County Government of Bungoma & 2 others v JOO & 2 others (Civil Appeal 61 of 2018) [2024] KECA 1377 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KECA 1377 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 61 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

FEBRUARY 23, 2024

BETWEEN

THE COUNTY GOVERNMENT OF BUNGOMA ..... 1ST APPELLANT

THE BUNGOMA COUNTY CABINET SECRETARY FOR HEALTH ..... 2ND APPELLANT

BUNGOMA COUNTY REFERRAL HOSPITAL ..... 3RD APPELLANT

AND

JOO ..... 1ST RESPONDENT

WOMEN'S LINK WORLDWIDE ..... 2ND RESPONDENT

AFRICAN GENDER AND MEDIA TRUST ..... 3RD RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Bungoma, (Abida Aroni, J.) dated 22nd March, 2018 in HC Petition NO. 5 of 2014)

Court of Appeal affirms Kshs. 2.5 million award to a mother forced to give birth on the hospital floor being subjected to abuse and denied dignified care

Reported by John Ribia

Constitutional Law *– fundamental rights and freedoms – social and economic rights - rights to dignity – right to humane treatment – right to health and quality maternal care – where an expectant mother was mistreated at a hospital during childbirth - whether the rights to dignity, humane treatment, health, and quality maternal care of an expectant mother were violated during a hospital admission process in which the expectant mother was subjected to physical and verbal abuse as well as denied care in the first instance when she went into labour – Constitution of Kenya articles 2(5), 2(6), 22(1), 25, 27, 28, 29(e), 29(f), 35(1), 35(6), and 43 (1); Convention on Elimination of All Forms of Discrimination against Women (CEDAW), (1979) article 12; International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) article 10; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Maputo Protocol (2003) article 24.*

Constitutional Law *– social and economic rights - right to health and quality maternal care – progressive realization of social and economic rights - where an expectant mother was mistreated at a hospital during childbirth – to what extent was the right to the highest attainable standard of health realizable in Kenya - what was the minimum core of a woman's right to respectful maternal care during childbirth - whether the principle of progressive realization of socio-economic rights such as the right to the highest attainable standards of health required more than clinical components and mandated ensuring positive and affirming care experiences - whether the appellants' plea for progressive realization, citing limited resources such as drugs, hospital beds, and medical personnel, absolved them of their duty to uphold the respondent's immediate rights to dignity and humane treatment during maternity care - Constitution of Kenya articles 2(5) 2(6), 22(1), 25, 27, 28, 29(e) 29(f), 35(1), 35(6) and 43 (1); Convention on Elimination of All Forms of Discrimination against Women (CEDAW), (1979) article 12; International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) article 10; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Maputo Protocol (2003) article 24.*

Law of Evidence *– electronic evidence – admissibility of electronic evidence - video evidence – admissibility of video evidence – claim challenging admissibility of video evidence on appeal when no objections or cross examination on the presenter of the video evidence were done at trial - whether video evidence admitted without objection at the trial court could be challenged on grounds of inadmissibility on appeal - whether the failure to cross-examine the presenter of video evidence at trial precluded one from contesting the weight assigned to the video evidence on appeal.*

Brief facts

The 1st respondent was admitted to Bungoma County Referral Hospital on August 8, 2013, for childbirth. Despite a Presidential Directive for free maternity services, she was forced to purchase her own supplies and share a bed due to overcrowding. During labor, the 1st respondent gave birth on the hospital floor after being denied timely assistance by nurses. She alleged physical and verbal abuse by the nurses and was forced to carry her un-expelled placenta to the delivery room. The 1st respondent claimed the hospital failed to provide dignified care and neglected to inform her of grievance procedures.

The trial court held that the appellants violated the 1st respondent constitutional rights under articles 28, 43, and others, including her rights to dignity, non-discrimination, and quality healthcare. The court awarded Kshs. 2.5 million in damages and directed the appellants to issue a formal apology. Dissatisfied, the appellants filed an appeal, challenging the sufficiency of evidence, the legal findings on constitutional violations, and the damages awarded.

Issues

i. Whether the rights to dignity, humane treatment, health, and quality maternal care of an expectant mother were violated during a hospital admission process in which the expectant mother was;
    1. subjected to physical and verbal abuse;
    2. denied care in the first instance when she went into labour;
    3. forced to give birth on the floor, in the corridor and in full view of other people;
    4. forced to walk back to the delivery room while carrying her un-expelled placenta; and
    5. while back in the delivery room, she was left unattended to and was not given any pain or other medication.

ii. To what extent was the right to the highest attainable standard of health realizable in Kenya?

iii. What was the state's minimum core obligation of a woman's right to respectful maternal care during childbirth?

iv. Whether the principle of progressive realization of socio-economic rights such as the right to the highest attainable standards of health required more than clinical components and mandated ensuring positive and affirming care experiences.

v. Whether the appellants' plea of progressive realization, citing limited resources such as drugs, hospital beds, and medical personnel, absolved them of their duty to uphold the respondent's immediate rights to dignity and humane treatment during maternity care.

vi. Whether video evidence, that was admitted without objection at the trial court, could be challenged on grounds of inadmissibility on appeal.

vii. Whether the failure to cross-examine the presenter of video evidence at trial precluded one from contesting the weight assigned to the video evidence on appeal.

