



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 63 OF 2017

VERONICAH NYANGAI.....PETITIONER

VERSUS

THE NAIROBI WEST HOSPITAL LTDRESPONDENT

JUDGMENT

This is a petition by **Veronichah Nyangai** dated, 28th February 2017 and filed on the same day, against **Nairobi West Hospital Limited**, a private hospital offering medical services within Nairobi. The petition is supported by the petitioner's affidavit sworn on the same day and another affidavit by **Maxwell Hudson Kaduki** sworn on the 27th February 2017.

Facts of the petition as can be seen from the petition and affidavits are that the petitioner was admitted to the respondent hospital on 16th December 2016 while in labour. The petitioner's condition deteriorated and on 19th December 2017 she underwent a caesarian operation and delivered a baby. The baby died a few days later but the petitioner says she was not allowed to dispose of the body neither was she allowed to leave the hospital until the outstanding hospital bill which then stood at about Ksh410,333/= had been paid. The petitioner was then moved to a room away from the maternity ward where she remained while the baby's body remained in the hospital morgue.

The petitioner states that although she was discharged on 23rd December 2017, she was not allowed to leave hospital for failure to pay hospital bill. The petitioner further states that although she was later moved to the general ward, she was still charged as if she was in the maternity ward. An offer by the petitioner's partner to pay Ksh50,000/= per month from March 2017 was declined by the respondent and further negotiations bore no fruits. The respondent insisted that a payment of 80% of the outstanding bill of Kshs.650,000/= be paid and a deposit of security for the balance be given before the petitioner could be allowed to leave which the petitioner says she could not afford. The petitioner further states that the bills are inconsistent and exaggerated.

From the above facts, the petitioner filed the present petition seeking the following orders:

- 1. An order of mandamus compelling the respondent to release the petitioner from its unlawful detention.***
- 2. A declaration that the continued detention of the petitioner by the respondent is arbitrary and unlawful.***

3. General damages for the violation of the petitioner's fundamental human rights.

4. Any other relief this Court may deem fit.

5. Costs of this petition.

The respondent filed a replying affidavit sworn on 6th March 2017 as well as grounds of opposition both dated and filed on the same date. The respondent's case is that it is both a health provider and commercial entity. As a health provider, the respondent provides health care services to various people in the country and beyond who pay for those services since it is a private entity.

The respondent states that the petitioner was admitted in hospital on 17th December 2017 after presenting herself to the hospital with serious premature labour pains. She was in the company of one **Maxwell Hudson Kaduki** who guaranteed payment of the bill arising from the petitioner's admission and treatment while in the facility. **Maxwell** also promised to pay the deposit the following day.

According to the respondent, the petitioner's case was an emergency and for that reason, she was admitted on humanitarian grounds, but on the undertaking by both the petitioner and **Maxwell**, to pay the deposit the following day. The deposit was not paid as promised and has not been paid to date. It was further stated that although the petitioner was advised that the foetus was not mature enough and was therefore advised against delivery, she insisted that she wanted to deliver and in the opinion of the doctor who attended to her the operation had to go ahead on realizing that the petitioner had had previous caesarian operations. According to the Doctor, continued labour pains could lead to rupture of the previous caesarian scars which would have endangered the petitioner's life. The petitioner therefore had a premature delivery thus the baby could not have survived at week 26, and the petitioner was fully informed.

The respondent denied mistreating the petitioner. The respondent has also denied the allegation that it has declined to accept the offer to use **NHIF** scheme for Ksh150,000/= stating that such money is not guaranteed until NHIF itself confirms that the petitioner is entitled to a rebate up to such an amount. The respondent denied that it has violated the petitioner's constitutional rights but maintained that the petitioner has also an obligation to pay her medical bill due to the respondent.

Parties filed written submission which they relied on. For the petitioner, it was submitted that the petitioner's detention at the respondent hospital on account of non-payment of hospital bills is a violation of the petitioner's fundamental rights and freedoms contrary to **Articles 29, 39** and **58** of the constitution. It was further submitted that the detention violates general rules of international law and conventions; namely Universal declaration of Human Rights and International Convention on Civil and Political Rights (ICCPR).

