violated their rights under Article 43 and 27. Further, as a consequence of the detention, their rights under Article 28 which guarantees the right to human dignity and Article 29 which guarantees freedom and security of the person, as well as freedom from torture, cruel and degrading treatment, have been violated. In addition, their right to freedom of movement guaranteed under Article 39 was also violated.

70. The response from the respondents can be summarized as first, a denial that the events alleged ever happened, and secondly, that the matters complained of have been overtaken by events as the state has put in place a policy mechanism under which maternity fees are no longer charged at maternity hospitals. As a corollary to these arguments is the submission that the petitioners have not met the criteria set by law with respect to alleged violation of constitutional rights.

71. In determining this matter therefore, I believe the Court is called upon to address its mind to the following three main issues:

> ***(a) Whether the petition is incompetent for failure to state, with a reasonable degree of precision, the manner in which the petitioners' rights have been violated.***
>
> ***(b) Whether the respondents have violated the petitioners' right to:***
>
> > ***i. Liberty and security of the person;***
> >
> > ***ii. Freedom of movement;***
> >
> > ***iii. Freedom from torture, cruel and degrading treatment;***
> >
> > ***iv. Dignity;***
> >
> > ***v. Health;***
> >
> > ***vi. Non-discrimination;***
>
> ***(c) Should the responses to the above issues be in the affirmative, what remedies to grant to the petitioners.***

72. Before delving into a consideration of the last two issues, I will first deal with the question of the competence of the petition.

Whether the Petition is Competent

73. The 3rd respondent has contended that the petition is incompetent and should be dismissed as the petitioners have failed to demonstrate, with a reasonable degree of precision, the rights alleged to have been violated, and the manner of violation. For this proposition, the 3rd respondent has relied on the authority of **Anarita Karimi Njeru vs Republic (No. 1) [1979] KLR 154**. The principle in this decision is that a party who alleges that his or her rights under the Constitution have been violated must demonstrate, with a reasonable degree of precision, the Articles of the Constitution that have been violated, and the manner of violation with respect to him. Courts have expressed various opinions with respect to the application of this principle, with some, such as the Court in **Peter M. Kariuki vs Attorney General [2014] eKLR (Civil Appeal No. 79 of 2012),** expressing the view that the **Anarita** decision had too narrow an interpretation of the right to address the court.

74. Similarly, in **Central Organization of Trade Unions (K) vs Cabinet Secretary, Ministry of Labour Social Security & Services & 2 others [2014] eKLR (Miscellaneous Application No. 21 of 2014),** the Court expressed the view that:

> ***[20.] With respect to the need to state with precision the provision of the Constitution alleged to have been breached, it is my view that the case of Anarita Karimi though still relevant ought to be read with the provisions of the current Constitution in mind…."***

75. The Constitution of Kenya, 2010 at Article 159 (2)(b) requires that courts be guided by various principles, among them that justice be administered without undue regard to procedural technicalities and that the purpose and principles of the Constitution be respected.

76. In its decision in **Trusted Society of Human Rights Alliance vs Attorney General & Others High Court Petition No. 229 of 2012,** the High Court expressed itself as follows:

> ***[40.] We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication: a person claiming constitutional infringement must give sufficient notice of the violation to allow her adversary to adequately prepare her case and to save the Court from embarrassment of adjudicating on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."*** (Emphasis added)

77. In **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR (Civil Appeal No. 290 of 2012)** the Court of Appeal underscored the need to have a ***reasonable*** degree of precision in drafting of pleadings in constitutional litigation. The Court rendered itself in the following manner:

> ***[41]. We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude***

ex ante is to miss the point."

78. The Court also emphasized the importance of providing the Court with sufficient particulars on alleged breaches, and stated that:

> ***"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 extension of this principle."***

79. Applying the principles above to the case at hand, I find that there is no merit in the 3rd respondent's assertion. The petitioners have filed voluminous pleadings, which clearly set out their factual allegations with respect to their detention by the 5th respondent and the treatment they were subjected to while so detained. The petitioners also gave evidence on oath, and were cross-examined at length on their evidence. They have clearly linked the factual allegations with the provisions of the Constitution which they allege were violated. There can be no argument therefore that the petitioners have not set out their case with precision. Even had they failed to do so, however, on the authority of the cases set out above, that would not have been, of itself, sufficient to render the petition incompetent, for the duty of the Court is to render substantive justice, not to pay talismanic homage to rules and procedural technicalities.

80. I also take judicial notice of the fact that the 3rd respondent is charged with the general oversight of the 5th respondent, and has, or ought to have, sufficient information on the operations of the 5th respondent. As is evident from the affidavits in opposition to the petition, particularly the affidavit of Dr. Kumba, the respondents were clear on the petitioners' grievances, and the facts and circumstances leading thereto. For these reasons, the 3rd respondent cannot claim that there is a lack of sufficient particulars that limit its ability to know the case against it so as to render the petition incompetent.

Whether there has been a Violation of the Petitioners' Rights under the Constitution

81. As can be discerned from the pleadings and submissions of the petitioners and the issues distilled therefrom, the Court is called upon to determine whether the facts before it disclose a violation of the petitioners' rights guaranteed under article 27, 28, 29, 39 and 43, as well as the rights of their newborn children under Article 53 of the Constitution. The alleged violation of these rights is interlinked, arising as it does from the same facts, the alleged detention of the petitioners by the 5th respondent for non-payment of their maternity bills. As the fact of detention has been denied, it is necessary to consider the facts to determine whether they disclose such detention, and whether such detention amounted to violation of the petitioners' rights under Articles 29 and 39 of the Constitution.

Whether there was Detention of the Petitioners and Deprivation of their Liberty and Freedom of Movement

82. The 1st petitioners averred in her affidavit, and testified on oath, that she was admitted to the hospital on 20th September 2010, delivered her baby soon after admission with no complications, and was discharged on 21st October 2010. She was therefore held in the hospital after discharge for a period of 24 days, until the 15th of October 2010. This averment has not been controverted.

83. The 2nd petitioner details two periods of detention. The first, according to her evidence, was in 1992, while the second was in 2010. While she has produced documents that support the detention for one week in 2010, there is no evidence in support of the alleged detention in 1992, some 22 years prior to the filing of the petition. I will therefore address myself only to the second period of detention for which there is evidence.

84. While the respondents deny in general terms the detention of the petitioners, their own evidence,

particularly that of the 5th respondent, bears out their claim. The evidence before the Court discloses that the petitioners remained in Pumwani for different periods after their discharge, 24 days in the case of the 1st petitioner, and 6 days in the case of the 2nd petitioner. The evidence before me shows that the 5th respondent prevented the petitioners from leaving the hospital. The testimony of the petitioners as well as Dr Kumba illustrates that there were guards posted at the entrances and the gates, and to leave the facility, a discharged patient had to present a clearance sheet confirming either that the bill had been paid, or that it had been waived. This would be the only way the discharged patient would be able to exit the hospital.

85. Additionally, the hospital wards were closed and locked at night, and the uncontroverted evidence of the petitioners is that they were not even allowed to go out and bask in the sun during the period of their detention for fear that they would escape. Clearly, the petitioners were not at liberty to leave the 5th respondent as and when they chose. They could only do so upon payment of the bill they had incurred when they were admitted to Pumwani to deliver.