Held

Per JM Ngugi, and F Tuiyott, JJA

1. In a first appeal, the standard of review was *de novo*: the court was required to review issues of both facts and law afresh and come to its own independent conclusions. The trial court had the advantage of seeing and assessing the demeanor of witnesses. The court must be cognizant of the fact that it should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial court was shown demonstrably to have acted on the wrong principles in reaching its findings.
2. The video clips were not wrongly admitted into evidence. The trial court ruled *in limine* about the conditions for and modality of admissibility of the evidence of the video clips. The appellants did not appeal against that ruling and neither could it be said to have preserved that question for appeal. No objections were raised to the admission of the video clips into evidence it was sought to produce them.
3. When producing the clips, the witness adhered to the conditions and modality set by the trial court. The appellant's challenge to the clips was mainly about the weight to be attached to the clips. That was a question for the trial court. The trial court was persuaded that the clips depicted authentic scenes from the hospital on the material day and believed the 1st respondent when she said that she recognized herself and some of her fellow patients in the video clip. Apart from the claim that the content of the video clips materially contradicted the 1st respondent's other claims, the appellants had not pointed out why the court should, on appeal, depart from findings of credibility and weight of the electronic evidence.
4. The appellants intimated that it was a tale tell sign that the video clips were not authentic because of alleged contradictions. In particular, that there were empty beds yet it was claimed that the hospital labour ward was full. The presenter of the video was not cross examined. Without a developed record about the claims of alleged contradiction regarding the empty beds, the complaint by the appellants on appeal was unavailing. There could be any number of explanations for the supposed anomaly, if at all it was one. It could be that the patients were not in their beds at the time the clips were taken. It could be that the appellants were simply mis-reading the video clips. The appellants in their pleadings conceded that the hospital was overstretched and the patients shared beds. The authentication of the video clips, therefore, dissipated that line of complaints.
5. The evidence presented by the 1st respondent in the case easily met the evidentiary threshold. She demonstrated on a balance of probabilities that:
    1. She was admitted to the hospital and that the hospital was overstretched to the extent that she had to share a bed with another patient.
    2. She had to purchase her own drugs and cotton wool despite the government policy and presidential directive that maternity services were free of charge.
    3. She gave birth on the floor, in the corridor of the hospital, and without assistance.
    4. She underwent physical and verbal abuse at the hands of the two nurses who attended to her when she fell unconscious on the floor.
    5. She was forced to carry her un-expelled placenta back to the delivery room in further act of cruelty and humiliation.
    6. She was not informed of the process she could use to file any grievance she had.

6. Whether the evidence was contradictory or not was an evidentiary question of fact not a question of law to be determined on the crucible of the principle requiring that constitutional petitions be pleaded with reasonable precision. The petition was quite detailed both in terms of the factual claims and the constitutional provisions the 1st respondent alleged had been breached. Upon an independent review of the evidence presented to the trial court, the petitioner sufficiently proved her factual claims.
7. Under the Constitution, every woman was entitled to respectful maternal care during childbirth as part of their social and economic rights enshrined in article 43. That aspect of the right to health was not subject to progressive realization. It was part of the minimum core of the right that must be realizable immediately and not progressively. The minimum core of a woman's right to respectful maternal care during childbirth must, as the trial court expounded, include:
    1. the right to be free from physical violence and verbal abuse during labour and childbirth;
    2. the right to be free from discrimination during labour and childbirth;
    3. the right to a dignified and respectful care – including being granted acceptable levels of privacy and confidentiality during labour and childbirth.
8. The three aspects of a woman's right to health as enshrined in article 43 of the Constitution and amplified by the various conventions and treaties to which Kenya was party to (which were also part of the laws of Kenya by dint of articles 2(5) and 2(6) of the Constitution) constituted part of the minimum core of the right to health which was not subject to progressive realization. They included article 12 of the Convention Against the Elimination and Discrimination Against Women; article 10 of the International Covenant on the Economic, Social and Cultural Rights; and article 24 of the Protocol to the African Charter on Human and People's Rights of Women in Africa (Maputo Protocol). The appellants were obligated to ensure the 1st respondent enjoyed the minimum core of her right to maternal health when she was admitted at the hospital.
9. Each of the aspects of the minimum core obligations were violated during the 1st respondent's admission at the hospital:
    1. she was slapped by the two nurses who accused her of "soiling" the corridor when she gave birth in the corridor.
    2. She was verbally assaulted and shouted at.
    3. She was denied care in the first instance when she informed the nurse that she was going into labour.
    4. She was subjected to utmost indignity and disrespect by being forced to give birth on the floor, in the corridor and in full view of other people.
    5. She was further humiliated by being forced to walk back to the delivery room while carrying her un- expelled placenta.
    6. While back in the delivery room, she was left unattended to, neglected, and was not given any pain or other medication.
10. Whereas the appellants could plausibly make the plea of progressive realization respecting the availability of drugs, hospital beds and even shortage of medical personnel, human rights-based maternity care commanded by a purposive reading of article 43 of the Constitution included not only clinical components, but also ensuring positive and affirming care experiences for women during childbirth. All women had the right to dignified, respectful health care throughout pregnancy and childbirth as well as freedom from violence and discrimination. The 1st respondent 's rights in that regard were outrageously and grossly violated.
11. At the systemic level, the appellants were also liable for the eminently clear failure to establish a human rights-based clinical protocols for women during childbirth. Such protocols, if available, included not only clinical components but outlined measures to ensure all women were accorded the right to dignified, respectful health care throughout pregnancy and childbirth as well as freedom from violence and discrimination. That included the provision of respectful maternity care that maintained women's