The petitioner relied on the decision in the case of **Christine Kidha v Nairobi Women's Hospital [2016]eKLR** for the proposition that detention of a person that seeks to procure or compel a person to perform a contractual duty is an insult to the right to liberty and a violation of that right under the constitution. The petitioner again relied on the case of **Mary Nyang'anyi Nyaigero & Another v Karen Hospital Ltd & Another [2016] eKLR** where the court ordered release of a dead body which had been retained by the hospital pending payment of hospital bills. Finally the petitioner relied on the case of **Tryphosa Jebet Koskey v Elgon View Hospital[2016]elk** where it was held that the hospital could have released the petitioner and recovered the outstanding debt as provided by law. In the Counsel for the petitioner's view, the petitioner's right to fair administrative action and right to access information were also violated by the respondent.

On behalf of the respondent it was submitted that the petitioner has failed to perform her obligation to settle the outstanding hospital bill after she was attended to at the facility despite her and her partner undertaking to pay the charges. According to the respondent, the altitude of the petitioner as well as that of her guarantor partner is that of "*can't pay won't pay*"

It was further submitted for the respondent, that by refusing to pay hospital charges, the petitioner has violated the respondent's right to property guaranteed under **Article 40** of the constitution. Counsel cited **Article 260** of the Constitution on the definition of property, which includes *any vested or contingent right to or interest in or arising from among other things – money, choses in action or negotiable instruments*.

The respondent's counsel distinguished the case of **Tryphosa Jebet** (supra) from the current case submitting that in **Tryphosa's** case, the petitioner had offered security which had been declined and the petitioner later fully paid the hospital bill. Reference was also made to the case of **Isaac Ngugi v Nairobi Hospital and Others Petition No. 407 of 2012** where the court had ordered release of the deceased body subject to security, and in that regard it was a conditional release unlike the present case where the petitioner wants to be released unconditionally. The respondent urged the court to look at justice from both ends and order the petitioner to provide suitable security before her release.

I have considered this petition the response thereto, submission by both counsel and authorities cited. The gravamen of the dispute before court is refusal by the respondent to release the petitioner upon discharge from hospital for failure to pay outstanding hospital charges or provide a suitable security to secure payment of the outstanding debt.

The petitioner was admitted to the respondent hospital for what is said to have been premature labour pains. She underwent caesarian operation but the baby died due to what the hospital says was premature birth, while the petitioner seems to hold a different view. The petitioner was to pay a deposit on admission but she and her partner, **Maxwell Hudson Kaduki** promised to pay the deposit the following day which made the respondent admit the petitioner on humanitarian grounds due to the petitioner's condition. The deposit was however not paid as promised.

The petitioner was discharged but could not leave the hospital for nonpayment of the hospital charges or for failure to provide suitable security. She has now filed this petition seeking among others an order compelling the respondent to release her.

The petitioner sought and had medical attention at the respondent hospital where she gave birth but the baby died due to premature birth. She is still in hospital though discharged which she says has violated her fundamental right because she is being held against her will.

The Constitution of Kenya 2010 gives a wide range of rights contained in the Bill of Rights. **Article 29** of the constitution 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. **Article 39** also provides that every person has the right to freedom of movement. These Constitutional provisions make it clear 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.

There are also international conventions and instruments which recognize human dignity freedom and respect. **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. **Article 9(1)** of the International Convention on Civil and Political Rights (ICCPR) provides;

“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.”

The article is clear that the right to liberty is non violable and that a person's liberty can only be curtailed in accordance with procedural laws. **Article 11** of the ICCPR provides that no one shall be imprisoned merely for inability to pay a debt or discharge a contractual obligation. This refers to a situation where someone is committed to civil jail because he is unable to satisfy a decree. **Article 6** of the **African Charter on Human and Peoples Rights** provides that every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions

previously laid down by law. In particular, no one may be arbitrarily arrested or detained. These international instruments support the protection of fundamental human rights that the right to liberty in inviolable except in accordance with the law.

The issue of detention by hospitals for nonpayment of bills has been a subject of consideration by courts. In the case of **Sonia Kwamboka Rasugu v Sandalwood Hotel and Resort and another [2013]eKLR** where the contention was that the petitioner had been illegally detained the court stated;

“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 the Bill of Rights.”