86. At paragraph 10 of his affidavit sworn on 13th June 2014, Dr. Kumba indirectly concedes the detention of patients when he avers that ***" … there were cases of mothers who remained in the delivery wards subsequent to being discharged…"*** He states that the onus would then fall on the Matron of the hospital to establish why the mother has remained in hospital, and if it was a question of lack of funds, hand the case over to a social worker. The 1st petitioner testified about her efforts to reach the Matron, and the reception she got from the social worker when she tried to explain her situation.

87. The question is whether the acts of the 5th respondent amounted to a violation of the petitioners' rights under articles 29 and 39 of the Constitution.

88. Article 29 provides that:

> ***"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;***
>
> ***(b) detained without trial...".***

89. At article 39, the Constitution provides that ***"Every person has the right to freedom of movement."***

90. These provisions are in accord with the provisions of international covenants to which Kenya is a party, and which the petitioners have called in aid in their extensive submissions. It should be borne in mind that, under the provisions of Articles 2(6), the provisions of international treaties to which Kenya is a party form part of the law of Kenya. Articles 2(6) provide that "***Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."***

91. Kenya has ratified the International Covenant on Civil and Political Rights (ICCPR). Article 9(1) thereof provides that:

> ***"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."***(Emphasis added)

92. In its **General Comment No 35**, the Human Rights Committee notes that liberty of person concerns the ***"freedom from confinement of the body"***.

93. Violation of the right to liberty of person by way of arbitrary arrest implicates other rights. In its decision in **Beatrice Wanjiku & another vs Attorney General & Another** ***(supra)*** in which it was dealing with the issue of arrest and committal to civil jail, the Court outlined the multiple rights implications that result from arbitrary arrest:

> ***"…Committal and imprisonment constitutes a violation of fundamental rights and freedoms guaranteed by our Constitution. The right to inherent dignity of the person protected under Article 28 is a proclamation of our humanity. Arbitrary arrest and imprisonment degrades the human spirit, affects families and relationships. Arbitrary arrest and committal also infringes the right to security of the person protected under Article 29, the right to a fair trial protected under Article 50(1) and the right to movement under Article 39. A consideration of all these rights points to the fact that arrest and committal of a judgment-debtor constitutes a violation of the collectivity of these rights."***

94. As a signatory to the ICCPR, and in keeping with its obligations under the Constitution, the state has an obligation to protect the right to liberty and movement of all citizens. It must not only not deprive citizens of the right, but must safeguard citizens from deprivation by others. Thus, the Human Rights Committee notes in General Comment No. 35 that states should protect the "***right to liberty of person against deprivations by third parties,***". In this regard, at Paragraph 7 of General Comment No.35, the Human Rights Committee states that:

> ***"States parties have the duty to take appropriate measures to protect the right to liberty of person against deprivation by third parties. States parties must protect individuals against abduction or detention by individual criminals or irregular groups, including armed or terrorist groups, operating within their territory. <u>They must also protect individuals against wrongful deprivation of liberty by lawful organizations, such as employers, schools and hospitals."</u>*** (Emphasis added)

95. In the case of **Sonia Kwamboka Rasugu vs Sandalwood Hotel & Resort and Another [2013] eKLR (Petition No. 156 of 2011)**, the Court (Majanja J), when considering a claim arising out of detention for failure to pay a debt owed to a hotel, examined the question of the deprivation of liberty by a non-law enforcement entity. The Court cited various authority, among them the **ICCPR, In Re Zipporah Wambui (supra) and Elijah Momanyi p/a Anassi Momanyi and Company Advocates v Bartera Maiyo HC Eldoret Misc. 149 of 2005 (Unreported)** and held that:

> ***"Centrality of the liberty of the person and the protection from illegal and false imprisonment is one of the fundamental rights and freedoms enshrined in our Bill of Rights."***

96. In holding that the petitioner had been unlawfully detained, the Court cited **Sunbolf vs Alford *(1838) 3 M & W 248 150 ER 1135*** in which that Court stated:

> ***"if an innkeeper has a right to detain the person of his guest for non-payment of his bill he has a right to detain him until the bill is paid, which may be life… The proposition is monstrous. Again, if he have any right to detain the person, surely he is the judge in his own cause."***

97. I am also guided by the decision of the Constitutional Court of South Africa, which has stated with regard to deprivation of the right to liberty in **Malachi vs Cape Dance Academy International and Others (2010) CCT 05/10 ZACC 13** that:

> ***"…freedom has two interrelated constitutional aspects: the first is a procedural aspect which requires that no one 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 constitutional 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."***

98. In the case of **Isaac Ngugi vs Nairobi Hospital & 3 Others Petition No 407 of 2012,** Majanja J also held that detention of a person for non-payment of a medical bill was a violation of the constitutional guarantee to liberty and dignity under Articles 29 and 28 of the Constitution respectively.

99. What emerges from the authorities cited above is that detention must be carried out by a lawful

authority, must be for just cause or else it amounts to arbitrary detention which would go against the law. In the present case, the 5th respondent detained the petitioners for their inability to pay their medical bills. There is nothing in law that allows a medical institution to detain a patient for non-payment of a medical bill, and I agree with the reasoning in the **Sonia Kwamboka** and **Isaac Ngugi** cases that such detention amounts to an arbitrary deprivation of liberty and violation of the right to freedom of movement. I therefore find and hold that the detention of the petitioners by the 5th respondent for their inability to pay their medical bill was arbitrary, unlawful and unconstitutional.

Whether the Detention of the Petitioners was a Violation of their Right to Dignity and Amounted to Torture, Cruel and Degrading Treatment

100. The petitioners have argued that the condition of their detention at the 5th respondent deprived them of their right to dignity guaranteed under Article 28, and amounted to torture, cruel and degrading treatment contrary to Article 29 of the Constitution. They also allege that the treatment was in violation of the state's obligations under Article 29 of the Banjul Charter, Article 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Article 7 of the ICCPR.

101. Article 29 read with Article 25 of the Constitution of Kenya, 2010 provides that every person has a right to freedom and security of the person, which includes the right not to be subjected to torture in any manner, whether physical or psychological and not to be treated or punished in a cruel, inhuman or degrading manner. The freedom from torture is one of the rights under the Constitution that no derogation from is permitted.

102. Torture is defined in CAT as follows:

> ***"Torture means any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person, information or a confession, punishing him for an act he or a third party person has committed or is suspected of having committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain suffering arising only from, inherent in or incidental to lawful sanctions."***

103**. Black's Law Dictionary, 9th Edition**, defines torture as:

> ***"The infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure, Cruel, degrading, treatment and punishment is defined as:***
>
> ***"By torture I mean the infliction of physically founded suffering or the threat immediately to inflict it, where such infliction or threat is intended to elicit, or such infliction is incidental to means adopted to elicit, matter of intelligence or forensic proof and the motive is one of military, civil, or ecclesiastical interest." James Heath, Torture and English Law 3 (1982).***

104. In his submissions, the AG referred to the definition of 'inhuman treatment' in **Black's Law Dictionary (Gardner, Ed.) 8th Edition** which was relied on in the decision of this Court in **Harun Thungu Wakaba vs Attorney General [2010] eKLR (Miscellaneous Application 1411 of 2004)**:

> ***"Inhuman treatment is defined in reference to family law as physical or mental cruelty so severe that it endangers life or health while torture is defined as the infliction of intense pain to the body or mind to punish to extract a confession or information or to obtain sadistic pleasure."***

105. Do the circumstances of this case give rise to the inference that the petitioners were subjected to

torture, cruel and degrading treatment as defined above, sufficient to amount to a violation of the constitutional and international law provisions set out above?