dignity, privacy and confidentiality, enabled informed choice and continuous support throughout labour and childbirth, and ensured freedom from mistreatment.

12. Health systems, such as the appellants', must be held accountable for the mistreatment of women during childbirth, and for failure to effectively prevent and respond to these harmful practices. Beyond providing resources to ensure quality, accessible maternal health care, the appellants were obligated to provide clear policies to ensure dignified, respectful health care throughout pregnancy and childbirth for all women.

13. A purposive reading of the right to health in article 43 of the Constitution as read together with the international human rights treaties cited above which accentuated the right dictate that health systems must be organized and managed in a manner that ensured respect for women's sexual and reproductive health and their other human rights – including the right to dignity. That must include action to ensure that specific policies to promoted respectful maternal care had not only been adopted, but that they were translated into meaningful action through implementation.

14. The appellants violated the 1st respondent 's right to dignified, respectful health care during her childbirth, as well as her right to be free from violence and discrimination. The appellant was subjected to abuse, neglect and disrespect during childbirth. Additionally, she was denied her right to be equal in dignity; to be free to seek and receive information; and to be free from discrimination. The 1st respondent was denied the right to enjoy the highest attainable standard of physical and mental health, including her sexual and reproductive health. While the appellants were vicariously liable to the direct abuse suffered by the 1st respondent in the hands of the hospital, they were, additionally, directly liable for the failure to put in place specific policies to promote respectful maternal care and to ensure that those policies translated into meaningful action through implementation.

15. The award of damages was not excessive at all. The mistreatment and indignity that the 1st respondent went through in the hands of the agents of the appellants was simply depraved, malevolent and outrageous. The amount awarded must signal to the appellants and other duty bearers the society's sense of indignant and righteous outrage at the conduct.

16. The award of Kshs 2.5 Million to the 1st respondent for all the depravity and indignity she suffered at the hands of the agents of the appellants was hardly sufficient to atone for the emotional trauma and scarring she suffered. There was no reasonable basis for upsetting it.

Per Kiage, JA (Concurring)

17. It is a terrible blight on Kenya's public health system that in 2024, a mother in the process of bringing forth a new life, a veritable miracle that ought to leave all the awe of the mother, should have been subjected to the abuse, violence, humiliation and utter indignity that the 1st respondent endured. It was pain so excruciating and so traumatic she not only passed out, her mind literally blocked the episode temporarily from her mind, to protect her sanity.

18. No mother in labour, new or repeat, should ever have to be insulted and assaulted by maternity nurses nor should she have to give birth unassisted on the floor of a hospital no matter how stretched the labour force and be made to carry the placenta in her hands as some form of punishment. It was the business of the relevant level of government to ensure a functional system of health, including maternal health care. The instant case demonstrated an abject failure in that regard.

19. What the 1st respondent was put through was a monumental shame in the part of the Bungoma County Referral Hospital, and one shuddered to imagine that it might not be an isolated case, a black swan. If hospitals could have in employment, nurses with such grotesquely horrendous, callous and cynical attitudes towards patients, and mothers in labour at that, then such hospitals were a curse, not places of succour. If hospitals did not ensure that their staff were patient-friendly, patient-responsive, and patient-centric in all their actions and processes then woe was the Kenyan patient. That state of affairs must be sternly rebuked as not reflective of the society we aspire to.

20. The horror of what the 1st respondent was put through spoke to a wanton and widespread disregard for the right to dignity by so many levels of official don. People in authority see themselves as some kind to tin gods, and the institutions at which they work as their personal fiefdoms. They perceived those who sought services, paid for, mind you, by the taxes of *Mwananchi*, as some kind of inconvenience and they would think it right to be rude, discourteous, disrespectful and inattentive to the needs of the service-seeker whom they strip of dignity with abandon, and often, with impunity.
21. The High Court was right to find the appellants liable and to make the award of damages. In the same way there was a fundamental principle in environmental law that the polluter pays, courts ought, if the rights enumerated in the Bill of Rights were to have meaning beyond mere pious declarations, to adopt a more robust, protective approach that in appropriate cases and the instant one, the abuser pays and really pays. The Kshs. 2.5 million awarded to the 1st respondent should therefore not be disturbed.

