



**Maina v Registered Trustees of the Sisters of Mercy (Kenya) t/a the Mater Misericordiae Hospital (Constitutional Petition E020 of 2021) [2023] KEHC 22347 (KLR) (Constitutional and Human Rights) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22347 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E020 OF 2021**

**AC MRIMA, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**JOHN MARK NJOROGE MAINA ..... PETITIONER**

**AND**

**THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY (KENYA) T/A  
THE MATER MISERICORDIAE HOSPITAL ..... RESPONDENT**

**JUDGMENT**

1. On 17<sup>th</sup> August 2021, John Mark Njoroge Maina, the Petitioner herein, was hospitalized in The Mater Misericordiae Hospital, (hereinafter referred to as ‘the Respondent’ or ‘the Hospital’), for COVID-19.
2. On 20<sup>th</sup> August 2021, he was transferred to High Dependency Unit (HDU) where he spent 12 days. Thereafter, he was moved to isolation ward where he spent another 8 days before being moved to the main ward.
3. While receiving treatment in HDU, Doctors informed the Petitioner’s wife, on two different occasions, that he was making good progress and would be taken off the ventilator by 28<sup>th</sup> August, 2021.
4. However, as it would turn out, the Petitioner stayed in HDU until 1<sup>st</sup> September 2021. He was only taken off the ventilator after his wife escalated the matter the Customer Care Manager.
5. During the Petitioner’s stay at the HDU, he developed severe deep sores on his bottom which went unnoticed until he was transferred to the isolation ward.
6. Upon making full recovery from COVID-19, the Petitioner, claimed that he remained at the hospital due to the wounds.



7. Eventually, he was discharged on 11<sup>th</sup> September 2021.
8. It is the foregoing events and the ones that ensued after that yielded the instant Petition.
9. The Respondent opposed the Petition.

**The Petition:**

10. Through the Petition dated 14<sup>th</sup> October, 2021 supported by the Affidavit and Supplementary Affidavit of the Petitioner deposed to on 14<sup>th</sup> October 2021 and 9<sup>th</sup> February 2022 respectively, the Petitioner sought to highlight and redress constitutional infractions visited at him by the Respondent.
11. The Petitioner pleaded that his extended stay at the facility was needless, but for the selfish financial gain and unjust enrichment pursued by the Respondent.
12. It was further his claim that the deep bed sores he acquired on his bottom were medically preventable with proper care.
13. The Petitioner attributed his extended stay to sub-standard care and negligence on the Respondent.
14. The Petitioner pleaded that his wife requested and was given an all-clear bill of health by the Doctors.
15. However, upon discharge, the Petitioner posited that he could not raise enough money to settle the entire hospital bill.
16. On insistence of full payment by Credit officers, the Petitioner pleaded that his request of 13<sup>th</sup> September, 2021 for a collateral and a favourable payment plan fell on deaf ears.
17. On account of the unpaid bills, the Petitioner posited that he was illegally detained in the Hospital.
18. He averred that during the detention, the Hospital neglected to take proper care of the bedsores he had acquired leaving them in a smelly and messy state.
19. The Petitioner pleaded that the wounds left him in embarrassment and indignity despite his wife pleading with the hospital staff for proper care.
20. The Petitioner pleaded that, on the advice of Kenya Medical Practitioners Dentists Council (hereinafter referred to as 'the Council'), his wife wrote a letter dated 19<sup>th</sup> September, 2021 to the hospital raising concern about the care given to him and the medical bill.
21. It is his case that the Respondent addressed the issue regarding his care but ignored the one regarding his medical bill.
22. The Petitioner pleaded that whereas he was admitted to the Hospital for COVID-19, which he recovered fully from, his health deteriorated because of the badly managed bedsores to the extent that he could not walk unaided.
23. The Petitioner averred that as of 12<sup>th</sup> October 2021, his hospital bill had accumulated to Kshs. 3,151,596/12 and had managed to pay a sum of Kshs.928,000/- leaving a balance of Kshs. 2,223,596/12.
24. It is the Petitioner's case that the Hospital levied unreasonable and unjustified charges on him through the illegal detention.
25. The Petitioner pleaded that his wife sought the intervention of the Council through the letter dated 9<sup>th</sup> October, 2021 and in response, the Council wrote to the Hospital ordering the release of the Petitioner.