106. From the definition of torture already referred to, there must be "***severe pain or suffering whether physical or mental*"** inflicted intentionally, with a specific purpose such as obtaining information or a confession, or punishing a person for an act done by the person who is subjected to torture, or by another. It must also be instigated by or with the consent or acquiescence of a public official or other person acting in an official capacity. I therefore agree with the submissions of the AG that the treatment the petitioners were subjected to did not reach the level of torture as defined above.

107. Did the said treatment, however, reach the level of cruel and inhuman treatment? It has been recognized that women experience pain and suffering in an additional special way because of their sex and gender. In **Miguel Castro-Castro Prison vs Peru, Inter-Am. Ct. H.R. (ser. C) No. 160** the Inter-American Court of Human Rights was of the opinion that the failure of the prison to consider the physiological needs of its female prisoners, by giving them adequate facilities to maintain their hygiene and health, allowing them regular access to toilets and allowing them to bathe and to wash their clothes regularly, as well as the failure to provide regular antenatal and prenatal care to women who required it, implied inhuman treatment on the part of the prison.

108. It is also recognized that cruel, inhuman, and degrading treatment can result from severe mental suffering. The Human Rights Committee concluded in its General Comment No. 20 that ***"the prohibition in article 7 [prohibiting torture and other cruel, inhuman, and degrading treatment] relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim."***

109. Several regional and international human rights bodies have recognized acts resulting in mental suffering as forms of torture or cruel, inhuman, and degrading treatment, including when that mental suffering was inflicted by health care workers and when women have been denied needed reproductive health care services. See the decision in **R.R. vs Poland, No. 27617/04 Eur. Ct. H. R. (2011).**

110. In the case before me, the petitioners were detained at Pumwani Maternity Hospital after they gave birth. In the case of the 1st petitioner, though she gave birth almost immediately after admission and was discharged the next day, she was detained for a period of 24 days for non-payment of her bill, which inevitably kept escalating. In the case of the 2nd petitioner, she was suffering from severe complications after a life-threatening childbirth, and a subsequent surgery to fix a ruptured bladder. It cannot be disputed that when the 2nd petitioner was detained for 6 days, on the floor, after two surgeries and a septic wound, she underwent great suffering.

111. Although the 1st petitioner had not suffered complications during childbirth, her detention in unsanitary conditions and without access to follow-up treatment threatened her health. She also alleges that it led to her contracting pneumonia, which the respondents dispute. Considering the circumstances in which the petitioners were detained, while they may not amount to torture as defined elsewhere above, the treatment that they were subjected to at the hands of staff at the 5th respondent amounted to cruel, inhuman, or degrading treatment.

112. Sadly, this has been a feature of the treatment to which women who attend health institutions to deliver are subjected to. In the Concluding Observations issued to Kenya on the second periodic report of Kenya, adopted by the committee at its fiftieth session (6-13th May 2013) dated 19th June 2013 (available at http:/ibinternet.ohchr.org) the CAT Committee has expressed concern about detention of women in maternity hospital when they fail to settle their hospital bills. The Committee states that it.

> ***"remains concerned about ill-treatment of women who seek access to reproductive health services, in particular the on-going practice of post-delivery detention of women unable to pay their medical bills, including in private health facilities."***

113. The Committee has therefore urged ***"the State party to strengthen its efforts to end the practice of***

forcible detention of post-delivery mothers for non-payment of fees including in private health facilities."

114. While the petitioners in this case were not in prison properly so called, their condition was akin to that of prisoners, confined to the ward at Pumwani, unable to leave of their own free will, with guards stationed at the wards who would not allow them to leave. They were both subjected to ill-treatment and humiliation during their detention for not paying their medical bills, a failure to pay their debt, at the 5th respondent. In the words of the 1st petitioner, she was ***"in a small prison, no way to know when the hospital would have mercy on me and thereby release me and I was constantly worried about the bill escalating to an amount that I could never comprehend to pay in my lifetime."***

115. In addition, the petitioners were subjected to extremely poor conditions while they were detained in the hospital. It has been found that poor conditions and treatment within detention settings amounts to cruel inhuman and degrading treatment. In **Institute for Human Rights and Development in Africa v. Angola (2008) AHRLR 43 (ACHPR 2008)** the African Commission stated that conditions of detention where food was not regularly provided and detainees had no access to medical treatment characterized cruel, inhuman, and degrading treatment and was a violation of Article 5 of the Banjul Charter.

116. The conditions of detention for the 1st and 2nd petitioners can only be described as pitiful. The petitioners have narrated how they were denied beds to sleep in and had to sleep on the floor without adequate bedding, which was never changed and was dirty. The 1st petitioner had to sleep next to a flooding toilet. Though they were given food, it was insufficient. Both petitioners were held in these conditions for significant periods of time: for the 2nd petitioner, it was for a period of six days in 2010, while the 1st petitioner was held for 24 days.

117. During their detention, they were in need of medical care, more so the 2nd petitioner. All these point to the 5th respondent having created conditions which were inimical to the mental and physical health of the petitioners, and can properly be described as inhuman and degrading treatment. They were also kept away from their other children, and they have averred that the separation from their families during the period of detention also caused them severe mental anguish. In the words used by the African Commission in the case of **John K. Modise v. Botswana, Afr. Comm'n on H.R., Commc'n No. 97/93, para. 92 (2000)**, the detention of the petitioners by the 5th respondent deprived the petitioners of their families, and the petitioners' families of the petitioners' support.

118. As in the **Modise case (supra)** in which the Commission found that Mr. Modise was subjected to inhuman and degrading treatment during a period of state-imposed exile because that exile "***deprived him of his family, and his family, of his support,"*** I find that the cruel and inhuman treatment of the petitioners was compounded by the fact that they were forced to be away from their other children, for whom they solely provided.