Appeal dismissed.

Orders

Costs awarded to the 1st respondent.

Citations

Cases

Kenya

1. *AKN v Republic* [2023] KEHC 25684 (KLR); (1976-1980) KLR 1272 - (Applied)
2. *Federation of Women Lawyers (FIDA – Kenya) & 3 others v Attorney General & 2 others* Petition 266 of 2015; [2016] KEHC 7356 (KLR) - (Explained)
3. *Jabane, Mohamed Mahmoud v Highstone Butty Tongoi Olenja* Civil Appeal 2 of 1985; [1986] KECA 21 (KLR); [1986] KLR 661 - (Applied)
4. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)

Regional Court

Selle v Associated Motor Boat Co Limited [1968] EA 123 - (Explained)

Statutes

Kenya

Constitution of Kenya articles 2(5)(6); 22(1); 25; 27(4)(5); 28; 29(e)(f); 35(1)(6); 43(1) - (Interpreted)

Instruments

1. Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979
   article 12
2. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
   article 10
3. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Maputo Protocol, 2003
   article 24

Advocates

None mentioned

JUDGMENT

Judgment of Joel Ngugi, JA

1. The central question presented in this appeal is whether the 1st respondent's right to (maternal) health was violated by the appellants during childbirth. In deciding that central question, this court must

decide two subsidiary questions: first, the implications of the constitutional provision that the social and economic rights are subject to progressive realization on a bid by the respondent to enforce them judicially; and, second, the evidentiary standards applicable in a constitutional petition.

2. The basic and undisputed facts of the case are as follows. The 1st respondent, JOO (also known as JM) (hereinafter, J), self-described (without refutation) as a woman from marginalized socio-economic setting, was admitted at the then Bungoma District Hospital, the 3rd appellant, (the hospital) on the 8 August 2013 for childbirth. She had passed her due date of delivery at the time of her admission. As per the Presidential Directive issued on 1 June 2013, the hospital, as a public health facility, was obligated to offer the J free maternity health care services.

3. At the hospital, J was seen by Dr Wekesa Kubasu. He advised that she was overdue and that she would have to undergo induced labour. Due to a limited number of beds at the hospital, J was forced to share a bed with another patient. She received information from the nurses on duty that at the onset of labour pains, she would have to walk from the labour ward to the delivery room. The inducement drug was administered upon J as the doctor had ordered. J, then, went into labour. She eventually gave birth on the floor, in a corridor between the labour ward and the delivery room.

4. The circumstances leading to that unfortunate incident is where the parties' narratives diverge. First, J narrated to the trial court that she had to buy the drug and the cotton wool despite the Presidential Directive that maternity care would be free. The appellants plainly dispute that. Second, J testified that upon administering the inducement drug, the nurses failed to physically check and monitor her progress and on the onset of labour pains, and that even when she sought for help none was forth coming. When a nurse finally attended to her, the nurse incorrectly concluded that J was not due for delivery without conducting the required physical examination.

5. J insists that when the nurse refused to examine her to confirm that she was going into childbirth, due to the intensity of the labour pains, she decided to walk to the delivery room. On getting there, however, she found the only three available beds occupied by other women who were in the process of delivery. Though in intense pain, J attempted to walk back to the labour ward. In between, in the corridor, she lost consciousness and was delivered of her baby on the floor.

6. J testified that she regained consciousness to shouts, verbal insults and physical assault from two nurses who were apparently displeased that she had given birth on the floor. The two nurses, she testified, ordered her to carry her placenta and walk to the delivery room to have it expelled. At this time, J was in a state of confusion and half-consciousness so much that her mind did not fully register in her memory the mistreatment she went through. It was only later, after she watched a video clips aired by Kenya Television Network (KTN) on September, 2013, that the memories of her traumatic experience came flooding back. The video clips shown on KTN had been captured by another woman at the hospital who had gone to seek maternity services but changed her mind and went to a different hospital upon seeing the shocking scenes attending J's childbirth.

7. In their replying affidavits, the appellants admitted that J gave birth on the floor but contested her version of how it happened. They insisted that she was properly attended to; was not abused or insulted; and was treated with dignity despite the fact that the hospital was overstretched owing to scarce resources available for public health facilities.

8. The appellants also presented evidence in their affidavits that the two nurses who were implicated were interdicted and investigated by the Nursing Council of Kenya but that the investigations revealed that they had acted professionally and they were reinstated. They categorically denied violating J's rights or her dignity.

9. The appellants also argued that J had been discharged from the hospital without any complaint and intimated that the allegations about violations of her rights were "far-fetched, wild" and manufactured to malign and paint the appellants in bad light. They also presented evidence that J had, after the clip was aired on KTN TV, written a statement indicating that she had no complaint against the appellants.