In the case of **MAO & another v Attorney General & 4 others [2015]eKLR** where the petitioner had been detained for failure to pay medical bill, the court held

“ 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.”

The same question was considered by **Onguto J** in the case of **Christine Kidha v Nairobi Women’s Hospital (supra)** where the petitioner had also been detained for non-payment of hospital charges after receiving treatment at the hospital. The learned judge held that the act of detaining the petitioner for a contractual debt was unlawful and against the petitioners’ rights as enshrined under **Articles 29 and 39** of the constitution given that the petitioner had even offered security which was not accepted by the hospital.

Yet again in the case of **Tryphosa Jebet Kosgey v Elgon View Hospital (supra)** the petitioner had been detained over hospital bills, the court held that the petitioner had been held against her will observing that the hospital could have released the petitioner and recovered the debt in the manner provided for in law.

In contemporary jurisdictions, the issue was dealt with in the South African case of **Malachi v Cape Danle Academy International & another [2010] CCT 05/COZACC 13** thus;

“Freedom has two interrelated constitutional aspects; the first is a procedural aspect which requires that no one to 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.”

Detention of a person cannot be lawful if it is carried out by an unlawful authority. Even where such detention is carried out by a lawful authority, it must conform to procedural law.

In the present case, the petitioner went to the respondent hospital to seek medical intervention. She was admitted in the facility and when her date of discharge came, she could not pay for her medical attention and was thus detained at the facility against her will. Attempts to negotiate did not yield fruits and the petitioner continues to be detained which she has challenged through this petition.

The fact of detention has not been denied or challenged by the respondent. The respondent’s reason for not releasing the petitioner is that she and her partner have failed to pay the outstanding amount said to be at about Ksh. 600,000/=, or offer suitable and reasonable security to secure this amount.

Articles 29 and 39 of the constitution are clear on the liberty and freedom of movement. The petitioner’s freedom of movement has been curtailed by the respondent. She is being arbitrarily held under the auspices of non-payment of the hospital bill. This is clearly a violation of the petitioner’s fundamental rights. The petitioner states that she was due to be discharged on 15th February, 2017 but she is still detained at the hospital until the hospital bill is paid or security provided.

The question that one would ask is; for how long should the petitioner be detained in the circumstances of this case? One month, two months, or how many years? The action by the respondent of arbitrary detention of the petitioner against her will until the hospital bill is paid is unconstitutional, a violation of the petitioner's fundamental rights, is unacceptable in a democratic society. The respondent must employ other lawful means of recovering its debt but cannot be allowed to continue violating the petitioner's rights.

The respondent has on its part argued that failure to pay hospital charges by the petitioner violates its right to property under **Article 40** of the constitution. I am not persuaded by this argument. The respondent took in the petitioner on the understanding that a deposit and hospital fees was to be paid.

The two entered into a contractual relationship. If the petitioner has failed to perform her part of the bargain, the respondent has legal avenues through which it can pursue the petitioner and recover the debt owed. That debt cannot justify illegal and arbitrary detention of the petitioner. The respondent has no legal mandate to detain her and its action is a violation of the petitioner's rights. In any case two wrongs do not make a right.

The petitioner has also claims damages. I do not find this claim justified. The petitioner went to the respondent hospital for medical attention. She did not pay a deposit as agreed, and after treatment, she did not pay her medical bill. I have seen communication between her counsel and officials of the respondent. Although there had been an understanding that 80 per cent of the bill was to be paid, counsel changed the position and said the petitioner could not raise any money. This was not a sign of good faith on the part of the petitioner. Furthermore, the decisions relied on where damages had been awarded, petitioners in those cases had offered security or paid the outstanding bills. That is not what I find in this case. The petitioner has not made a case for damages.

From what I have stated above, the petition dated 28th February, 2017 is hereby allowed and I make the following orders;

- 1. A declaration be and is hereby issued that the continued detention of the petitioner by the respondent is arbitrary and unlawful.***
- 2. An order of mandamus is hereby issued compelling the respondent to release the petitioner from the unlawful detention.***
- 3. Each party do bear their own costs.***

Dated and Delivered at Nairobi this 16th Day of March 2017

E C MWITA

JUDGE