Violation of the Petitioners' Right to Dignity

119. Human dignity is one of the national values upon which the Constitution of Kenya, 2010 is grounded. Article 10 (2) (b) provides that the national values and principles of governance include:

> ***"human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized."***

120. Article 28 of the Constitution guarantees the right to human dignity by providing that ***"Every person has inherent dignity and the right to have that dignity respected and protected."***

121. As submitted by the petitioners, human dignity is also a core value of international human rights instruments. Article 5 of the Banjul Charter proclaims that every individual ***"shall have the right to respect of the dignity inherent in a human being ...."***

122. The right to dignity with respect to women is specifically recognized in the **Preamble to the Protocol to the African Charter on the Rights of Women in Africa (The Maputo Protocol)**. In the Protocol, states recognize that dignity is one of the African values, and they also acknowledge the crucial role that women play in the preservation of African values. Article 3 (1) of the Protocol provides that ***"every woman shall have the right to dignity inherent in a human being...."*** and requires state parties to ***"adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence."***

123. In determining whether the right to dignity of the petitioners in this case was violated, it is important to consider the inter linkage of human rights. This Court has stated before that human rights are indivisible, interdependent and interrelated, that they are equal in importance and equally essential for the respect and dignity of each person. See **PAO & 2 Others vs Attorney General - High Court Petition No 409 of 2009.**

124. In the case of **Zia vs WAPDA [1994] 32 PLD Supreme Court 693 (Pak.)** the Court noted that Article 9 of the Constitution of Pakistan guaranteed the dignity of man and also the right to life. The court then held that:

> ***"if both (rights) are read together, [the] question will arise whether a person can be said to have dignity of man if his right to life is below [the] bare necessity like without proper food, clothing, shelter, education, health care, clean atmosphere and [an] unpolluted environment."***

125. Courts in Kenya have also underscored the importance of the right to human dignity. In **Republic vs. Minister for Home Affairs & 2 Others ex-parte Leonard Sitamze (2008)eKLR (Misc Civ Appli 1652 of 2004)** Nyamu J (as he then was), considered the rights of an ex parte applicant to obtain a work permit and stated that:

> ***"Human dignity is of fundamental importance to any society including Kenya and is indeed a foundational value which informs the interpretation of many and perhaps all other fundamental rights."***

126. In **S vs Makwanyane and Another (CCT3/94) [1995] ZACC 3** the Constitutional Court of South Africa stated as follows with regard to the right to dignity as a fundamental value of the Constitution:

> ***"The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Constitution]."***

127. The right to health and the right to dignity are inextricably related. In providing health care of acceptable quality, health care institutions must respect the dignity of their patients. They must also be responsive to the needs of their patients and provide acceptable care. In this situation, when patients are not given care that affords them the right to dignity, it can negatively affect their well-being.

128. From the petitioners' accounts, their treatment fell short of the acceptable standards of health care that would guarantee protection of the right to dignity. The 1st petitioner complained of being treated rudely by the nurses in the employment of the 5th respondent. The 2nd petitioner's account of her experience was even more unhappy. After being forced to sit on a bench for a period of time while she was bleeding, she was rushed to theatre without being informed of what procedure she was to undergo. After her delivery, she wanted to use the bathroom but the nurses treated her with contempt. This was a violation of her inherent right to dignity. The purpose of that treatment was only to humiliate her and strip her of her self-worth.

129. The fact that the petitioners were detained for lack of enough money to pay their medical bills was again, of itself, a manifestation of the contempt with which their impecunious state was held by the 5th

respondent, and was a violation of their inherent dignity. In addition, even had the detention of the petitioners by the 5th respondent been lawful and acceptable, the petitioners would not, by reason of such detention, have lost their inherent dignity, and the right to have that dignity respected. Article 10 (1) of the ICCPR stipulates that:

> ***"All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."***

130. I have already set out above the deplorable conditions under which the petitioners were held during the period of their detention, which I need not repeat, save to observe that they were denied medical care, despite the fact that they required it, more so in the 2nd petitioner's case whose bladder had ruptured during the caesarean section she underwent, the catheter inserted had been removed, and she had a septic wound. To top it all off, the petitioners were subjected to verbal abuse at the hands of the nurses, a fact indirectly confirmed by Dr. Kumba. At paragraph 21 of his affidavit, Dr. Kumba avers that ***"…cases of abuses of mothers have tremendously reduced…"*** and speaks of managing ***"stubborn"*** and "***rogue mothers,"*** a clear indication of the attitude that the hospital had towards its patients.

Violation of the Right to Health

131. Reference has already been made to the interlink between human rights, particularly between the right to health and the right to dignity. It is the petitioners' case that the treatment they were subjected to during the period of their detention by the 5th respondent was also a violation of their right to health, which is essential to the enjoyment of other human rights.

132. The right to health finds expression at Article 43(1)(a) of the Constitution of Kenya, which guarantees to everyone ***"…the highest attainable standard of health, which includes the right to health care services, including reproductive health care."*** The right to health for all is also recognized in regional and international law which, as stated above, form part of Kenyan law. Article 16 of the **African Charter on Human and Peoples' Rights**, (The Banjul Charter) provides that ***"Every individual shall have the right to enjoy the best attainable state of physical and mental health."*** In addition, the Banjul Charter requires state parties to ***"…take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."***

133. At Article 12(1), the ICESCR provides that ***"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."***

134. In its decision in **P.A.O. & 2 Others vs Attorney General (2012)** (supra) this Court affirmed that the right to health is:

> ***"a fundamental human right indispensable for the exercise of other human rights" and "[e]very human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity."***

135. It further noted in that decision that the right to health encompasses:

> ***"…not only the positive duty to ensure that its citizens have access to health care services and medication but must also encompass the negative duty not to do anything that would in any way affect access to such health care services and essential medicines."***

136. The Committee on Economic, Social and Cultural Rights (CESCR) which monitors the implementation of the ICESCR has interpreted the right to health as an inclusive right. In General Comment No 14, the CESCR states that this right includes ***"the right to control one's health and body, including sexual and reproductive freedom."*** In addition, the CESCR considers that the right to health includes a health system that includes the following entitlements:

> ***"the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health."***

137. In this regard, the CESCR states that ICESCR requires state parties to ensure that health services are ***available, accessible, acceptable,*** and ***of good quality***. It interprets *availability* to encompass "***not only…timely and appropriate health care but also…the underlying determinants of health such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions and access to health-related ... information."***

138. Accessibility requires non-discriminatory access to health facilities, goods and services, ***"especially [for] the most vulnerable or marginalized sections of the population."*** In addition, accessibility also requires that health services be available and free from discrimination; they must be physically accessible; and they must also be economically accessible, that is they must be affordable.

139. At paragraph 17 of General Comment No 14, the CESCR sets out what states need to do in order to realize Article 12 (2) (d) which requires states to take the necessary steps to achieve the full realization of the right to health, including '***the right to health facilities, goods and services'.*** In addition, State Parties must ensure that public health infrastructures ***provide public sexual and reproductive health services, that health providers are appropriately trained, and <u>that health providers are trained to recognize and respond to the specific needs of vulnerable or marginalized groups</u>.***

140. The state is under a duty, as the CESCR notes at General Comment No. 14, to fulfill or provide a specific right ***"when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.***" This implies, in circumstances such as the petitioners found themselves in, where they were not able to provide for themselves, that the state was under an obligation to provide affordable reproductive health care services.

141. The state in Kenya thus has a constitutional and international law obligation with respect to ensuring that its citizens have access to the highest attainable standard of health, and specifically with respect to women, that they have access to reproductive health care. Reproductive health care has been defined by the **United Nations Inter-Agency Task Force on the Implementation of the ICPD Programme of Action** as including:

> ***"the right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant."***

142. Despite these obligations placed on the state under national and international law, and as the various reports relied on by the petitioners attest, a large number of women do not benefit from the protection afforded under the Constitution and international law. The petitioners submit, and this has not been controverted by the 5th respondent, that they and other women in Kenya, have long experienced multiple rights violations in Pumwani Maternity Hospital and other health facilities.