10. However, one of J's complaints in the petition was that she was never informed about the complaints procedure and neither were they displayed prominently at the hospital. While conceding that she had signed a statement seemingly absolving the appellants from any blame, J said that she felt compelled to give the interview to a local TV station and sign the statement because she was not given the correct information about the incident. She said she did this before she saw the KTN clip which triggered her memories about the incident. J testified that even after she went back to the hospital after seeing the clip, no one offered her any apology for what had happened to her.

11. These duelling narratives emerged during the trial before Abida Ali-Aroni, J (as she then was). J and one JW, a journalist from KTN/Standard Media House testified for the petitioner. The appellants did not call any witness. All the parties filed written submissions and orally highlighted them.

12. The learned judge delivered the impugned judgment on 22 March 2018 in which she found that J had proved her claims to the required standards. The learned judge disposed of the petition with the following orders against the appellants:

    a. A declaration "that the physical and verbal abused meted out to the petitioner [J] at the 5th respondent facility [the hospital] amounted to violation of her right to dignity, right not to be subjected to cruel, inhuman and degrading treatment."

    b. A declaration "that the neglect the petitioner[J] suffered was a result of the National and County Government's failure to ensure health care services are of quality standard and are available."

    c. A declaration "that the National Government and county Government of Bungoma failed to develop and/or implement policy guidelines on health care including internal policy maternal health care thus denying the petitioner [J] her right to basic health care."

    d. A declaration "that the National Government and the County Government of Bungoma failed to implement and/or monitor the standards of free maternal health care and services thus resulting in the mistreatment of the petitioner[J] and violation of her right to dignity, and treatment that is devoid of cruelty, inhuman and not degrading."

    e. A declaration and order "that a formal apology be made to the petitioner[J] by the 3rd respondent, the 5th respondent and the three nurses herein named as having violated the rights of the petitioner [J] within the next 15 days of the date hereof."

    f. An "award [of] damages of Kshs 2,500,000 to the petitioner[J] as a result of the infringement of her rights."

    g. An "award [of] costs of the suit to the petitioner[J]."

    h. The award and costs were to be paid by the 2nd and 4th respondents in equal shares.

13. The appellants were dissatisfied with the judgment and decree and have filed the present appeal. In their Memorandum of appeal, they enumerated eight grounds reproduced verbatim as follows:

    1. That the trial judge erred in law and fact by making a declaration that there was violation of 1st respondent rights having been committed by the 2nd, 3rd and 5th respondent as per article

22(1) 25, 27(4) & (5), 28, 29(e) & (f), 35(1) & (6) and 43(1) of the Kenya *Constitution* which declaration was biased, misguided as there was no shred of evidence tendered before the court by the respondent or her witnesses that indeed her rights were trumped or violated by the appellants.

2. That the trial judge erred in law and fact by reaching a conclusion that the 1st respondent was mistreated at the County Referral Hospital when indeed the actual clip played by "KTN" journalist in court was blurred and could not show the image of the respondent being abused or beaten by the appellant workers.

3. That the trial judge erred in law and fact to reach a conclusion that there was serious violation of the 1 st respondent's rights especially on issue of treatment at the Bungoma County Referral Hospital when it was clear that the 1 st respondent was attended to by Doctors and Nurses at the Hospital and no negligence or abuse were exhibited as the respondent and the child were discharged without any problem.

4. That the trial judge erred in law and fact in the manner in which she admitted and considered the 1 st respondent video clip in evidence aired by KTN station which showed different scenes and which was edited for purposes of court case which was inconsistent and non-corroborative.

5. That the trial judge erred in law and fact by failing to consider the appellants evidence and submissions.

6. That the trial judge failed to notice that there was a serious material contradiction in evidence of the 1 st respondent in clips and pleadings which could not support the respondent claim.

7. That the trial judge erred in law and fact by making a recommendation that the Nurses were guilty and hence need to apologise to the 1 st respondent which conclusion was misleading as there was no sceneries of slapping any inform of abuse that could have given rise to the claim.

8. That the learned judge fell into error in law to condemn the 2nd and 5th respondents to pay Kshs 2,500,000 which amount the 1st respondent was not merited at all.

14. This is a first appeal. The standard of review is *de novo*: we are required to review issues of both facts and law afresh and come to our own independent conclusions. We are, however, obligated to bear in mind that the trial judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle v Associated Motor Boat Co Limited* [1968] EA 123). In addition, this court must be cognizant of the fact that it should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane v Olenja*[1968] KLR 661).

15. Having considered the pleadings in the record of appeal, the judgment of the trial court, the appellant's grounds of appeal and the rival submissions of the parties, the issues presented in this appeal can be condensed into three substantive ones:

a. First, whether there was sufficient evidence on record to warrant the findings that the J's various rights had been violated as the trial court did.

b. Second, whether, as a matter of law, the findings of constitutional and human rights violations were sound in view of the progressive nature of the right to health on which the petition was, in the main, premised on.

c. Third, whether the damages awarded were excessive in the circumstances.