26. The Petitioner averred that the Hospital ignored the Council's order on the basis that it does not accept any payment plans for unpaid hospital bills.
27. It is the Petitioner's claim that on 12<sup>th</sup> October 2021, he wrote to the Respondent offering to make payment of Kshs. 250,000/- and monthly instalments of Kshs. 50,000/ towards completion of the outstanding bill, to no avail.
28. In highlighting constitutional violations, the Petitioner pleaded that the failure by the hospital to provide him with proper medical care in respect of the bedsores resulted in violation of his to dignity under Article 28 of *the Constitution*.
29. He claimed further that the arbitrary and illegal detention was a derogation of his right to freedom, security of the person and the right not to have his freedom deprived arbitrarily and without just cause as provided for under Article 29 (a) of *the Constitution*.
30. The Petitioner further asserted that the detention violated his right to movement guaranteed under Article 39 of *the Constitution* and Article 12 of the International Convention on Civil and Political Rights.
31. On the foregoing legal and factual backdrop, the Petitioner prayed for the following reliefs: -
  - a. A declaration be and is hereby issued that the failure of the Respondent to provide proper wound care to the Petitioner which resulted in him being left in a messy, smelly state is a violation of the Petitioner's right to inherent dignity provided under Article 28 of *the Constitution* of Kenya, 2010.
  - b. A declaration be and is hereby issued that the continued detention of the Petitioner by the Respondent is arbitrary, unlawful and a breach of Articles 29 and 39 of *the Constitution* of Kenya, 2010.
  - c. An order be and is hereby issued compelling the Respondent to release the Petitioner from the unlawful detention.
  - d. A permanent injunction be and is hereby issued to restrain the Respondent from continuing or proceeding with the unlawful detention and incarceration of the Petitioner.
  - e. An order be and is hereby issued compelling the Respondent to release to the Applicant's all medical records, notes, and other documents relating to the Applicant's treatment and management at the Respondent Health Facility.
  - f. An award for general damages for the violation of the petitioner's fundamental human rights.
  - g. An award for exemplary damages be awarded to the Petitioner for false imprisonment. .
  - h. Costs of the Petition.
  - i. Interest on the above awards at court rates from the date of judgment till payment in full.
  - j. That this Honourable Court be pleased to grant such further Order or Orders as may be just and appropriate.



### The submissions:

32. In its written submissions dated 9<sup>th</sup> February 2022, the Petitioner reiterated his case by stating that the detention was illegal.
33. He relied on High Court at Nairobi Constitutional Petition No. 63 of 2017 Veronicah Nyangai -vs- The Nairobi West Hospital Ltd. [2017] eKLR where the right to liberty was spoken of in the following manner: -  
  
... the right to liberty is non-violable and that a person’s liberty can only be curtailed in accordance with the laws...
34. Further support was drawn from High Court at Nairobi Constitutional Petition No. 562 of 2012 MAO & another v Attorney General & 4 others [2015] eKLR it was held: -  
  
.... I therefore find and hold that the detention of the Petitioners by the 5<sup>th</sup> Respondent for their inability to pay their medical bill was arbitrary, unlawful and unconstitutional.
35. With respect to violation the right to dignity, the Petitioner submitted that the care given to the wounds he developed did not meet the definition of dignity as per The Cambridge Advanced Learner’s Dictionary & Thesaurus defines “dignity” as “the importance and value that a person has, that makes other people respect them or makes them respect themselves.
36. He referred to the medical notes which indicated that the wounds had “wet dressings with worrying exudation that is looking like pus”
37. The Petitioner fortified violation of Article 28 by relying on the decision in JWN Vs Securex Agencies (K) Ltd. [2018] eKLR.
38. In urging the Court to make a finding that he is entitled to damages for being illegally detained for 47 days, he found support in High Court at Nairobi Constitutional Petition No. 352 of 2018 Emmah Muthoni Njeri v Nairobi Womens Hospital [2021] eKLR where it was observed: -  
  
... When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation.
39. Further support was drawn from Sonia Kwamboka Rasugu v Sandalwood Hotel and Resort and another Petition No. 156 of 2011 where it was observed;  
  
... I think a sum of Kshs.1,000,000.00 as general damages would be an appropriate award... In this case, the unlawful act was not accompanied by torture and it was for a period of four days. But it was a deliberate and intentional act designed to humiliate the petitioner to ensure that payment was made...
40. Based on the foregoing, the Petitioner submitted that a sum of Kshs. 2,000,000/- as general damages would be sufficient for violation of Article 28 of *the Constitution*.
41. The Petitioner further submitted that he was entitled to aggravated damages since Respondent’s actions were actuated with financial gain and profit.
42. It was his submission that the Respondent benefited financially from its illegal actions by levying daily charges on the Petitioner. He stated that his outstanding bill as at September 11, 2021 when he was first discharged was a total of Kshs. 2,235,356.47/= and the total invoice amount when he was discharged



on October 28, 2021 was Kshs. 3,689,194/- earning the Respondent an additional Kshs. 1,453,837.53/ = from the illegal detention.

43. The Petitioner submitted that aggravated damages was also awardable due to the neglect he faced that exposed him to indignity embarrassment and low self-esteem.
44. In the end, the Petitioner prayed for costs of the suit since the Respondent had ample time to consider his proposal made on 11<sup>th</sup> September, 2021 but failed to do so.

**The Respondent's case:**

45. The Registered Trustees of the Sisters of Mercy T/A The Mater Misericordiae Hospital challenged the Petition through the Affidavit of Evelyn Maina, its in-house Counsel deposed to on 1<sup>st</sup> December 2021.
46. She deposed that the Petitioner's prolonged stay at the hospital was necessitated by his health and despite what the Doctors may have intimated, the Petitioner was dependant on mechanical ventilation for oxygen in the HDU and his condition was bound to change without warning.
47. It was her case that the Respondent had no intention of making an extra coin from the Petitioner and the general high demand of HDU would not have permitted the Respondent to keep the Petitioner longer than necessary.
48. She further deposed that the bedsores were as a result of the Petitioner's obesity and for being bedridden for several days, not negligence or physical torture.
49. It was her case that the prolonged stay was as a result of the sores not out of the Respondent's volition.
50. She deposed further that the Petitioner requested on three occasions to be discharged, a request that was granted but his inability to walk and the pending bill rendered him unable to walk.
51. The Respondent denied being given an opportunity to settle. Instead, she deposed that the Petitioner rushed to the Council and to this Court.
52. It was his deposition further that the acceptance of the proposal by the Respondent was a confirmation of goodwill in resolving the matter.
53. It was the Respondent's case that the prolonged stay was not arbitrary and it could not have neglected the Petitioner due to unpaid medical bill.
54. In conclusion, Mrs. Maina deposed that both the prayer for release of the Petitioner and the medical reports were spent.
55. It was urged that the prayers, in their totality, were not awardable to the Petitioner.

**The submissions:**

56. In its written submissions dated 2<sup>nd</sup> February 2022, the Respondent, from the outset, stated that the Petitioner had not attained the threshold required of constitutional Petitions for making general assertions without offering any particulars.
57. It was its case that the Petitioner had failed to provide any evidence on the expected medical standards in contrast to the sub-standard medical care given to him. The Respondent therefore denied violation the Petitioner's right to dignity.
58. It was submitted that the claim of sub-standard medical care is one of professional negligence as opposed to being a constitutional issue.



59. As regards breach of Article 29 on freedom and security of a person, the Respondent reiterated that it was neither forceful, arbitrary nor illegal as it was occasioned by his immobility caused by wounds and pending bills.
60. In claiming that the Petitioner had not discharged his burden of proof, it was submitted that the annexed witness statement was not sworn under oath and that the documentary evidence before the Court was not properly produced.
61. The Respondent submitted that the award of damages was not due to the Petitioner since he had not presented evidence to warrant general damages.
62. It was the Respondent's case that the Petitioner was not entitled to cost for having jumped the gun for rushing to Court without giving his time to consider his settlement proposal.
63. It was urged that the Petition is dismissed with cost for lack of evidence.

**Analysis:**

64. The subject of this Petition is a legal path which, by now, is a well-trodden one. Courts have repeatedly expressed themselves on the unconstitutionality of health institutions detaining patients on account of unpaid medical bills and expenses.
65. In this matter, and in particular, the Council, in its letter dated 12<sup>th</sup> October, 2021 to the Respondent directed the release of the Petitioner. The Council brought to the attention of the Respondent herein the relevant constitutional provisions, the Professional Code of Doctors and Health Institutions and Court decisions in respect to the subject at hand.
66. The Respondent, however, disregarded the order of the Council and insisted otherwise until when this Court urged the parties to discuss settlement of the matter thereby reaching a consent which was dated 27<sup>th</sup> October, 2021 and recorded in Court on 28<sup>th</sup> October, 2021.
67. The Petitioner who had been discharged on 8<sup>th</sup> October, 2021 was then released thereafter.
68. Since the correct constitutional and legal position on the gist of the matter herein was communicated by the Council to the Respondent, this Court will not really endeavour to re-invent the wheel.
69. Further, the Petitioner in his written submissions, rightly so, and elaborately also dealt with the issue at hand.
70. In a nutshell, health institutions cannot detain patients on account of unpaid medical bills and expenses. Since the relationship between the institution and the patient is always contractual, then the contract ought to provide for lawful ways of debt recovery. The contracts may also provide for ways of taking care of the bills and expenses from escalating way above.
71. Detaining a patient, therefore, is not one of the ways of debt recovery. The act runs contra various rights and fundamental freedoms provided in the Bill of Rights. They include Article 29 of *the Constitution* which provides that every person has the right to freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause. There is also Article 39 which provides that every person has the right to freedom of movement. These constitutional provisions make it apparent that freedom and security of a person cannot be limited without a just cause. Furthermore, Article 28 provides that every person has inherent dignity and the right to have the dignity respected and protected.



72. Several decisions have been rendered buttressing the foregoing. They include *Sonia Kwamboka Rasugu v Sandalwood Hotel and Resort and another* [2013] eKLR, *MAO & another v Attorney General & 4 others* [2015] eKLR, *Tryphosa Jebet Koskey v Elgon View Hospital* [2016] eKLR, *Mary Nyang'anyi Nyaigero & Another v Karen Hospital Ltd & Another* [2016] eKLR, *Christine Kidha v Nairobi Women's Hospital* [2016] eKLR, *Veronica Nyangai v Nairobi West Hospital Ltd* [2017] eKLR among many others.
73. Detention is also condemned by international instruments which Kenya is a signatory. Article 2(6) of *the Constitution* recognizes general principles of international law and international treaties to which Kenya is a signatory as part of the Laws of Kenya. One of such instruments is the International Convention on Civil and Political Rights, (ICCPR) wherein Article 9(1) thereof provides as follows: -
- Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
74. Internationally, the South African decision in *Malachi v Cape Danle Academy International & another* [2010] CCT 05/COZACC 13 attests to the above.
75. Having said as much on the unconstitutionality of healthy institutions detaining patients on account of unpaid medical bills and expenses, this Court reiterates the duty bestowed on every person (including entities) to defend *the Constitution* in Article 3. It is, therefore, a serious indictment for a person to disregard the provisions of *the Constitution*.
76. In order to protect itself from such abuse, *the Constitution* provides various ways in which those who act contrary to its provisions are compelled to respect, uphold and defend the very Constitution. Some of the ways include the filing of constitutional Petitions, sanctions for instance those in Chapter Six, among others.
77. In this case, therefore, the Respondent acted in blatant disregard of *the Constitution* in not releasing the Petitioner from its custody even after the regulator, the Council, ordered it to do so. The Respondent, no doubt, acted with impunity. Even if, for any reasons whatsoever, the Respondent may be excused from the detention of the Petitioner until when the Council wrote to it on the release, that is on 12<sup>th</sup> October, 2021, the subsequent detention cannot be excused as the Respondent did not have any regard to *the Constitution* and to the professional regulator.
78. This is a case, therefore, where damages must attach with a view of urging the Respondent to be obedient to *the Constitution* and the law. Maybe the Respondent will, by being condemned to pay damages, learn that violation of rights, fundamental freedoms and *the Constitution* is such a serious indictment. A conservative sum shall, however, be rendered for now.
79. As this Court comes to the end of this matter, it must state categorically that the claim that the Petitioner was not well handled medically by the Respondent staff thereby resulting to him developing bedsores is not allowed. The reason is that this Court is not in a position to ascertain the veracity of such technical allegations. Such complaints fall under the purview of the Council.
80. In the end, and on the basis of the foregoing, this Court hereby makes the following final orders in this matter: -
- a. A declaration be and is hereby issued that the detention of the Petitioner by the Respondent from 8th October, 2021 to 28th October, 2021 on account of unpaid medical bills and expenses was contrary



to Articles 28, 29 and 39 of *the Constitution* and Article 9(1) of the International Convention on Civil and Political Rights.

b. Any expenses incurred by the Respondent on the Petitioner as from 8th October, 2021 to 28th October, 2021 are, therefore, unrecoverable and shall not form part of the balance of the bills and expenses payable, if any. The said sum shall be expunged from the balance.

c. The Respondent shall pay general damages for the violation of the Petitioner's rights and fundamental freedoms in the sum of Kshs. 1,000,000/= (Read: Kenya Shillings One Million Only). The said sum shall be credited in favour of the Petitioner if the payable bills and expenses exceed the said sum.

d. This judgment shall not affect the parties' consent on liquidating the new balance of the sums payable at the monthly rate of Kshs. 70,000/= (Read: Kenya Shillings Seventy Thousand Only) as recorded in Court on 28th October, 2021.

e. The Respondent shall bear the costs of the Petition.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 21ST DAY OF SEPTEMBER, 2023.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered virtually and in the presence of:**

**Miss. Muthoni** Learned Counsel for the Petitioner.\*\*\*

**Miss. Mbugua**, Learned Counsel for the Respondent.

**Regina/Chemutai** – Court Assistants.\*\*