143. Their averments and submissions find support in proceedings before international bodies. The practices that patients experience, which the petitioners have described in this petition, were decried in the **CESCR Committee's 2008 Concluding Observations on Kenya (U.N. Doc. E/C.12/KEN/CO/1 (2008))** in which the Committee recommended that Kenya "***take immediate measures to ensure . . . that all pregnant women, including poor women … have affordable access to skilled care free from abuse during pregnancy, delivery, postpartum, postnatal periods … including in remote rural areas"*** and that ***"the waiver of maternity fees in public hospitals and health facilities is effectively enforced without compromising the quality of services."***

144. The respondents have maintained in their response to the petition that the right to health should be progressively realized. They rely on the decision in **John Kabui Mwai & 3 Others vs Kenya National Examination Council & 2 Others Nairobi (2011) eKLR (High Court Petition No. 15 of 2011)** in

which the High Court held that socio-economic rights in the Constitution are:

> ***"….ideologically loaded. The realisation of these rights involves the making of ideological challenges which, among others, impact on the nature of the country's economic system…… [since].. these rights engender positive obligations and have budgetary implications …….a public body should be given appropriate leeway in determining the best way to meeting its constitutional obligations…"***

145. They also cite the words of the Court in that case where it observed that:

> ***"…In our view, the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10 (2) (b).***
>
> ***The realisation of socio-economic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need. One of the obstacles to the realisation of this objective, however, is limited financial resources on the part of the Government. The available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual...'***

146. The respondents argue that the state's ability to implement the economic and social rights under the Constitution is dependent on the available resources measured against the population. The contention is that realization of these rights is progressive, and that Article 43 must be read with Article 20(5) of the Constitution which provides that:

> ***"(5) In applying any right under Article 43, if the state claims that it does not have resources to implement the right a court, tribunal or other authority shall be guided by the following principles-***
>
> ***…***
>
> ***(d) It is the responsibility of the State to show that the resources are not available.***
>
> ***(e) In allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals and***
>
> ***(f) The court, tribunal or other authority may not interfere with a decision by a state organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion"***

147. In response, the petitioners rely on the pronouncements of the CESCR: that even if access to social economic rights is dependent on the availability of resources, there are '*minimum core'* obligations that are non-derogable. With respect to the right to health, state parties have an obligation, as stated at paragraph 43 of the CESCR General Comment No. 14, to ***"ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.***"

148. At paragraph 44 of General Comment No. 14, the CESCR confirms state parties are under an obligation to ***"… ensure reproductive, maternal (pre-natal as well as post-natal) and child health care,"*** as well as ***"the adoption and implementation of a national public health strategy and plan of***

action to address the health concerns of the state." These obligations are of comparable priority to the non-derogable minimum core rights, and are essential steps in ensuring the attainment of the right to the highest attainable standard of health.

149. Thus even for rights that may be progressively realized, the CESCR has noted that progressive realization ***"should not be interpreted as depriving States parties' obligations of all meaningful content."*** The CESCR states at paragraph 31 that:

> ***"The progressive realization of the right to health over a period of time should not be interpreted as depriving States parties' obligations of all meaningful content. Rather, progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 12.***"

150. While they acknowledge that the state has taken some steps towards the realization of the right to health, particularly with respect to reproductive health, the petitioners submit that some measures have been retrogressive. They point out that there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. Where there are retrogressive measures being undertaken, state parties have a burden to prove that:

> ***"…they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources."***

151. It is the petitioners' submission that even with the steps so far taken by the government towards attainment of maternal health care, there are still various retrogressive practices in public health facilities. These practices include the requirement of user fees in government health facilities, which require that a patient wishing to access health services pays for them. According to the petitioners, user fees are an inefficient and ineffective way of financing health care. Quoting **Alfred Anangwe, Health Sector Reforms in Kenya: User Fees in Governing Health Systems in Africa 44, 46 (Martyn Sama & Vinh-Kim Nguyen, Eds., 2008)**, the petitioners submit that user fees disproportionately affect women who are forced to incur expenses with respect to reproductive health care, and make many services unaffordable, and as such women are unable to access gynecological services. The net effect of user fees therefore is an impediment to the right to health.

152. It must be acknowledged, as the respondents submit, that in order to mitigate the undesirable effects of user fees, the government introduced cost exemptions for certain services. These services include ante-natal and post-natal care, and family planning services. A waiver system was also introduced for those who were unable to pay their medical costs. However, at the time material to this petition, according to the petitioners, the exemption system was ineffective because many of the services had costs attached, and not all health care providers were aware of the fact that ante-natal care services were required to be free, thus severely limiting free access to these services. The petitioners further submitted that the waiver system largely fails because it takes a long time to request and be granted a waiver, and even worse, in some instances, many hospital users are unaware that a waiver systems exists, and whom to approach, and so they do not initiate the waiver process.

153. The petitioners thus dispute the testimony of the 5th respondent that there was a fee waiver system that they could have availed themselves of. They submit that the fee waiver system is largely ineffective. They rely on a 2007 report by the **Centre for Reproductive Rights and Federation of Women Lawyers** titled "**Failure to Deliver: Violation of Women's Human Rights in Kenyan Health Facilities"** and submit that obtaining a fee waiver is burdensome, demeaning and dangerous for women. In practice, women who are unable to pay their medical bills in private facilities or public facilities that require deposits, or have not implemented waiver systems, are denied services or told to return when they are able to pay. The ineffectiveness of the waiver system created an onerous barrier for the petitioners in obtaining care when they were unable to pay the hospital fees, and resulted in additional negative health outcomes from poor detention conditions.

154. In **Laxmi Mandal vs Deen Dayal Harinagar Hospital & Others,** ***W.P.(C) Nos. 8853 of 2008***, the High Court of Delhi was of the opinion that the right to health, which ***"[includes] the right to access government (public) health facilities and receive a minimum standard of treatment and care,… the enforcement of the reproductive rights of the mother and the right to nutrition and medical care of the newly born child and continuously thereafter till the age of about six years***" is an integral part of the right to life.