16. The first ground is the gravamen of the appeal. The appellants attack the impugned judgment on the evidentiary crucible on three sub-grounds:

    a. First, the appellants argue that the electronic evidence of the video clips from KTN was wrongfully admitted into evidence and it should be ignored.

    b. Second, the appellants complain that the petitioner's evidence at the trial court was contradictory and woefully insufficient to warrant the evidentiary findings the learned Judge made.

    c. Third, the appellants contend that the whole petition as drawn and litigated violated the legal standard for reasonable precision required by our jurisprudence.

17. Were the video clips wrongly admitted into evidence? I do not think so. First, it is noteworthy that the learned judge, Mabeya J, who at the time was hearing the petition, ruled in limine about the conditions for and modality of admissibility of the evidence of the video clips in a ruling dated 12 June 2014. The appellants did not appeal against that ruling and neither can they be said to have preserved that question for appeal. Indeed, no objections were raised to the admission of the video clips into evidence when PW2 sought to produce them.

18. Second, on the facts and the law, the question the appellants seem to raise is one of credibility of the video evidence and not one of its authentication. In my view, the clips were properly authenticated by PW2, the journalist, who explained in detail the chain of custody of the raw footage and how it was edited. In producing the clips, the witness adhered to the conditions and modality set by the trial court. Therefore, the appellant's challenge to the clips, it would appear, is mainly about the weight to be attached to the clips. This was a question for the trial court. The trial court was persuaded that the clips depicted authentic scenes from the hospital on the material day and believed the petitioner when she said that she recognized herself and some of her fellow patients in the video clip. Apart from the claim that the content of the video clips materially contradicts the petitioner's other claims, the appellants have not pointed out why this court should, on appeal, depart from findings of credibility and weight of the e-evidence.

19. I will now turn to the alleged contradictions and paucity of evidence. The contradiction the appellants point to is that allegedly the video clips showed a number of empty beds, yet J, in both her pleadings and testimony, claimed that the hospital labour ward was so full that they had to share beds. Indeed, the appellants intimated that this was a tale tell sign that the video clips were not authentic but had been tampered with. I noted from the court proceedings that the appellants' counsel did not cross-examine at all on this aspect of the case. The only questions that counsel asked PW2 were about the chain of custody which go to authentication. On record, the witness confirmed, without refutation, that the only part of the four video clips that that had been blurred was the face of the woman who took the raw footage. This was done in order to protect her identity and security, and at her request.

20. Without a developed record about the claims of alleged contradiction regarding the empty beds, this complaint by the appellants on appeal is simply unavailing. There could be any number of explanations for the supposed anomaly, if at all it was one. It could be that the patients were not in their beds at the time the clips were taken. It could be that the appellants are simply mis-reading the video clips. In any event, the appellants, in their own pleadings and submissions, conceded that the hospital was overstretched and the patients shared beds. The authentication of the video clips, therefore, dissipates this line of complaints.

21. Turning to the evidence presented, J gave compelling evidence about what happened when he was admitted to the hospital. Her admission to the hospital is not disputed. Indeed, a key aspect of her

testimony is admitted: that she gave birth on the floor in the corridor. The appellants incredulously claim that the floor was hygienic and clean. They really do not offer any theory to explain why she had to give birth on the floor except to admit that the hospital was overstretched. They deny the claims about physical and verbal abuse.

22. The learned judge believed J's narrative as corroborated independently by the video clips. I do not think there are any grounds for departing from those factual findings in the face of the evidence on record. J's narrative remained unshaken on cross-examination while the video clips offered ironclad corroboration of the abuse she underwent in the hands of the two nurses. Further unwitting piecemeal corroboration is offered by the appellants' own narrative as pointed out above.

23. I should only wish to point out that J adequately explained her statement which she had issued earlier apparently exonerating the hospital and its staff from ill treatment. She explained the pressure she was put under and the compromising circumstances she was in as she penned the statement. She also explained that she wrote the statement before she had had an opportunity to view the video clips that helped reconstruct her memory about the traumatic events at the hospital.

24. All in all, the evidence presented by petitioner in the case easily met the evidentiary threshold: J demonstrated on a balance of probabilities that:

    a. She was admitted to the hospital – and the hospital was overstretched to the extent that she had to share a bed with another patient;

    b. She had to purchase her own drugs and cotton wool despite the government policy and Presidential directive that maternity services were free of charge;

    c. She gave birth on the floor, in the corridor of the hospital, and without assistance;

    d. She underwent physical and verbal abuse at the hands of the two nurses who attended to her when she fell unconscious on the floor;

    e. She was forced to carry her un-expelled placenta back to the delivery room in further act of cruelty and humiliation;

    f. She was not informed of the process she could use to file any grievance she had.

25. I will, finally, turn to the third complaint. In this argument, the appellants are channelling the ratio in the famous *AKN v The Republic* (1976-1980) KLR 1272 wherein it was held that constitutional violations must be pleaded with a reasonable degree of precision. That decision was cited with approval in the post-2010 period by this court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

26. In the *Mumo Matemu* case, this court reformulated the test in AKN case thus:

> "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 coterminous 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."

