



**Oyugi v Avenue Healthcare Limited, Kisumu (Petition
E020 of 2021) [2023] KEHC 17464 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17464 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
PETITION E020 OF 2021**

FA OCHIENG, J

MAY 9, 2023

BETWEEN

TOBIAS OKUMU OYUGI PETITIONER

AND

AVENUE HEALTHCARE LIMITED, KISUMU RESPONDENT

JUDGMENT

- 1 The petition before me was premised upon the grounds that the respondent had violated the petitioner’s constitutional rights to the highest attainable standards of health.
- 2 The said right is enshrined in Article 43 of the [Constitution](#).
- 3 It was the understanding of the petitioner that one of the rights that he was entitled to was the right to receive emergency treatment, as provided for under Article 43(2) of the [Constitution](#).
- 4 However, when he fell ill, and was taken to the respondent’s facility on November 17, 2020, the petitioner complains that the respondent violated his said rights.
- 5 By way of a background, the petitioner says that, for a period of 3 days prior to being rushed to the hospital, he had been suffering from general body malaise, chest pains, epigastric pains and cough. He therefore expected that upon reaching the hospital, he would be given emergency treatment.
- 6 However, instead of being given the necessary emergency treatment he was; “... segregated and secluded” for over 5 hours, without any medical attention at all.
- 7 During the said period of 5 hours, the petitioner says that the members of his family and also his colleagues from Siaya Law Courts, (where he works), were not allowed to see him.
- 8 As a consequence of the hospital barring family members and colleagues from seeing him, the petitioner says that he was caused untold mental torture.



- 9 Apparently, the hospital had formed the opinion that the petitioner was suffering from the dreaded Coronavirus.
- 10 It was the petitioner's case that members of his family and his colleagues were faced with panic, fear, anxiety and terror, because they thought that the petitioner would not make it out of the hospital, alive.
- 11 The petitioner asserted that the respondent had simply orchestrated the allegation that he was a coronavirus patient, in order to obtain the colossal sum of Kshs 350,000/- as a deposit, as that was the quantum of the deposits which the hospital was asking for from patients suffering from coronavirus.
- 12 Although the hospital was not providing any medical attention to the petitioner, they declined his request, to have him transferred to the Jaramogi Oginga Odinga Teaching and Referral Hospital.
- 13 He said that it took a call from the Resident Judge, Siaya Law Court's (who was the petitioner's Station Supervisor), to persuade the respondent's staff to transfer him to the alternative medical facility.
- 14 At the said alternative medical facility, tests were carried out and it was established that the petitioner was not suffering from coronavirus. He was suffering from pneumonia.
- 15 As a result, the petitioner believes that if the respondent had carried out tests on him, it would have become clear that he was only suffering from pneumonia; and therefore the respondent would not have demanded the high amount of money in respect to a deposit prior to admissions.
- 16 Based upon those facts, as set out in the petition, it was the petitioner's case that the respondent's staff had contravened his constitutional right to the highest attainable standard of health, and also the right to freedom from torture and inhuman treatment.
- 17 As a consequence, the petitioner prays for the following reliefs;
- a) An order for general damages for trauma, pain, suffering and mental torture caused by the acts and/or omission of the respondent.
 - b) A declaration that the acts and/or omissions of the Respondent were in total contravention of the Petitioner's rights and fundamental freedom.
 - c) A formal apology to the Petitioner from the Respondent.
 - d) Costs be provided.
 - e) Any other or further orders or directive the Court may deem fit."
- 18 The petition was supported by the petitioner's affidavit, which reiterated the matters contained in the said petition.
- 19 In answer to the petition, the respondent filed a replying affidavit which was sworn by Samuel Bwire Otieno, who was the respondent's Medical Services Manager.
- 20 The respondent acknowledged that the petitioner was taken to its hospital on November 17, 2020, at about 4.00 pm.
- 21 According to the respondent, the petitioner presented a history of generalised body malaise; chest pains; epigastric pains; persistent cough for 3 days; and on and off fevers.
- 22 Upon arrival, the respondent took the petitioner to its holding area, at Special Room No 3. Whilst in the said holding area, the petitioner was examined by Dr Nyongesa. From the results of the examination, Dr Nyongesa made a provisional diagnosis of Covid-19/Pneumonia and Peptic Ulcers.



- 23 Having been provisionally diagnosed as having Covid-19/Pneumonia, the respondent asserts that it took steps which were in line with Ministry of Health Guidelines on the management of Covid-19 in Kenya.
- 24 The said guidelines stipulate, inter alia that when handling; “suspected or confirmed COVID-19 cases”, the key measures to be taken during screening and triage include;
Give the patient with suspected COVID-19 a medical mask and direct the patient to a separate area or an isolation room if available.”
- 25 According to the respondent, the action to place the petitioner in the Special Room No 3, was informed by the guidelines issued by the Ministry of Health.
- 26 The respondent further said that it contacted the petitioner’s insurers, but the said insurers declined to give an undertaking to meet the costs of the tests and of admission.
- 27 The respondent told this Court that it relayed the message from the insurers, to the spouse and also to the brother of the petitioner, at about 4.20 pm, when they got to the hospital.
- 28 In the light of the refusal by the insurer to give its undertaking in relation to costs, the respondent advised the petitioner’s spouse and brother that it required a deposit of Kshs 300,000/-, in order to have the petitioner admitted.
- 29 The respondent’s case was that the petitioner’s spouse and brother asked for time to enable them hold consultations. And whilst their consultations were ongoing, the petitioner was kept in the holding area.
- 30 The respondent acknowledged that at about 6.00 pm, Ken, who is the nurse attending to the petitioner, was instructed by the said petitioner to talk to a Lady Judge, on phone.
- 31 The petitioner handed over his phone to Ken, who then explained to the Lady Judge that the insurance company had declined to authorise the admission of the petitioner.
- 32 In those circumstances, explained Ken, the hospital had asked the petitioner for a deposit of Kshs. 300,000/-. The Lady Judge told Ken that because the petitioner was unable to raise the required deposit, the respondent ought to let him go to the Jaramogi Oginga Odinga Teaching and Referral Hospital.
- 33 The respondent’s case was that it wrote a referral note, which then enabled the petitioner to be transferred to the Jaramogi Oginga Teaching and Referral Hospital (JOOTRH).
- 34 In a nutshell, the respondent insists that its actions were in compliance with the protocols that had been issued by the Ministry of Health.
- 35 The respondent believes that its actions were within acceptable medical practices, and did not constitute a violation of the petitioner’s constitutional rights.
- 36 In the face of the documentary evidence which the respondent provided, the petitioner filed a further affidavit. In his said affidavit, the petitioner denied;
- a. that he was brought to the hospital at 4:00 pm. He insisted that he came to the hospital at 12:00 noon.
 - b. that the hospital took his vital signs. He stated that the contents of the readings were fabricated by the hospital to try and hoodwink the court.



- c. that the hospital adhered to their own policy. In his opinion, the hospital's policy required that it would make efforts to counteract possible adverse effects on patients, as a result of being isolated e.g anxiety, depression, boredom, or perceptions of stigma.
- d. that Britam Insurance refused to give authorization for the admission of the petitioner. He insisted that both Britam and Liaison Insurance were ready to authorise admission on condition that the hospital stated what the petitioner was ailing from.
- e. that the hospital informed his spouse or his brother about the insurance declining to authorise admission.

37 In determining the petition, the court is obliged to give due consideration to the evidence adduced as well as the applicable law.

38 Each of the parties before me gave evidence by way of affidavits. The contents of the respective affidavits are literally at cross-purposes. The facts cited by one party are denied by the other party.

39 It is within that context that the petitioner invited the court to determine the following issues;

- a) Whether the failure by the respondent to provide the petitioner with emergency medical care, coupled with the lengthy detention of the Petitioner, was in breach of Article 43(a) of the *Constitution of Kenya 2010*, Section 5(1) and 5(2) of the *Health Act*, and other related international conventions.
- b) Whether the Petitioner is entitled to the orders sought.”

40 I had earlier set out the 5 reliefs which the petitioner was seeking.

41 The petitioner submitted that his isolation, without having tested him to establish his true cause of ailment was akin to subjecting him to inhuman and undignified treatment.

42 He was of the view that his right to emergency treatment was violated.

43 He casts doubt on the qualifications of Samwel Bwire Otieno, who was the Medical Services Manager. In his view, the person who should have presented the results of any test that was carried out on him, should have been Dr Nyongesa, as it was the said doctor who allegedly conducted the tests.

44 I understand the petitioner to be saying that any person who was not a qualified medical practitioner would not be qualified to make an assessment on the question as to whether or not a patient should be accorded immediate medical attention.

45 Nonetheless, the petitioner proceeded to submit that he needed emergency treatment. His said assessment was not based upon his qualifications in the medical field. Instead, the petitioner pegged his conclusion on information which he obtained from “Fever Easy Your Body Temperature Explained.”

46 Based upon information obtained from the internet, the petitioner submitted that;

... Older humans, like the Petitioner are known to have an average body temperature of 36 °C. This means that the Petitioner's body temperature of 39°C was not only high but also fell within the fighting range of ‘dangerous’.”

The petitioner further said;

Assuming one was still relying on SBO1 to judge whether the petitioner required emergency treatment, the obvious answer is only one. Indeed, he needed emergency treatment, which he was denied by being



isolated despite having insurance cover. The annexure shows that the Petitioner had difficulty in breathing and hence, he should have been treated as a matter of emergency.”

47 The parties before me hold divergent opinions concerning the question about whether or not the petitioner required treatment as a matter of emergency.

48 On its part, the respondent expressed the view that the first step which was necessary was to have the Petitioner isolated as soon as the respondent had formulated a provisional diagnosis which suggested that the Petitioner could possibly be suffering from Covid-19.

Whilst acknowledging that he was promptly placed in an isolation room, the petitioner insists that the respondent ought to have conducted further tests on him, to ascertain what ailment he was actually suffering from.

But the respondent insists that the isolation of the petitioner was, of itself, a part of the medical care which was being provided.

49 The reason advanced by the respondent for isolating the petitioner was that the provisional diagnosis suggested that the petitioner was suffering from pneumonia and Covid-19.

The tests which were carried out later, at JOOTRH ruled out Covid-19. Therefore, the petitioner was convinced that the respondent had simply orchestrated the allegation that he was a corona-virus patient, with a view to extracting from him, the colossal sum of Kshs. 300,000/-.

In my evaluation of the evidence placed before me, there is nothing to demonstrate that the respondent had orchestrated some nefarious scheme to extort money from the petitioner.

50 I find that there is no clarity on the question as to whether or not the petitioner required emergency medical care. I so find not because I understand how to assess when a person who is ailing needs emergency attention; but because the petitioner did not make available to me, the assessment of a medical professional who arrived at such a considered opinion, based on the petitioner’s circumstances at the material time.

51 If the court were to base its conclusion upon the website which the petitioner relied upon, I note that;

A temperature slightly above normal to a temperature of 100.4° F (38 °C) is called a low-grade fever and is usually not a cause for worry unless it continues to rise. A temperature that is higher than a low-grade fever should be monitored and a fever of 104 °F (40 °C) or higher can be dangerous and a doctor should be called immediately.”

As the petitioner’s temperature was 39 °C, it required monitoring; in accordance with the write-up on the internet. The temperature had not reached “the fighting range of dangerous”.

52 On the question as to whether or not the insurer had declined to give its authorisation to have the petitioner admitted into the hospital, the petitioner could easily have proved that the insurer had given the requisite authorisation, by making available an affidavit in that regard.

53 Or if the respondent did not even seek the authorisation of the insurer, it should have been possible for the petitioner to make available evidence to demonstrate that fact.

54 As matters stand, the evidence by the two parties is not sufficient to enable the court conclude that either the respondent did not seek authorisation, or that the insurer declined to give its authorisation.

55 When a hospital fails to give emergency care to a patient, that would constitute a violation of the said patient’s constitutional right.



- 56 That which constitutes emergency care would depend on the circumstances of each patient. For example, a patient who was a victim of a motor-vehicle accident, and who was bleeding from cuts sustained in the accident, would require emergency care to contain the bleeding.
- 57 But when a patient was suffering from an ailment which was not so obvious, it would be prudent for the said patient to make available the evidence of an appropriate medical services provider (such as a doctor) who would testify concerning the nature of the emergency medical care which was required.
- 60 In this case the petitioner was referred to another medical facility, after he failed to raise the amount of money which the respondent required to be paid as a deposit.
- 61 The amount of money demanded on account of the deposit is colossal, by the standards of most Kenyans. I so find because I can, and do, take judicial notice of the low levels of income receivable by the majority of people in Kenya.
- 62 If the hospital received a patient who required medical care, as a matter of an emergency; and if the hospital declined to provide the requisite emergency medical care, the hospital would have violated the constitutional rights of that patient.
- 63 I believe that everyone on us, who visits a hospital when he or she is feeling ill, would wish to have prompt medical attention. However, the fact that we are feeling very ill does not necessarily imply that the condition requires emergency medical care. In my considered opinion, the persons who are best suited to determine whether or not a patient requires emergency medical care is a qualified medical practitioner.
- 64 Secondly, I find that it is the medical practitioner who was best suited to determine the nature of the emergency medical care that is appropriate in any particular situation.
- 65 If a medical services provider fails to do that which other such providers would provide in the particular situation; or if the medical provider does something which other qualified medical providers would not have done in the particular situation, the court would hold such a provider liable.
- 66 Similarly, any other professional who provides services would be held liable if he or she failed to do what other professionals in the same field of expertise would do in the particular circumstances. For instance, an advocate would not be liable for unprofessional conduct simply because he handled a case differently from how the client expected him to do. The advocate would only be liable if he or she failed to do something that other advocates would have done in the circumstances. For instance, if an advocate was duly instructed, but thereafter failed to institute proceedings within the time provided for under the Limitations of Actions Act, he may well be held liable for the said failure.
- 67 The point that I am making is that it is vital to first identify that which constitutes emergency health care. Once the parameters are established, either by statute, rules of practice or professional standards, the Court would thereafter hold liable, the person who is demonstrated to have failed to act appropriately.
- 68 In this case, the petitioner failed to demonstrate the particulars of the emergency health care that was necessary in his circumstances. Secondly, he failed to demonstrate that he was in a condition that required emergency medical care.
- 69 Accordingly, the petition is without merit, and is therefore dismissed.



70 As regards the quantum of damages, I find that if the petition had been successful, an award of Kshs. 2,000,000/- (as suggested by the petitioner; and to which the respondent has not responded), would have been sufficient.

71 On the issue of costs, I order that each party will meet his own costs of the Petition. Ordinarily, costs should follow the event. However, in the prevailing circumstances, in which the petitioner appears to have been seriously impacted by the experience he went through, I find that it is in the interests of justice to refrain from burdening him with an order for costs. On the other hand, I hold the view that this order on costs would not be prejudicial to the respondent.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF MAY, 2023.

FRED A. OCHIENG

JUDGE

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