155. The Court was in that case determining a case where a woman, Shanti Devi, died at home shortly after prematurely giving birth to her 6th child. When she had been pregnant for the fifth time, her foetus died in utero as a result of a fall. She went to four different hospitals to seek medical care, but each of these hospitals refused to admit her before she paid some money for her admission. The fees demanded by the hospital were to be paid because Shanti did not have a ration card which would have enabled her get subsidized or even free services at the public health facilities. She had to carry the dead foetus in her womb for more than two weeks; she did not have a valid ration card despite the fact that she lived below the poverty line, and therefore qualified for state benefits. She was eventually treated at a Delhi hospital, where the foetus was removed but she was discharged without receiving any advice on family planning or any follow-up on her treatment. She fell pregnant again in 2009, and due to her past experiences with the public health care system, she opted not to go to hospital. She eventually gave birth prematurely and died. In its decision, the Delhi High Court stated that Shanti's case pointed to a:

> ***"…complete failure of the implementation of the [public health care scheme]. With the women not receiving attention and care in the critical weeks preceding the expected dates of delivery, they were deprived of accessing minimum health care at either homes or at the public health institutions."***

156. The Court found that the denial of access to health care services to pregnant women due to their background constitutes a violation of the right to health, which is tied to the right to life. The Court rendered itself as follows:

> ***"When it comes to the question of public health, no woman, more so a pregnant woman should be denied the facility of treatment at any stage irrespective of her social and economic background. This is the primary function in the public health services. This is where the inalienable right to health which is so inherent to the right to life gets enforced. There cannot be a situation where a pregnant woman who is in need of care and assistance is turned away from a Government health facility only on the ground that she has not been able to demonstrate her BPL status or her "eligibility"."***

157. In addition, the Court emphasized that the government's role in implementing social welfare schemes was to ensure that there was as wide coverage as possible, and that to require would-be beneficiaries to prove that they were eligible for the benefits would only serve to bar their right to access services at public health facilities. The Court stated that:

> ***"The approach of the Government, both at the Centre and the States, in operationalising the schemes should be to ensure that as many people as possible get „covered? by the scheme and are not "denied? the benefits of the scheme. Instead of making it easier for poor persons to avail of the benefits, the efforts at present seem to be to insist upon documentation to prove their status as "poor? and "disadvantaged?. This onerous burden on them to prove that they are the persons in need of urgent medical assistance constitutes a major barrier to their availing of the services."***

158. And so it is with the present petition. The petitioners' uncontroverted testimony was that they were required to pay some money before they could be admitted to the 5th respondents. In the case of the 2nd petitioner, there was evidence that she had an insurance card which had some money on it, but she was still denied emergency medical services, and had to sit on a bench in the reception of the hospital while she was bleeding. This delay was a threat on her right to health, and indeed, her right to life. The 5th respondent had a fee waiver system, but the petitioners could not avail themselves to it as they were not

informed about it.

159. In **Alyne da Silva Pimentel Teixeira vs Brazil Communication No. 17/2008 CEDAW/C/49/D/17/2008** the Committee on the Elimination of all Forms of Discrimination against Women (CEDAW Committee) was considering a communication from a Brazilian citizen whose complaints included, inter alia, that the Brazilian health care system had problems which resulted in a lack of access to quality medical care during delivery. As a result of various delays in her treatment, Alyne de Silva died, and her mother made a complaint to the CEDAW Committee on her behalf. The state party on its part argued that there were a number of policies in place to address the specific needs of women. The Committee reiterated that policies put in place by state parties for elimination of discrimination must ***be action- and results-oriented as well as adequately funded.*** The Committee went on to state that:

> ***"The lack of appropriate maternal health services in the State party that clearly fails to meet the specific, distinctive health needs and interests of women not only constitutes a violation of article 12, paragraph 2, of the Convention, but also discrimination against women under article 12, paragraph 1, and article 2 of the Convention. Furthermore, the lack of appropriate maternal health services has a differential impact on the right to life of women."***

160. The circumstances in that communication are similar to those giving rise to the present petition. The petitioners come from a disadvantaged background. As such they both initially intended to seek obstetric care at a City Council clinic, since, in their experience, the cost of delivery there was much cheaper. However, due to complications that arose, they both ended up in the care of the 5th respondent. In both cases, they were denied treatment, until they could raise some of the money demanded by the hospital, Kshs3.600.

161. The 1st petitioner had only Kshs1,000 while the 2nd petitioner had an insurance card, which though issued by an organization housed within the hospital, and from the evidence bears the name of the hospital, "Changamka Pumwani Maternity Smart Card", was apparently not acceptable. The 2nd petitioner was kept waiting until she had to go into emergency surgery, and as a result (according to her evidence though no medical evidence was tendered in support) suffered a ruptured bladder. After surgery, during her detention, her wound became septic.

162. While the 5th respondent detained the petitioners for inability to raise the medical fees, it had a waiver system in place, and the government had, three years earlier in 2007, expressly given information to the public that maternity services would be free. It is clear that the only reason that the petitioners underwent this treatment, particularly the detention, is because they were unable to pay their bills, which served as a barrier to their access to health care services, and a violation of their right to health which leads to a consideration of the question whether the petitioners were subjected to discrimination, contrary to Article 27 of the Constitution, on the basis of their economic status.

Whether there was Violation of the Petitioners' Right Not to be Subjected to Discrimination

163. The petitioners allege that they were subjected to discrimination on the basis of their social economic status, contrary to express constitutional provisions and the provisions of international covenants to which Kenya is a party. The non-discrimination provisions in the Constitution of Kenya are set out in Article 27(4) and (5) as follows:

> ***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***
>
> ***(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).***

164. These provisions are in consonance with the provisions of regional and international treaties. Article 2 of the Banjul Charter provides that:

> ***"[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."***

165. At Article 18, the Charter requires state parties to:

> ***"ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."***

166. Further, at Article 28, the Banjul Charter states that ***"[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance."***

167. Article 1 of the Maputo Protocol defines discrimination against women as:

> ***"any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life."***

168. At Article 2, the Maputo Protocol requires States Parties to ***"combat all forms of discrimination against women through appropriate legislative, institutional and other measures,".*** Measures that state parties are required to take include enshrining the principle of equality between men and women into their legislation. Where discrimination exists against women, both in law or in fact, States are directed to ***"take corrective and positive action"*** including reforming ***"existing discriminatory laws and practices in order to promote and protect the rights of women."***

169. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) defines discrimination as:

> ***"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."***

170. Under Article 2 of CEDAW, States parties must not only condemn all forms of discrimination against women, but they must also ***"pursue by all appropriate means and without delay a policy of eliminating discrimination against women."*** Measures that states should take to ensure the practical realization of elimination of discrimination include enactment and adoption of appropriate legislation prohibiting discrimination against women. States are also required to

> ***"refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; and to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."***

171. Under the ICESCR, States must ***"guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."***

172. The ESCR Committee has described discrimination as follows:

> "***Discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights."***

173. Article 2 of the ICCPR stipulates that state parties must ensure to all individuals ***"the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."***

174. General Comment No 18 by the Human Rights Committee, the body charged with overseeing implementation of and compliance with the ICCPR defines discrimination as:

> ***"any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."***

175. Finally, the African Commission on Human and People's Rights has noted 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."***

176. Under all these international instruments, it is recognized that a violation of the right to non-discrimination inhibits women's enjoyment of their human rights and there is an obligation placed on states parties to effectively eliminate all forms of discrimination.

177. As I understand it, the petitioners' argument is that by failing to act on the practice of detention of women who are unable to pay their medical fees in respect of maternity services, the government discriminates against women as it is fully aware that it is only women who seek the services of institutions such as the 5th respondent to give birth. In failing to recognize and curb the practice, the state was in breach of its express obligation under CEDAW, Article 12 of which requires state parties to ensure that women have adequate services related to reproductive health by requiring states to:

> ***"ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."***

178. This provision is directly related to our Constitution which, at Article 21 (3), imposes a duty on all state organs to address the needs of vulnerable groups. In my view, poor expectant women who are in labour fall squarely within this category.

179. As observed elsewhere in this judgment, accessibility of health care facilities is a key element of the right to health. The ESCR Committee in General Comment No 14 has stated that acceptability of health care facilities requires that health care institutions be gender-sensitive, respectful of medical ethics and designed to improve the health status of patients. In addition, the CEDAW Committee in General Recommendation No 24 defines acceptable services as those that are delivered in a way that respects the dignity, and are sensitive to the needs and perspectives of, women. It is not without doubt that the petitioners were vulnerable during the time that they sought service at the 5th respondent. Their account of events, which I have no reason to disbelieve, was that they were treated in a manner that negates the principles of accessibility as contained in international law.

180. The state has submitted that the economic, social and cultural rights guaranteed under Article 43 are subject to progressive realization as provided in Article 20, and it is correct in this submission. However, ensuring access to these rights in a non-discriminatory manner is not subject to progressive realization, but is of immediate effect. The African Commission on Human and People's Rights in **Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights** in the African Charter on Human and People's Rights has stated that:

> ***"some of the obligations imposed on States parties to the Banjul Charter are immediate upon ratification of the Charter. These obligations include but are not limited to ... the obligation to prevent discrimination in the enjoyment of economic, social and cultural rights."***

181. Similar sentiments have been expressed by the CEDAW Committee in its **General Recommendation No 28**. The Committee has found that the phrase "***without delay***" in Article 2 of CEDAW is "***clear that the obligation of States parties to pursue their policy, by all appropriate means, is of an immediate nature."*** Thus CEDAW ***"does not allow for any delayed or purposely chosen incremental implementation of the obligations that States assume upon ratification of or accession to the Convention. It follows that a delay cannot be justified on any grounds, including political, social, cultural, religious, economic, resource or other considerations or constraints within the State***."

182. The ESCR Committee has also noted that there are non-derogable rights to which a state party cannot justify non-compliance. These rights include ***"the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups."***

183. In view of the foregoing, I am constrained to find that the petitioners were clearly discriminated against because of their economic status. They were denied access to health care facilities due to their inability to pay. When they were, very grudgingly, given treatment, they were detained due to their inability to pay, and while at the hospital, they were denied basic provisions such as beds, and bedding, and the food they were given was insufficient.

184. We have not, as a society, clearly internalized the fact that denial or neglect to provide interventions that only women need is a form of discrimination against women. As such, the lack of state provision or facilitation of access to affordable maternal health care, including delivery and post-natal care, is a facet of discrimination against women. In **General Comment No 14**, the CESCR, commenting on the normative content of Article 12 of CEDAW notes that:

> ***"the highest attainable standard of health" in article 12.1 takes into account both the individual's biological and socio-economic preconditions and a State's available resources."***

185. It further observes that ***"the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health."***

186. That the neglect of health care services that are unique to women's needs is a form of discrimination against women has also been recognized in other jurisdictions, and was underscored in ***Alyne da Silva Pimentel Teixeira v. Brazil (supra),*** in which the CEDAW Committee made clear that the lack of adequate, appropriate maternal health services and the failure to:

> ***"meet the specific, distinctive health needs and interests of women not only constitutes a violation of article 12, paragraph 2, of the Convention, but also discrimination against women under article 12, paragraph 1, and article 2 of the Convention."***

187. In Kenya, the Pumwani Maternity Hospital is the largest facility where women who come from poor backgrounds can access maternity services. At the time the petitioners went to seek those services, there was a cost attached, which they, and many women like them, could not afford. The experience of the petitioners is a demonstration of the danger that poor women would be denied maternity services, and if the services were provided, they were done in a manner that demonstrated the disdain that those charged

with the provisions of the services held towards the poor women.

188. The ESCR Committee has also noted that:

> ***"[i]ndividuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty … may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of … health care as others."***

189. While the establishment of the waiver system at the time the petitioners sought medical services was a step towards the elimination of discrimination in health care settings, its pervasive ineffectiveness, the lack of implementation and the government's failure to appropriately monitor and evaluate it prevented then (and in respect of services other than maternity services which are still subject to the waiver), still prevents the waiver system from effectuating the right to health and the right to be free from discrimination.

190. The result is that there was a disproportionate impact on poor women's ability to access health care, which constitutes discrimination on the basis of social origin, and negates the right of women to enjoy their constitutionally guaranteed rights and freedoms. The consequences of this pervasive discrimination is the inaccessibility of maternal health services overall, which in turn hinders the attainment of the highest attainable standard of health for poor women.

Conclusion

191. Before disposing of this matter, I must express my disquiet about the facts that were presented before me, and what they portend for our society. The 1st petitioner was referred to the 5th respondent because her baby was feared to be in the breech position, and so she was considered at risk of developing complications and in need of specialized care which she could get at the 5th respondent. As it turned out, she did not have any complications, and was ready to go home the next day. She could not though, as the hospital demanded payment of Kshs3600. Since she did not have it, she spent an additional, unnecessary, 24 days in the hospital, in deplorable conditions, at the risk of her health, that of her new born baby, and the health and safety of her other children whom she had left alone at home.

192. The 2nd petitioner had the prudence to try to obtain some kind of insurance, the "Changamka Pumwani Maternity Smart Card", which she states she had loaded with money to meet her expenses. Since the card was unacceptable to the hospital, her evidence being that she had given a member of staff of the hospital money to load in the card for her, but this had apparently not been done, she was left, bleeding, on a bench, until according to her testimony, one doctor noted her condition and instructed that she be taken to theatre lest she die. From theatre, though she survived the operation, she emerged with a ruptured bladder, but still got no sympathy from the staff of the 5th respondent. She was detained in hospital, but was not given a bed, nor was her wound treated, because she had no money to pay for these services.

193. One is tempted to ask what may sound like a naïve question: what became of our humanity, our compassion? How do those of us who work in a maternity hospital watch a poor woman in labour, bleeding on a bench, and feel no compulsion, regardless of her economic status, to act in order to relieve her suffering, and save her life and that of her unborn child?

194. It is noteworthy that the petitioners, who apparently knew the kind of treatment they were likely to receive at the 5th respondent, had tried, within their limited means, to avoid going there. How many other women in similar circumstances, die in childbirth because they are afraid of going to the 5th respondent? How many of the annual maternal deaths in Kenya, which the **Kenya Demographic and Health Survey (KHDS) 2008-2009** put at 488 maternal deaths per 100,000 live births, can be attributed to the lack of care in institutions such as the 5th respondent, or the fear of the inhuman treatment in such institutions? If

the conditions that the petitioners describe, and the 5th respondent tacitly acknowledges, are what mothers in labour encounter at the main maternity hospital in Kenya, what do they encounter in hospitals in the rural areas? Would it not be correct to say that our health care system, certainly for expectant women, as this petition illustrates, is a totally unconstitutional situation?

195. The rights in the Constitution and the international instruments that I have set out above, and which represent the great hope of the poor and marginalized in our society, will remain weak and ineffectual platitudes unless we can unearth, from the recesses of our hearts and minds where they are buried under layers of indifference and lack of concern for the welfare of others, even those whom we have a legal duty to serve, the remnants of values, compassion and empathy that we once had. Without these three, in circumstances such as have been presented before me, all that a Court can do is come in after the fact, after great pain and suffering has been inflicted on the minds, bodies and spirits of our mothers, sisters, daughters and wives, to offer reliefs that may not quite make up for the humiliations and degradation that we subject others to. And that, in the final analysis, degrade and dehumanize all of us.

196. It is, however, not a totally hopeless situation. I note that the state has put in place a policy under which maternity services, including ante natal and post natal care in public hospitals, will be free. If properly implemented, women will not be dependent on the doubtful mercy of those in public hospitals charged with determining whether they qualify for a waiver or not. This is a good thing. The state must, however, go further, to ensure that the services rendered are rendered in accordance with constitutional and international law standards and conform to such standards with respect to the right to health.

197. The challenge of ensuring access to health for all, but particularly for women and, by necessary extension, children, must be at the forefront in the minds of policy makers and implementers. This is particularly so in view of the fact that health care is now a devolved function, responsibility for which lies with county governments, under Schedule Four of the Constitution.

Disposition

198. In view of the findings above, my response to the issues set out above is as follows:

> **a. Whether the petition is incompetent for failure to state, with a reasonable degree of precision, the manner in which the petitioners' rights have been violated.**
>
> It is my finding that the petition is competent and properly before the Court. The petitioners have sufficiently pleaded their case and have filed voluminous pleadings, which clearly set out their factual allegations with respect to their detention by the 5th respondent and the treatment they were subjected to while so detained. The petitioners also gave evidence on oath, and were cross-examined at length on their evidence. The submission that their petition is incompetent has therefore no merit. Even had they failed to plead with precision, however, that would not have been, of itself, sufficient to render the petition incompetent. The duty of the Court is to render substantive justice, not to pay talismanic homage to rules and technicalities.
>
> **b. Whether the respondents have violated the petitioners' right to liberty, freedom of movement; freedom from torture, cruel and degrading treatment; right to dignity, health and non-discrimination.**
>
> I have found as a fact that the petitioners were detained at the 5th respondent for failure to pay the bill for medical services rendered during the delivery of their children. The 1st petitioner was detained for 24 days, while the 2nd respondent was detained. Such detention, in deplorable conditions, violated the petitioners' right to liberty and freedom of movement, right to dignity, and right to health. Since the treatment of the petitioners and their detention was on account of their status as poor, socially and economically marginalized women, it was a violation of their right not to be subjected to discrimination on the basis of their status.

Remedies

199. The final issue for consideration in this matter is what relief to grant the petitioners in light of my findings on the first two issues above.

200. Article 23 (3) of the Constitution grants the Court power to grant appropriate relief, including a declaration of rights and an order of compensation. The facts in this petition reveal that Kenya has in the past not fulfilled its constitutional and international obligations with regard to the right to health, the prevention of discrimination, the right to dignity and the prevention of cruel, inhuman and degrading treatment with respect to women seeking reproductive health services.

201. I have found that there were inadequate and ineffective administrative measures which would have saved the petitioners from the violations that they went through at the hands of the staff of the 5th respondent. The only internal mechanism for redress that was available to the petitioners was to address their concerns to the hospital Matron or social worker, both of whom were either unavailable or unhelpful. If this system had worked as it should have, then the violations against the petitioners would not have occurred.

202. The respondents have argued that the petition has been overtaken by events as the state has now put in place a policy under which maternity fees are no longer payable. At the time the events complained of took place, however, there was a similar directive and a waiver policy, yet the petitioners were subjected to the mistreatment they have described. I am therefore satisfied that the introduction of the policy does not render the petition incompetent, and the petitioners have made out a case against the respondents and are entitled to the reliefs that they seek. In the circumstances, the orders sought in the petition which commend themselves to me, and which I hereby grant, are the following:

> ***1. I declare that the detention of the 1st and 2nd Petitioners by the 5th respondent was arbitrary and unlawful;***
>
> ***2. I declare that the act of arbitrary and unlawful detention in a health care facility is a violation of the constitutional and human rights standards under the Constitution, as well as under international conventions and treaties that Kenya subscribes to;***
>
> ***3. I declare that the Kenyan Government must take the necessary steps to protect all patients from arbitrary detention in health care facilities, which includes enacting laws and policies and taking affirmative steps to prevent future violations;***
>
> ***4. I declare that the conduct of staff of the 5th Respondent against the petitioners before and during their detention constitutes an infringement of the petitioners' fundamental rights and freedoms as set out in Articles 27(4), 28, 29 (a-d, f), 39(1, 3), 43(1[a], 2-3), 45(1), and 53(d) of the Constitution;***
>
> ***5. I direct that the 3rd, 4th and 5th Respondents will develop clear guidelines and procedures for implementing the waiver system in all public hospitals;***
>
> ***6. I direct that the 3rd, 4th, and 5th Respondents take the necessary administrative, legislative, and policy measures to eradicate the practice of detaining patients who cannot pay their medical bills.***

203. The petitioners have also sought an award in damages for the violations they suffered at the hands of the staff of the 5th respondent. The 1st petitioner was detained for a period of 24 days, between 21st September 2010 and 15th October 2010, and was subjected to ill treatment which has been detailed above. The 2nd petitioner was detained for a period of 6 days between 13th and 19th November 2010. She was also subjected to ill treatment and neglect. While I recognize that damages will not fully compensate them for the violation of their rights, it is the only remedy that the Court is able to grant.

204. The decisions relating to unlawful detention that the petitioners rely on arose out of the Nyayo House incarcerations of the 1980s and 1990s. I believe that the decision that comes close to the circumstances of the petitioners in this case is the case of **Sonia Kwamboka Rasugu vs Sandalwood Hotel** (supra) in which the Court awarded a sum of Kshs1,000,000. Bearing in mind the circumstances of this case, and the conditions in which the petitioners were confined, as well as the violation of their right to dignity and health, I grant the petitioners a global sum in damages as follows:

1) To the 1st petitioner, the sum of Kshs 1,500,000.00;

2) To the 2nd petitioner, the sum of Kshs 500,000.00.

205. I note that though the state had put in place a waiver system in respect of maternity charges, the system had not been monitored and enforced. However, the liability for the violation of the petitioners' rights falls squarely on the 5th respondent, whose staff perpetrated the violations. Consequently, the 3rd respondent, now the county government of Nairobi, which has the responsibility of management and administration of the 5th respondent, shall pay the damages to the petitioners.

206. The petitioners shall also have the costs of this suit against the 3rd respondent, together with interest on costs and damages from the date hereof until payment in full.

207. In closing, I must express my great appreciation for the very extensive pleadings and well researched submissions and authorities presented by the parties, and gratitude for their patience given the time it has taken to render this judgment. This was occasional by the considerable caseload of the Court and the voluminous material placed before the Court for consideration, as well as the need to render a well-reasoned and considered judgment on the very important issues that this petition raises.

Dated, Delivered and Signed at Nairobi this 17th day of September 2015

MUMBI NGUGI

JUDGE

Ms. Okal instructed by the firm of Judith Auma Okal & Co. Advocates for the petitioners.

Ms. Muchiri instructed by the State Law Office for the 1st, 2nd and 4th respondents.

Mr. Sifuma instructed by the firm of Nyachae & Ashitiva & Co. Advocates for the 3rd and 5th respondent.