27. It seems to me that the appellants' reliance on this line of authorities is misplaced. The appellants do not seem to question whether the petition presented complied with the principle requiring that constitutional petitions are pleaded with reasonable precision. They, instead, seem to make the argument that the material contradictions in the evidence presented by the petitioner definitionally violates the principle enunciated in *AKN* case. Whether the evidence was contradictory or not is an evidentiary question of fact not a question of law to be determined on the crucible of the principle requiring that constitutional petitions be pleaded with reasonable precision. In fact, a perusal of the petition and the supporting affidavit belie the complaint that it was not pleaded with reasonable precision. The petition is quite detailed both in terms of the factual claims and the constitutional provisions the petitioner alleged had been breached.

28. The inevitable conclusion is that, upon an independent review of the evidence presented to the trial court, J sufficiently proved her factual claims. The question that follows this conclusion is whether the facts, as proved, demonstrated constitutional violations to entitle her to the declarations the court made in her favour and against the appellants.

29. It is not, at all, contested that under our Constitution, every woman is entitled to respectful maternal care during childbirth as part of their social and economic rights enshrined in article 43 of the *Constitution*. That aspect of the right to health is not subject to progressive realization. It is part of the minimum core of the right that must be realizable immediately and not progressively. The minimum core of a woman's right to respectful maternal care during child birth must, as the trial court expounded, include:

    a. The right to be free from physical violence and verbal abuse during labour and childbirth;

    b. The right to be free from discrimination during labour and childbirth;

    c. The right to a dignified and respectful care – including being granted acceptable levels of privacy and confidentiality during labour and childbirth.

30. In my view, these three aspects of a woman's right to health as enshrined in article 43 of the *Constitution* and amplified by the various conventions and treaties to which Kenya is party to (which are also part of the laws of Kenya by dint of articles 2(5) and 2(6) of the *Constitution*) constitute part of the minimum core of the right to health which is not subject to progressive realization. These include: Article 12 of the *Convention Against the Elimination and Discrimination Against Women*; article 10 of the *International Covenant on the Economic, Social and Cultural Rights*; and article 24 of the *Protocol to the African Charter on Human and People's Rights of Women in Africa (Maputo Protocol)*.

31. The appellants were obligated to ensure the petitioner enjoyed this minimum core of her right to maternal health when she was admitted at the hospital. As the evidence rehashed above has demonstrated, each of these aspects of the minimum core were violated during J's admission at the hospital:

    a. She was slapped by the two nurses who accused her of "soiling" the corridor when she gave birth in the corridor;

    b. She was verbally assaulted and shouted at;

    c. She was denied care in the first instance when she informed the nurse that she was going into labour;

    d. She was subjected to utmost indignity and disrespect by being forced to give birth on the floor, in the corridor and in full view of other people;

e. She was further humiliated by being forced to walk back to the delivery room while carrying her un- expelled placenta;

f. While back in the delivery room, she was left unattended to, neglected, and was not given any pain or other medication.

32. Differently put, whereas the appellants could plausibly make the plea of progressive realization respecting the availability of drugs, hospital beds and even shortage of medical personnel, human rights-based maternity care commanded by a purposive reading of article 43 of the *Constitution* includes not only clinical components, but also ensuring positive and affirming care experiences for women during childbirth. All women have the right to dignified, respectful health care throughout pregnancy and childbirth as well as freedom from violence and discrimination.

J's rights in this regard were outrageously and grossly violated.

33. At the systemic level, the appellants are also liable for the eminently clear failure to establish a human rights-based clinical protocols for women during child birth. Such protocols, if available, includes not only clinical components but outline measures to ensure all women are accorded the right to dignified, respectful health care throughout pregnancy and childbirth as well as freedom from violence and discrimination. This includes the provision of respectful maternity care that maintains women's dignity, privacy and confidentiality, enables informed choice and continuous support throughout labour and childbirth, and ensures freedom from mistreatment.

34. Health systems, such as the appellants', must be held accountable for the mistreatment of women during childbirth, and for failure to effectively prevent and respond to these harmful practices. Beyond providing resources to ensure quality, accessible maternal health care, the appellants were obligated to provide clear policies to ensure dignified, respectful health care throughout pregnancy and childbirth for all women.

35. Differently put, a purposive reading of the right to health in article 43 of our *Constitution* as read together with the international human rights treaties cited above which accentuate the right dictate that health systems must be organized and managed in a manner that ensures respect for women's sexual and reproductive health and their other human rights – including the right to dignity. This must include action to ensure that specific policies to promote respectful maternal care have not only been adopted, but that they are translated into meaningful action through implementation.

36. In the present case, the appellants violated J's right to dignified, respectful health care during her childbirth, as well as her right to be free from violence and discrimination. J was subjected to abuse, neglect and disrespect during childbirth. Additionally, she was denied her right to be equal in dignity; to be free to seek; and receive information; and to be free from discrimination. In short, J was denied the right to enjoy the highest attainable standard of physical and mental health, including her sexual and reproductive health. While the appellants are vicariously liable to the direct abuse suffered by J in the hands of the hospital, they are, additionally, directly liable for the failure to put in place specific policies to promote respectful maternal care and to ensure that those policies translated into meaningful action through implementation.

