



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NUMBER 195 OF 2013

DAVID LAWRENCE KIGERA GICHUKI.....PETITIONER

VERSUS

THE AGA KHAN UNIVERSITY HOSPITAL.....RESPONDENT

JUDGMENT

Introduction

1. The petitioner alleges violation by the respondent of his right to privacy under **Article 31** of the Constitution following the release of confidential medical information by the respondent to a third party. The medical information pertained to treatment of the petitioner, who was involved in a road traffic accident on or about 15th April 2012, at the respondent hospital. By a letter dated 8th June 2012, the law firm of **Messrs. Mbugua Mureithi and Company Advocates** wrote to the respondent requesting for triage notes relating to the treatment of the petitioner on the said date. The respondent released the confidential treatment notes to the law firm.

2. On 13th June 2012, the respondent also prepared a Medical Report containing the said confidential information which the prosecution seeks to rely on in Traffic Case No. 1454 of 2012 in which the petitioner is charged with the offence of causing death by dangerous driving. It is the release of the treatment notes and the medical report that precipitated the filing of this petition.

The Petitioner's Case

3. The petitioner's case is set out in the petition dated 15th April 2013 and supported by an affidavit sworn on the same date by the petitioner as well as submission dated 21st June 2013. Learned Counsel, Mr. Mureithi submitted on behalf of the petitioner that the release of the petitioner's medical information to Messrs. Mbugua Mureithi and Company Advocates without the petitioner's consent was a violation of his right to privacy as the respondent had obtained the medical information in trust and solely for the purpose of granting medical services to the petitioner.

4. It was the petitioner's case that in breach of the said confidentiality and trust, and without the consent of the petitioner, the respondent further unlawfully made use of the said confidential information otherwise than for the purpose for which it was supplied to it. Mr. Mureithi submitted that this was an unlawful, unjustified and arbitrary curtailment and threatened complete negation of the petitioner's right

to privacy in violation of **Article 31** of the **Constitution**.

5. Counsel relied on the decision in the case of **Kenya Plantation and Agricultural Workers Union vs James Finlay (K) Limited 2013 eKLR** to underscore the importance of the right to privacy as espoused in the Constitution.

6. The petitioner contends that the respondent acted in bad faith and was actuated by malice in that it prepared the medical report without the petitioner's consent; that it also, without the petitioner's consent, forwarded the report and copies of treatment notes to the firm of Messrs. Mbugua Mureithi and Company Advocates; and that as a result of the unauthorized release of confidential information, the petitioner has suffered and continues to suffer loss and prejudice.

7. The petitioner submits that despite demand the respondent has refused to admit liability or to make good his claim. It is his contention that the respondent has not demonstrated which law required it to disclose the confidential information, and he prays that the court finds in his favour and grants him an award of damages in the sum of **Kshs. 3,500,000**. He has relied on the decision in **C.O.M vs Standard Group Limited and Another 2013 eKLR** where the court awarded the petitioners damages of **Kshs. 1,500,000** for breach of their right to privacy. He also prays for the grant of the following orders:

(a). A Declaration that the petitioner's right to privacy without arbitrarily being deprived of the same is guaranteed by Article 31 of the Constitution and the respondent's action contravenes the petitioner's fundamental rights under the Constitution.

(b). A Declaration that the acts of the respondent have infringed on the petitioner's inherent dignity.

(c). An Order compelling the respondent to pay damages to the petitioner.

(d). An injunction against further transmission of information held by the respondent relating to the petitioner.

(e). The cost of this Petition be awarded to the petitioner.

(f). The Honourable court do issue such other orders and further directions as it may deem fit to meet ends of justice.

The Respondent's Case

8. The respondent's case is contained in the replying affidavit sworn on 24th May 2013 by one **Judith Oduge Otieno**, the respondent's legal officer, and its submission dated 12th May 2014. Its case was presented by Learned Counsel, Mrs Ogalo. According to the respondent, it is in its day to day activities, required to carry out its functions with adherence to the core values of the medical profession which include integrity and professionalism, respect for quality of human life and dignity, and ethical practice. It concedes that the petitioner was treated and discharged at the hospital on 15th April 2012, and that he did not require further medical intervention except routine check-up. The respondent submits that it later transpired that the accident the petitioner was involved in was the subject of **Criminal Case No. 1454 of 2012** in which the petitioner was charged with the offence of causing death by dangerous driving.

9. The respondent also admits that it released the petitioner's information Ms otieno avers that being conscious of the fact that the events of 15th April 2012 were now part of a trial in the traffic court; being aware of the nature of the matter and the relevance of the notes to the trial, the respondent discharged its public interest duty and released the said notes to the Advocate.

10. It is its submission that the release of the notes was informed by the nature of the serious charges facing the petitioner and the contents of the notes themselves. It is its case that there was therefore no

infringement of the petitioner's right to privacy; that the circumstances under which the respondent disclosed the petitioner's medical information was motivated by the belief that a practitioner may be persuaded by public interest that his duty to the community overrides the duty to his patient; and that the right to privacy under the Constitution is not absolute but is subject to limitation under **Article 24**.

11. The respondent submitted therefore that in the circumstances, it was under a duty to disclose the said information; that the information was released to an appropriate person in the circumstances of the case; and that the public interest overrode any disclosure privilege or duty that it owed to the petitioner.

12. It was also the respondent's submission that the enforcement of a right must always be balanced against various interests such as principles, values, and objectives to be attained; a sense of proportionality, public interest and public policy considerations; and it relied for this proposition on the decision in **Kenya Bus Services Ltd and Others vs Attorney General and Others Misc Civil Appl No. 413 of 2005**.

13. Counsel for the respondent also referred the court to the decision in **AG v Guardian Newspapers Ltd (No. 2) 1988 3 ALL ER 545 at 659** for the proposition that although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, that public interest may, nevertheless, be outweighed by some other countervailing public interest which favours disclosure; that this limitation may apply to all types of confidential information, and that it is this limiting principle which may require a court to carry a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

14. Counsel for the respondent submitted that in the circumstances of this case, there was no constitutional issue disclosed by the petition. She prayed that the petition be dismissed with costs.

Determination

15. It is, I believe, common ground that the petitioner has the right to privacy with regard to his medical information, and that the respondent did disclose such medical information to a third party without the knowledge or consent of the petitioner. The issue then that falls for determination is whether the respondent, by such disclosure, violated the petitioner's rights under **Article 31** of the Constitution as alleged.

16. The petitioner's claim is founded on Article 31 (c) which provides that:

“Every person has the right to privacy, which includes the right not to have—

(a)...

(b)...

(c) information relating to their family or private affairs unnecessarily required or revealed;..”
or

(d) the privacy of their communications infringed.”

17. The Constitution does not define the term 'privacy' or what the right to privacy entails. However, **Black's Law Dictionary, Ninth Edition**, defines the right to privacy as ***“the right of a person and the person's property to be free from unwarranted public scrutiny or exposure.”*** Violation of the right to privacy thus involves the unwelcome intrusion on someone's personal privacy or disclosure of information about a person without their consent.

18. The protection of privacy has been considered of sufficient importance to warrant constitutional protection under our constitution. However, while it is important to protect the privacy of an individual either from unlawful searches or seizures, or from unlawful disclosure of private information, it is not one

of the rights that cannot, under Article 25, be limited. It is thus not an absolute right and is subject to the limitations set out in **Article 24** of the **Constitution** which provides that a right or fundamental freedom in the Bill of Rights shall not be limited:

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

a. The nature of the right or fundamental freedom;

b. The importance of the purpose of the limitation;

c. The nature and extent of the limitation;

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

e. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

19. The High Court in Kenya has had occasion to consider the implications of the right to privacy and the circumstances under which it can be deemed to have been violated. In the case of **Samson Mumo Mutinda vs Inspector General National Police Service and 4 Others Petition No. 38 of 2014**, the court, while in agreement with the decision in **Samura Engineering Limited and Others vs Kenya Revenue Authority Nairobi High Court Petition No. 54 of 2011** pointed out that:

“... [23] The right to privacy protects a person’s autonomy. The breach of the right of privacy either involves violation of the law that permits infringement of the right consistent with the limitation provided under Article 24 or failure to obtain consent of the person...”

20. In **Kenya Plantation and Agricultural Workers Union vs James Finlay(K) Limited** (supra) the court held as follows:

“This issue is of particular concern to the court because under Sub-Article 31(c) of the Constitution, every person has the right to privacy which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed. In the opinion of the court, such right includes the right to have information such as official records, photographs, correspondence, diaries and medical records kept private and confidential. It is the further opinion of the court that in the instant case, the respondent in discharge of the duty to uphold medical professional ethics of its medical staff as prescribed in the Rules is obligated to take positive steps to prevent intrusions into the privacy of its hospital’s patients)”

21. The issue of privacy in relation to disclosure of medical information was also considered in the case of **JLN and 2 Others vs Director of Children Services and 4 Others Petition No. 78 of 2014**. In that case, the petitioners contended that the respondent hospital had violated their right to privacy guaranteed under Article 31 by unnecessarily and without just cause disclosing confidential medical information to a third party. They contended that the hospital had breached the doctor/patient confidentiality principle by disclosing the details of the surrogacy arrangement between the parties. In holding that the hospital had not breached the right to privacy but that the Director of Children Services had breached the right to ...the court stated that:

“...The right to privacy is not absolute. Implicit in the protection accorded is that information relating to family and private matters must not be “unnecessarily revealed.” Indeed, counsel for the petitioner submitted that there are instances where the right to privacy in respect of the

patient/client relationship may be abridged. He cited the case of W v Edgell [1990] 1 ALL ER 835 where Lord Bingham set out the principles under which a doctor may disclose the information held in confidence. The principles were as follows;

- i. A real and serious risk of danger to the public must be shown for the exception to apply.*
- ii. disclosure must be to a person who has legitimate interest to receive the information.*
- iii. disclosure must be confined to that which is strictly necessary (not necessarily all the details) ...”*

22. The disclosure of a person’s medical information by his doctor has also been considered in other jurisdictions, and regulated in codes of ethics for medical practitioners. The general principle that emerges from a consideration of the decisions from these jurisdictions is that the right to privacy is not absolute and must, in certain circumstances, give way to the greater public interest in disclosure.

23. In the United States, the US Supreme Court in the case of **Margaret O’Hartigan vs Department of Personnell ET AL 118 Wn. 2d 111, P2d 44 (No. 56063-3 En Banc)** pointed out that:

“... [2] The Supreme Court has identified two types of interests protected by the right to privacy: the right to autonomous decision-making and the right to non-disclosure of intimate personal information, or confidentiality... [3] The interest in confidentiality, or non-disclosure of personal information, has not been recognized by this court as a fundamental right requiring utmost protection. Disclosure of intimate information to governmental agencies is permissible if it is carefully tailored to meet a valid governmental interest, and provided the disclosure is no greater than is reasonably necessary... The right to non-disclosure of personal matters is a valued right meriting constitutional protection. However, the right is not absolute...”

24. In **Alexander vs Knight, 197 Pa. Super 79, 177 A.2d 142 (1962)**, the court held that:

"We are of the opinion that members of a profession, especially the medical profession, stand in a confidential or fiduciary capacity as to their patients. They owe their patients more than just medical care for which payment is exacted; there is a duty of total care; that includes and comprehends a duty to aid the patient in litigation, to render reports when necessary and to attend court when needed. That further includes a duty to refuse affirmative assistance to the patient's antagonist in litigation. The doctor, of course, owes a duty to conscience to speak the truth; he need, however, speak only at the proper time..."

25. In **Hague vs. Williams, 37 N.J. 328, 181 A.2d 345 (1962)** the New Jersey Supreme Court, though it dismissed the plaintiff’s claim in the matter, nonetheless recognized that:

"...A patient should be entitled to freely disclose his symptoms and condition to his doctor in order to receive proper treatment without fear that those facts may become public property. Only thus can the purpose of the relationship be fulfilled. So here, when the plaintiffs contracted with defendant for services to be performed for their infant child, he was under a general duty not to disclose frivolously the information received from them, or from an examination of the patient... This is not to say that the patient enjoys an absolute right, but rather that he possesses a limited right against such disclosure, subject to exceptions prompted by the supervening interest of society. We conclude, therefore, that ordinarily a physician receives information relating to a patient's health in a confidential capacity and should not disclose such information without the patient's consent, except where the public interest or the private interest of the patient so demands..."

26. In Australia, The **Australian Medical Association Guidelines for Doctors on Disclosing Medical Records to Third Parties 2010** provides at section 21 that:

“... There may be circumstances where the law authorises, but does not require, a doctor to disclose information from a patient’s medical record, regardless of whether or not the patient has provided consent. This may include certain types of medical research, for certain health management activities, where there is a serious and imminent threat of harm to the patient or another identifiable person or group of persons, or in a medical emergency.”

27. At section 26, the Guidelines provide that there may be circumstances where the law actually requires a doctor to disclose a patient’s medical record, regardless of whether or not the patient has consented. This includes circumstances where statute so requires, or where there has been subpoena or court order. In such circumstances, section 29 of the Guidelines provides that:

“Whether disclosure of information from a patient’s medical record is permitted or required by law without patient consent, where appropriate the patient should be informed of that having occurred and this information should be documented in the medical record...”

28. Here in Kenya, the **Medical Practitioners and Dentists Board (Disciplinary Proceedings) (Procedure) Rules under the Medical Practitioners and Dentists Act Cap 253 Laws of Kenya** prohibit abuse of professional confidence and provide at rule 8 that:

Abuse of professional confidence:-

“A practitioner or an institution shall not disclose to a third party information which has been obtained in confidence from a patient or the patient's guardian, where applicable. The practitioner or institution shall safeguard the confidential information obtained in the cause of practice, teaching, research or other professional duties subject only to such exceptions as are applicable. The following are possible exceptions:

i. The patient or his/her lawyer may give a valid consent;

ii. The information may be required by law or through a Court Order;

iii. Public interest may persuade a Practitioner that his/her duty to the community overrides the one of the patient;

iv. Information may be given to a relative or appropriate person if in his/her opinion it is undesirable on medical grounds to seek the patient's consent; and

v. In the interest of research and medical education, information may be divulged, but at all times the patient's name shall not be revealed. A practitioner shall always be prepared to justify his/her action whenever he/she discloses confidential information. Whenever possible except in the public interest, the practitioner should keep secret the identity of the patient.”

29. The principles that emerge from the above considerations are therefore as follows:

i. That a medical practitioner or medical facility is under an obligation not to release confidential information about a patient without the patient’s knowledge or consent;

ii. That there are, however, circumstances in which the medical practitioner or institution may be required to release such information for valid governmental and public interest reasons;

iii. That a medical practitioner or institution may be required by law or a court order to release information about a patient without the patient’s consent.

30. Applying these principles to the facts of the present case, it is conceded by the respondent that it was under a duty not to divulge the petitioner’s medical information to a third party. It is its case, however, that the public interest required such disclosure, and that the information was released to a person with a

legitimate interest. From the evidence, the information was released at the request of an Advocate watching brief for the estate of one of the persons who had died as a result of the accident on 15th April 2012 involving the petitioner. The request was contained in the letter dated 8th June 2012 addressed to the Executive Officer of the respondent and copied to one Gladwell Otieno, was in the following terms

Dear Sir/Madam

RE: SYLVANO M.W. OTIENO – DECEASED

FATAL ROAD TRAFFIC ACCIDENT ON 15/04/2012

We act for the estate of the above named person who died on 15/04/2012 from injuries arising from a road traffic accident along James Gichuru Road, Nairobi. The deceased was aged 21 years.

The accident that killed the deceased involved a vehicle driven by him and another driven by one DAVID LAWRENCE KIGERA GICHUKI who has since been charged and arraigned before the Chief Magistrate at Kibera in Traffic Case No 1454 of 2012 with the offences of causing the death of the deceased and 2 others.

We are instructed that, after the accident, the said DAVID LAWRENCE KIGERA GICHUKI sought triage treatment from your hospital on the said 15/04/2012.

We are now instructed to request you to kindly furnish us with the triage notes regarding his treatment for our onward transmission to Officer In charge of Traffic Kabete Police Station, who is investigating officer or indicate availability of a doctor to appear in court and produce the same

YOURS FAITHFULLY

For: Mbugua Mureithi & Co.

Mbugua Mureithi

Advocate

31. The petitioner's records were required for purposes of his prosecution in a road traffic accident involving the petitioner and three others persons whom all died in the said accident. The medical information was sought by a third party, and unless there could be shown legitimate reasons for its release, or that the information falls under the exceptions set out above, then there can be no justification for its release.

32. The firm of Mbugua Mureithi and Co. Advocates, acting on behalf of the estate of one Sylvano M. W Otieno, deceased, sought the triage notes regarding the treatment of the petitioner for the purpose of transmitting the same to the Officer in Charge of Traffic, Kabete Police Station, the investigating officer in **Traffic Case No. 1454 of 2012**. The notes were needed in the court proceedings in the Traffic case.

33. In my view, the **reason** for the release of the notes was justifiable and in the public interest. I agree that the petitioner's right to privacy and to expect confidentiality from his doctors is important and deserving of legal protection, for as emerges from a consideration of the cases set out above, a patient should be entitled to freely disclose his symptoms and condition to his doctor in order to receive proper treatment without fear that those facts may become public property, for only then can the doctor-patient relationship be fulfilled. However, there may be circumstances in which that right must give way to the greater public interest. As Lord Bingham J observed in **W vs Edgell (supra)**:

“...The decided cases very clearly establish: (1) that the law recognizes an important public interest in maintaining professional duties of confidence; but (2) that the law treats such duties

not as absolute but as liable to be overridden where there is held to be a stronger public interest in disclosure... Thus the public interest in the administration of justice may require a clergyman, a banker, a medical man, a journalist or an accountant to breach his professional duty of confidence... These qualifications of the duty of confidence arise not because that duty is not accorded legal recognition but for the reason clearly given by Lord Goff in his Spy catcher speech ([1988] 3 W.L.R. 776 at 807), quoted by Mr. Justice Scott at 710G: ‘The third limiting principle is of far greater importance. It is that, although the basis of the law’s protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.’...”

34. However, the release of the notes to the Advocates watching brief for the estate of the deceased was not justifiable. The officer investigating the case was, in my view, the proper person to release the petitioner’s information to. Even then, however, such release could not properly have been done without an order of the court. Such an officer would have a legitimate government interest in the release of the information, but even then, it is necessary for the court seized of the criminal prosecution to make appropriate orders for the release of the information in the same way, say, that banks, who also receive confidential information from clients, can be required to release bankers’ books. Section 144 of the Criminal Procedure Code provides that:

“(1) If it is made to appear that material evidence can be given by or is in the possession of a person who will not voluntarily attend to give it or will not voluntarily produce it, a court having cognizance of a criminal cause or matter may issue a summons to that person requiring his attendance before the court or requiring him to bring and produce to the court for the purpose of evidence all documents and writings in his possession or power which may be specified or otherwise sufficiently described in the summons.”

35. It cannot be in the interests of the doctor/patient relationship for any person to be able to request for and obtain information from a doctor regarding a patient. While the confidentiality is not absolute and public interest considerations may override it in some cases, the medical practitioner or institution must bring itself within the limitations provided by law. The mere request by a third party is not, in my view, sufficient. One of the principles justifying disclosure by a doctor without the patient’s consent espoused in **W vs Edgell (supra)** is that:

“...disclosure must be to a person who has legitimate interest to receive the information.”

36. The police officer investigating the case had a legitimate interest in receiving, requesting for disclosure of and the information. However, the Advocate representing the estate of the deceased was not entitled to request for that information on behalf of the state. It was the duty of the state to request for that information, and if the hospital was not willing to make it available, invoke the provisions of section 144 of the Criminal Procedure Act.

37. For the above reasons, I find that the respondent did breach the petitioner’s right to privacy and was in violation of the doctor/patient confidentiality.

38. The question is whether, in the circumstances of this case, the petitioner is entitled to a remedy in damages against the respondent. As observed above, the reason for the release of the information was for a legitimate reason. Three people, one of them a young man of 21, had met their death in a road traffic accident involving the petitioner. The officer investigating the accident had a legitimate purpose for requesting the medical information and records of the petitioner, and had he made the request himself or applied for their release or for summons to the doctor who treated the petitioner on the morning of the accident, it is possible that the court, balancing the interests of the petitioner and that of the state, would

have directed the disclosure of the information.

39. In the circumstances, while I am satisfied that the release of the information to the Advocates of the estate of the deceased was not justifiable, I am not satisfied that there was any loss occasioned to the petitioner, or that damages, are as a result of such disclosure, merited.

40. For the above reasons, I decline to make an award in damages. However, the petitioner shall have the costs of the petition against the respondent.

Dated, Delivered and Signed at Nairobi this 29th day of October 2014

MUMBI NGUGI

JUDGE

Mr Mureithi instructed by the firm of Kingori Kariuki & Co. Advocates for the petitioner

Mrs Ogalo instructed by the firm of Oraro & Co. Advocates for the respondent