37. Finally, I will address the complaint that the damages awarded were excessive and not commensurate with the alleged violations. The appellants do not proffer any reasons they find the damages excessive. I do not find the award of damages excessive at all. I say so for two reasons. First, as demonstrated in this judgment, the mistreatment and indignity that J went through in the hands of the agents of the appellants was simply depraved, malevolent and outrageous. The amount awarded must signal to the appellants and other duty bearers the society's sense of indignant and righteous outrage at the conduct.

38. Second, the award of damages is comparable to others awarded in similar situations. In *Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others*; [2019] eKLR, for example, the court awarded the petitioner Kshs 3,000,000 in a case where the petitioner had suffered "physical, psychological, emotional and mental anguish, stress, pain and death" in a health care setting (refusal to offer safe abortion). In that case, the court profoundly rationalized the award thus:

> 409. Arriving at the award of damages is not an exact science. We are aware that no monetary sum can really erase the scarring of the soul and the suffering and deprivation of dignity and death that some of these violations of rights entail. 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....
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> 410. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional rights and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case.
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> 411 .....
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> 412. Differently stated, translating hurt feelings into hard currency is bound to be an artificial exercise. There is no medium of exchange or market for non-pecuniary losses and their monetary evaluation. It is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. (See *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452, 475-476).

39. In the present case, the award of Kshs 2.5 Million to J for all the depravity and indignity she suffered at the hands of the agents of the appellants is hardly sufficient to atone for the emotional trauma and scarring she suffered. There is simply no reasonable basis for upsetting it.

40. The upshot is that I find the appeal in its entirety meritless. I would dismiss it and affirm the judgment of the High Court with costs to the 1st respondent.

Judgment of Kiage, JA

1. I have had the advantage of reading in draft the erudite judgment of my brother Joel Ngugi, JA, with which I am in full agreement.

2. It is a terrible blight on our public health system that in this day and age, a mother in the process of bringing forth a new life, a veritable miracle that ought to leave all the awe of the mother, should have been subjected to the abuse, violence, humiliation and utter indignity that the 1st respondent endured. It was pain so excruciating and so traumatic she not only passed out, her mind literally blocked the episode temporarily from her mind, to protect her sanity.

3. No mother in labour, new or repeat, should ever have to be insulted and assaulted by maternity nurses. Nor should she have to give birth unassisted on the floor of a hospital no matter how stretched the labour force, and be made to carry the placenta in her hands as some form of punishment. It is the

business of the relevant level of government to ensure a functional system of health, including maternal health care. And this case demonstrates signal and abject failure in that regard.

4. What the 1st respondent was put through is a monumental shame in the part of the Bungoma County Referral Hospital, and one shudders to imagine that this might not be an isolated case, a black swan. If hospitals can have in employment nurses with such grotesquely horrendous, callous and cynical attitudes towards patients, and mothers in labour at that, then such hospitals are a curse, not places of succour. If hospitals do not ensure that their staff are patient-friendly, patient-responsive, and patient-centric in all their actions and processes then woe is the Kenyan patient. And that state of affairs must be sternly rebuked as not reflective of the society we aspire to.

5. Finally, the horror of what the 1st respondent was put through speaks to a wanton and widespread disregard for the right to dignity by so many levels of official don. People in authority see themselves as some kind to tin gods, and the institutions at which they work as their personal fiefdoms. They perceive those who seek services, paid for, mind you, by the taxes of mwananchi, as some kind of inconvenience and they would think it right to be rude, discourteous, disrespectful and inattentive to the needs of the service-seeker whom they strip of dignity with abandon, and often, with impunity.

6. I applaud the 1st respondent for not letting pass unaddressed that dark episode of dignity-negating misconduct by the respondents. And I am fully satisfied that it the name of the various articles of the *Constitution* cited and proved as breached, including article 43(1)(a) which decrees that every person has a right "to the highest attainable standard of health, which includes the right to health care services, including reproductive health care," and article 28 which states that "every person has inherent dignity and the right to have that dignity respected and protected." The High Court (Abida Ali-Aroni, J, as she then was) was right to find the appellants liable and to make the award of damages.

7. I think, with respect, that in the same way there is a fundamental principle in environmental law that the polluter pays, courts ought, if the rights enumerated in the Bill of Rights are to have meaning beyond mere pious declarations, to adopt a more robust, protective approach that, in appropriate cases, and the present is one such, the abuser pays. And really pays. I have no hesitation agreeing that the Kshs 2.5 million awarded to the 1st respondent should therefore not be disturbed and that, in sum, the appeal is one for dismissal.

8. As Tuiyott, JA agrees, the final orders in the appeal are as proposed by Joel Ngugi, JA.

Judgment of Tuiyott, JA

1. I have had the benefit of reading in draft, the judgment of my brother, Joel Ngugi, J A with which I entirely agree with and have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

JOEL NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR