NWM v Monda & 2 others; Cabinet Secretary of Health & another (Interested Parties) (Petition 82 of 2018) [2025] KEHC 11979 (KLR) (Constitutional and Human Rights) (13 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11979 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 82 OF 2018

LN MUGAMBI, J

AUGUST 13, 2025

BETWEEN

NWM ..... PETITIONER

AND

DR B MONDA ..... 1ST RESPONDENT

THE NAIROBI HOSPITAL ..... 2ND RESPONDENT

AAR INSURANCE (K) LIMITED ..... 3RD RESPONDENT

AND

CABINET SECRETARY OF HEALTH ..... INTERESTED PARTY

ATTORNEY GENERAL ..... INTERESTED PARTY

JUDGMENT

Introduction

1. The Petition dated 6th March 2018 was amended on 23rd December 2019 is supported by the Petitioner's affidavit in support of similar date.

2. The gist of this Petition is the claim that the 2nd Respondent unlawfully occasioned the detention of the Petitioner at the 2nd Respondent hospital from 24/2/2018 to 6/3/2018 because of an outstanding hospital bill. That the Petitioner was initially admitted into the 2nd Respondent's medical facility to deliver a baby but due to medical complications which she blames the 1st Respondent for occasioning, she ended up undergoing a second surgery at the facility and further, as a result of the delayed discharge by the 2nd Respondent in an attempt to enforce the payment of the huge medical bill, she contracted

another infection which led to continued hospitalization and escalation of the medical bill beyond the maternity package she had been booked on with the concurrence of the 3rd Respondent.

3. The Petitioner thus contends that her rights and fundamental freedoms particularly rights Article 29 (d) and 39 (1) were violated by the Respondents and thus seeks the following reliefs:

   i. A declaration that the Petitioner and her baby have been subjected to torture, cruel, inhuman or degrading treatment or punishment by the Respondents herein contrary to the provisions of *the Constitution*, for the period between 24th February, 2018 to 6th March, 2018.

   ii. A declaration that the Petitioner and her baby have been unlawfully detained by the Respondents contrary to Article 39(1)) of *the Constitution* for the period between 24th February, 2018 to 6th March, 2018.

   iii. A declaration that the Petitioner and her baby are entitled to compensation by way of damages for the for the period between 24th February, 2018 to 6th March, 2018.

   iv. Costs of the Petition.

   v. Any other orders, writs and directions the Court considers appropriate and just to grant for the purpose of the upholding the Petitioner's constitutional rights.

Petitioner's Case

4. This Petition was heard orally. The Petitioner, PW 1 -Naomi Wambui testified in Court on 26/2/2024 in which she adopted her written witness statement dated 23/10/2019 in her evidence in-chief as well as the affidavit and exhibits thereto.

5. The Petitioner stated that she was insured by the 3rd Respondent (AAR) under member No. AK023381-00 whose cover included a maternity benefit.

6. According to the Petitioner, the 2nd Respondent had advertised a maternity package which included Ksh.98,000 for normal delivery and Ksh.220,000 for caesarean section. She took up the package and began antenatal clinic sometime in 2017 under the management of 1st Respondent, Dr Brigit Monda. On 10/2/2018; she visited the 2nd respondent and on 12th February 2018 delivered a baby through caesarean section conducted by the 1st Respondent (Dr. Brigit Monda). The 3rd Respondent had committed to pay for the caesarean maternity bill an upper limit of Ksh.245,000/-.

7. The Petitioner contends that the 1st Respondent negligently conducted the caesarean operation and thus perforated her colon. The ensuing complication caused the 1st Respondent to seek the enlist the help of additional specialists among them, Dr. Dan Kiptoon (Consultant General Surgeon-PW 2) and Dr. Martin Wanyoike (Consultant Cardiologist) to manage her condition.

8. The Petitioner avers that in a report dated 24th February 2018, Dr. Wanyoike diagnosed that she had a gaseous abdomen and severe pneumoperitoneum indicating a perforated hollow viscus as per the CT scan that was conducted on 15th and 16th February 2018.

9. The Petitioner depones that the 1st Respondent proceeded to discharge them and instead indicated that she had Ogilvie's syndrome that caused an acute colonic pseud obstruction avoiding to mention the fact that she had in fact perforated her colon during the caesarean section.

10. The Petitioner was told at the time of discharge that her total bill escalated to Ksh.1,761,536.64 and was required that she was required to clear before leaving the hospital.

11. The Petitioner contested the bill on 26th February 2018 insisting that she was not obliged to pay the excessive amount occasioned by the 1st Respondent's acts of negligence during the caesarean section procedure. She claims that the 2nd Respondent in its response dated 27th February 2018 denied the negligent claims.

12. The Petitioner also stated that while at the hospital she contracted pneumonia spending a further 5 days in the hospital for treatment before she was subsequently discharged by Dr. Wanyoike on 5th March 2018.

13. According to the Petitioner, the final diagnosis was indicated as 'caecum perforation, right hemi colectomy, emergency caesarian section and pneumonia'. The Petitioner states that this diagnosis did not indicate that she had Ogilvie's syndrome as had been stated by the 1st Respondent previously.

14. The Petitioner depones that they were detained at the 2nd Respondent due to her inability to pay the now outstanding bill of Ksh.2,119,585. The Petitioner is aggrieved as she attributes the accrued to the negligent acts of the 1st and 2nd Respondent.

15. Nevertheless, the Petitioner has clarified that the essence of this suit is not the 1st and 2nd Respondents' medical negligence as this was dealt with via different suit, Chief Magistrates' Court in Nairobi CMCC No.3468 of 2018: Naomi Wangui Mwangi vs. Dr. B. Monda and the Nairobi Hospital.

16. The Petitioner asserts that this Petition is founded on her detention in hospital by of her and the baby by the 2nd Respondent from 24th February 2018 to 6th March 2018 as she was only released her on 6th March 2018 upon the filing of this suit.

17. The Petitioner (PW 1) produced various documents as exhibits in this case, they included the maternity package for Nairobi Hospital- P. exhibit 1, ultra sound dated 11/2/2018-P. exhibit 1b, the medical report by Dr. Wanyoike dated 24/2/2018-P. exhibit 1c, Discharge Summary by Dr. Brigit Monda dated 24/2/2018- P. exhibit 1d, Discharge Summary by Dr. Lengo dated 24/2/18- P. exhibit 1e, Hospital Bill for Kshs. 2.1 million dated 24/2/18-P. exhibit 1f.

18. Cross-examined by M/S Luchemo for the 1st Respondent, she confirmed the negligence suit filed was dismissed and asked why she sued Dr. Brigit Monda (1st Respondent) since the negligence claim was dismissed, the Petitioner explained:

> " She did not cooperate with us when we were in hospital. She even to give us the medical report. After surgery, she just disappeared...If she did the right thing, I could not have accumulated that Bill. Whatever made me detained in hospital was the second surgery. She did not cooperate well with other doctors and was primary doctor who did the C-Section..."

19. On cross-examination by Mr. Mwihuri for the 2nd Respondent, the Petitioner conceded that indeed the judgment on negligence was delivered by the lower court on 26/2/2020 but she was appealing the same. On the allegation that the 2nd Respondent had detained her in hospital from 24/2/2018 -6/3/2018 she confirmed her position was based on the discharge notes made by the 1st Respondent-Dr. Brigit Monda on 24/2/18. She was however referred to the hospital notes made by Dr. Dan Kiptoon (PW 2) in which she conceded:

> " 25/2/2025-... It is 6:20 a.m. It says I started complaining of chest pain on 25/2/2018. Dr says it is hospital acquired pneumonia. It goes to page 83-4/3/2018 signed by Dr. Kiptoon. He says I can be discharged after medical review. I was discharged on 6/3/2018."

20. Other witnesses called to testify on behalf of the Petitioner included Dr. Dan Kiptoon (PW 2); the Petitioner's husband, Mr. Amundi Nuru Ayub (PW 3) and Petitioner's sister, Ann Njeri Mwangi (PW 4) whose gist of their testimonies is as captured in the next few paragraphs.

21. Dr. Dan Kiptoon (PW 2) a Consultant General Surgeon testified before this Court on 26/2/2024. He confirmed that he operated on the Petitioner on 16/2/2018. At the time, the Petitioner was 5 days-post caesarean and one, Dr. Kaisha who had already asked for the CT scan that was pending. Upon getting hold of the CT scan that he examined between 6.30- 6.40 P.M that day, he decided the patient needed immediate surgery. On examining the Petitioner, Dr. Kiptoon, testified that her breathing was faster than normal (tachypnea), she had faster heartrate (tachycardia), had abdominal distension (swollen abdomen-meaning the intestines were not working normally), she had peritonitis (irritation of the abdomen). In addition, the CT scan showed severe pneumo-peritoneum (free fluid within the abdomen) and also fluid in the chest cavity. He explained:

> " Once you are told pneumo-peritoneum, it means it is outside. A little gas is expected after surgery, but severe, it means more than hence it means there was perforation or some leaking place in intestine and needed to be checked."

22. Explaining the findings on operation, he stated:

> " there was massive pneumoperitoneum – a lot of gas more than you would expect as in signifying pelvic purulent, it means there was gas in the abdomen, it meant there was infection. Infection was not expected in that environment. There was free fluid movement between bowel loops- (Seropurulent inter-loop ascites covering liver) it was liver trying to protect itself from what was in the abdomen, dusky, distended caecum-caecum is the first part of large intestine, the largest part-what happens is the caecum was extended and dusky and there were two small anterior perforations, that is, less than 0.5 millimeters, if they were larger, I would have been able to measure. The normal colour of the intestine is pink in colour but when it has purple with supply of blood, it gets darker and that is what I described as dusky. The caecum was distended by gas. Fifth finding- the holes were leaking intestinal feacal content from intestine into general peritoneal cavity, this is what was happening. The sixth finding, was that the uterus was healing well and back to its norma size."

23. On the corrective procedure that he undertook he explained:

> " First thing, we thoroughly cleaned the abdomen (through peritoneal) and we then removed the right hemicolectomy-colon is disposed from some parts... the caecum which was looking sickly is part of large intestine. We removed caecum and ascending colon and rejoined the small intestine the transverse colon. I repeated the wash out and closed the abdomen."

24. He thus concluded:

> " The diagnosis: acute necrotizing cellulitis with perforation and peritonitis"

25. He explained that necrotizing is associated with cell death while acute means short period.

26. Disputing the mechanical perforation theory, the witness PW 2 stated in his exam in chief by Prof. Wangai for the Petitioner as follows:

> " Trauma to the colon is mechanical injury to the colon. The bacteria to the large intestine is very virulent and if there had been perforation six (6) days ago, what we would have found would have been very severe"

27. Further informed that the Petitioner had a problem immediately after the C-Section, he reiterated:

> " If it was post caesarean, a minimum of six hours she would have been very sick..."

28. The witness produced the Medical Report as P. exhibit 3.

29. Cross-examined by Mr. Mwihuri on why the Petitioner had to remain in hospital even after the discharge on 24/2/2018; Dr. Dan Kiptoon explained:

> " From my speciality, the client was good on 24/2/2018 at 9.00 a.m. On the same day, Dr. Wanyoike said she may be discharged and same day, at 6 P.M, Dr. Monda said patient may be discharged. On 25/2/2018, 6.00 a.m. it was indicated Naomi had been discharged but had acquired hospital acquired pneumonia. She was advised to take 'Meropenem'. Meropenem is an extended broad spectrum anti-biotic used for serious/severe infection. It is given intravenously, through injection to the vain-IV medication. Typically, we don't recommend you go home if you are on this type of medication, you have to be admitted between 7-14 days depending on your response...Hospital acquired pneumonia is acquired from pathogens that tend to be resistant to many antibiotics, we presume it is a bug within hospital so we start from top antibiotics first and we review the antibiotics based on patient response to treatment..."

30. Mr. Amundi Nuru Ayub (PW 3) the Petitioner's husband was away on official trip to Arusha when his wife was admitted and operated upon. He came back on 14/2/2018. He found his wife who complained of bloating. At the time Dr. Kaisha was attending to her. On 16/2/18; he met Dr. Kiptoon and Dr. Wanyoike. She was taken for scan and was asked to sign the consent immediately so that she could be taken to the theatre. From the theatre she was taken to HDU for some days and then was transferred to a normal ward. She was discharged on 24/2/18 but the hospital bill was very high. He refused to pay and was informed that the wife would not be allowed to leave until the bill was cleared. He testified she contracted an infection was thus held in hospital even further.

31. Ann Njeri Mwangi (PW 4), the Petitioner's sister is the one who accompanied the Petitioner to the 2nd Respondent facility on 10/2/18. She stated about what transpired after the caesarean surgery:

> " On 12/2/18; the baby had not come and she was taken for C.S. At around 4.PM. after C.S. she was taken to the recovery ward. At 4.00 PM she complained of bloated stomach to the nurses. That was 12/2/18 after C.S was done. On 13/2/18, Dr. Monda referred her to Dr. by name Dr. Kaisha. She came, observed and read her file she went and never came back. On 14/2/2018, her stomach was so much bloated and was in so much pain. Dr. Monda came to check on her. She listened to her stomach and she said, 'You know, Naomi I am avoiding to take you back to the theatre' I was there in the ward... On 15/2/2018, she came with two doctors Dr. Kiptoon and Dr. Wanyoike. Dr. Kiptoon examined her and suggested a series of

lab tests. The tests revealed perforation caused by sharp object. It is Dr. Kiptoon who told us after we asked him. He said it was a sharp object…"

32. Concerning the hospital bill, she said:

> " Her insurance paid for maternity costs and they refused to pay for the other corrective surgery because it was due to negligence of the doctors. We got the report of Dr. Kiptoon. It is AAR which said that. We were at Nairobi Hospital when that was said. We came together, me, my brother-in-law and my cousin and see what could be done. We sought intervention of the lawyer because she was being detained…At the point the hospital said we cannot leave without clearing the bill…"

33. PW 4 was confronted by Ms. Luchemo for the 1st Respondent on her assertion that the Petitioner complained immediately of bloating on the day of surgery at around 4.00 PM, yet in her witness statement she wrote: "That when she was brought to the ward, she slept until morning"

34. She responded:

> " It was 13th in the morning after the CS. CS was done on 12/2/2018 around midnight.

35. Further challenged to pin-point where she had stated in her written statement that Dr. Kiptoon had informed her that the perforation was caused by a sharp object, she said:

> " I don't seem to find it."

36. On further prodding by Mr. Mwihuri for 2nd Respondent to confirm whether Dr. Kiptoon had told them that the perforation was due to a sharp object, she stated:

> " When he said perforation, I thought perforation is to pierce. He did not use the word sharp object, yaah, yes, he did not."

37. Further probed to explain her assertion that the sister was detained after discharge on 24/2/2018; she stated:

> " The part of detention comes in because she was discharged during the day, later is when she complained of chest pain. Discharge was already done but they told me we cannot leave without clearing. It was message from accounts office."

38. Cross-examined by Mr. Omuganda on allegations that AAR (3rd Respondent) refused to cover the hospital bill because of the doctor's negligence, she responded:

> " I have nothing written to that effect. It was verbal."

Petitioner's Submissions

39. The Petitioner through Prof. Kiama Wangai and Company Advocates filed submissions dated 25th February 2025.

40. Counsel reiterating the facts of this case submitted that the Petitioner and her baby had stayed at 2nd Respondent longer than expected because of the 1st Respondent's negligent acts.

41. Counsel noted that the Petitioner as per the evidence adduced had been discharged three times. Counsel submitted that her first discharge was after the botched caesarean section that caused a serious

injury to the Petitioner, being perforation of her intestines and whose injury could not allow her to leave the hospital. She was thereafter was subjected to a surgery to correct the injury caused by the 1st Respondent.

42. On the second discharge, it is argued that the Petitioner could not be released owing to the outstanding medical bill. This bill is argued to have accrued due to the 1st and 2nd Respondents' actions. In addition, it was submitted that the Petitioner contracted pneumonia consequent to the detention by the 2nd Respondent, this necessitated cancelation of her second discharge to enable her commence the treatment. Counsel stressed that her discharge was finally secured after filing of this suit.

43. Counsel further argued that the 3rd Respondent declined to pay the hospital bill indicating that the same was over and above what it had agreed to pay for. Counsel pointed out that the 3rd Respondent had not explained why it could not pay the hospital bill noting that the Petitioner had a Ksh.10,000,000 inpatient cover, notwithstanding the maternity cover.

44. Counsel submitted that it is unjustifiable that although medical disputes flow from negligence, high standards have been placed to prove the same compared to other acts of negligence, as the complainant must find a medical practitioner who agrees with her. Counsel urged the Court to depart from this and especially where it is clear that Medical Practitioners caused such harm to their patients.

45. Counsel additionally stressed that the Court ought to take judicial notice that doctors would never be witnesses in a matter of medical negligence other than when supporting their own and hence hapless patients like the Petitioner suffer injury from the medical practitioners and have to live with the scars and the financial losses.

46. Counsel submitted therefore that being that the Petitioner was detained from 24th February 2018 to 6th March 2018, she ought to be compensated.

1st Respondent's Case

47. The 1st Respondent in response, Dr. Brigit Monda, filed his Replying affidavit sworn on 13th September 2018 and a further affidavit sworn on 27th May 2020 in view of the amended Petition. She also testified orally in Court as (DW 1) on 27/2/2024. She also produced in evidence the annexures to her affidavits as D. exhibit 1 & 2.

48. The 1st Respondent (DW 1) stated that she is an obstetrician and gynecologist. She began attending to the Petitioner during her third trimester on 9th January 2018 at her private clinic. She states that prior to this, the Petitioner had been attending the antenatal clinic at the 2nd Respondent. She states that as per the scan, the Petitioner's Estimated Date of Delivery was on 5th February 2018.

49. During the consultations, she informed the Petitioner that her baby felt big for gestation, a fact which was confirmed by an obstetric ultrasound. Due to this, she informed the Petitioner that she may end up having a caesarean section.

50. The 1st Respondent admitted the Petitioner on 10th February 2018 for induction labour at the 2nd Respondent. She states that the Petitioner checked in at around 10:00 pm and the routine checkups conducted before her admission. The cardiotocograph indicated that the baby's heart beat was faster than usual prompting the attending nurse to contact the 1st Respondent.

51. She depones that this was an emergency hence required that the baby be delivered through an emergency caesarean section as the Petitioner was not yet in labour. While the Petitioner was reluctant to undergo the procedure, she explained the severity of the situation before her, her husband and sister. At the Petitioner's request a repeat scan was conducted. The scan indicated that the baby's heart beat

had stabilized and was now normal. The Petitioner at this point requested that they proceed with the induction of labour instead of the caesarean section.

52. The 1st Respondent induced the labour on 11th February 2018 at around 2:15 am. She avers that by 11:00 pm the Petitioner had not progressed into full labour. As such the baby had to be delivered using the caesarean section. She had appraised the Petitioner of the progress throughout who then finally consented to the procedure being done.

53. She stated that she did emergency caesarean and delivered a large healthy female infant of 3600 grammes who was received by pediatrician called Dr. Lengo. The Petitioner faired well post operation. She indicates that by the second day, the Petitioner was on a normal diet, fully ambulant, breastfeeding and passing stool normally. Abdomen was a bit gassy had bowel sound meaning intestines were moving. She had not passed stool on the 1st post-operative day so she requested nurses to put her on suppositories to enable her pass stool and gas as it is normal for post-operative patients to get gas because anesthesia and pregnancy which slows gut gas. As such, she set out to discharge the Petitioner and the baby on 14th February 2018.

54. On 14th February 2018, the anesthesiologist who reviewed the Petitioner, Dr. Mutie, reported that she abdominal distension.

55. Due to this, she could not discharge the Petitioner. She at once requested for a consultant gastric surgeon, Dr. Kaisha Otsiani, to get a second opinion. In addition, the Petitioner was instructed not to eat anything in view of these tests. She asserts that the Petitioner failed to adhere to these instructions consistently thereby delaying carrying of further tests.

56. An abdominal ultra sound conducted the next day showed that the Petitioner had a gaseous distension and fluid levels but no gut/intestinal perforation. She stated:

> " The diagnosis we were working on was obstructed intestines. I cannot recall what Dr. Kaisha wrote...she opened her bowels, passed stool, passed gas. Dr Kaisha had travelled, she asked Dr. Kiptoon to step in for him. When we went to review the patient on 16th, we found she had shut down, intestines were paralytic again. Dr. Kiptoon said we do CT scan of the abdomen..."

57. A further CT scan was conducted on 16th February 2018.It showed that the Petitioner had severe pneumoperitoneum indicating a perforated hollow viscus. She stated:

> " When CT scan was done, radiologist called me and told me there appeared to be acute perforation and it was an Ogilvie syndrome. At about 4.00 PM I called the patient and told her this was finding of CT scan. I texted the name of the condition and told her exactly what had been written. I called Dr. Kiptoon and revealed. I rushed to Nairobi Hospital to see the patient and explained to her what CT scan had showed and what it entailed. That was on 16/2/2018. Dr. Kiptoon came, explained findings to patient and what needed to be done. There was hostility towards me from relatives...Dr. Kiptoon was with the family for 2-3 hours. Ultimately, we needed to go to the theatre to confirm what CT scan had showed... Despite hostility, I told Dr. Kiptoon I would be in the theatre with him. I joined him in the surgery and we opened and what we found-there was no stool in peritoneal cavity. It means that perforation of intestine was an acute event...we also found two small holes in the large intestines-but not cut-edges were not clean. It was indication that perforation were

not done by surgical knife, it was done by something different. We also found peritonitis, an inflammation of the lining of the abdomen..."

58. They further found an intact involuting and healing uterus with a clean pelvic area.

59. In addition, she states that the surgery revealed that the acute perforation of the abdomen had occurred within the last 24 hours. This indicated that they were dealing with the Ogilvie syndrome. This conclusion alongside the lab results of the specimen acquired during the surgery, confirmed this diagnosis in the histology report dated 26th February 2018.

60. She states that after the surgery the Petitioner was transferred to the High Dependency Unit on 17th February 2018 due to poor oxygen saturations. Dr. Wanyoike was then called in to attend to her. She stabilized within a few hours and discharged to the St. Andrews Ward.

61. The 1st Respondent avers that the Petitioner called her on 23rd February 2018 asking to be discharged. She informs that she was not in a position to do so as at that point the Petitioner was under the care of Dr. Kiptoon and Dr. Wanyoike and were the ones who could discharge her. Dr. Kiptoon confirmed that he had put the Petitioner on a 10-day treatment.

62. She asserts that the Petitioner did not want to hear this and continued to insist that she wanted to be discharged. After consulting the two doctors, the 1st Respondent discharged the Petitioner on 24th February 2018. She avers that she is a stranger to the events that occurred thereafter.

63. The 1st Respondent stresses that she did not conduct the caesarean section negligently as alleged by the Petitioner. She adds that in fact has done 20 other similar procedure successfully following the Petitioner's procedure. She asserts that she took all the reasonable steps to ensure that the Petitioner and her baby's wellbeing was proper and thus denies breaching her duty of care. She adds that despite her instructions the Petitioner consistently failed to adhere to them to her detriment. In sum, she claims that the Petition lacks merit and so should be dismissed.

64. In her further response, she argues that she was wrongly joined in this suit as the Petitioner admits that this Petition revolves around the alleged unlawful detention at the 2nd Respondent not the issue of medical negligence. Considering this, she states that this suit does not raise any reasonable cause of action against her and so should be struck off from these proceedings.

65. She further depones that the issue of medical negligence was dealt with by the Court in Nairobi CNCC No.3468 of 2018; Naomi Wangui Mwangi vs Dr.B. Monda & the Nairobi hospital and a judgment entered on 26th February 2020. She avers that this suit was dismissed with costs to the defendants therein.

66. Confronted by Prof. Wangai during cross-examination on the diagnosis of Ogilvie syndrome; the 1st Respondent Dr. Brigit Monda (DW 1) responded:

> "The CT scan does not mention Ogilvie syndrome. (told she indicated the patient had suffered Ogilvie syndrome) Yes, and that is not disputed. It was the diagnosis I was working with. I called the patient and I told her I think she had what is called Ogilvie syndrome. Report of CT scan came out later that day at 4.00 PM. I had earlier discussed with Dr. Were to arrive at my earlier observation... my discussion with Dr. Were is not on the hospital notes, it was telephone conversation which is not in the record..."

67. (referred to Dr. Kiptoon's surgical notes and asked to show mentioned Ogilvie syndrome anywhere, the witness (DW 1) stated:

> "Dr Kiptoon did write it there. Ogilvie syndrome has several different names. Ogilvie syndrome can also be called acute colonic pseudo- obstruction which is the name Dr. Kiptoon used...my diagnosis of acute syndrome was confirmed by histology. There is no way of knowing if patient could have Ogilvie before surgery is done. It developed on 16/2/2018. That is why there was question mark in my notes..."

1st Respondent's submissions

68. On 25th February 2025, the 1st Respondent through Mbai Waweru Advocates filed submissions.

69. On the onset, Counsel submitted that the crux of this Petition is the alleged detention of the Petitioner and her baby from 24th February 2018 to 6th March 2018. Counsel submitted that as per the 1st Respondent's averments, the Petitioner was not under her care throughout this period as she had discharged her on 24th February 2018.

70. Counsel submitted that despite this, the Petitioner has throughout insisted that the 1st Respondent is culpable. Counsel submitted that the issue of medical negligence on the 1st Respondent's part had been dismissed and claim considered to lack merit by the Medical Board in PIC Case No.14 of 2018, the Magistrate Court in Nairobi CMCC No.3468 of 2018 and the subsequent appeal of the decision in Nairobi HCCA No.148 of 2020.

71. Counsel recapping the 1st Respondent's averments of the actions taken in attending to the Petitioner, submitted that the Petitioner is obliged to prove her allegations of negligence but had failed to do so.

72. Counsel also pointed out that even the scholarly articles adduced by the Petitioner, Ogilvie's syndrome is also referred to as acute colonic pseudo-obstruction, the terminology that was used by Dr. Kiptoon in his notes which collaborated the 1st Respondent's diagnosis.

73. In closing, Counsel maintained that the Petitioner had failed to render any credible reason as to why the case against the 1st Respondent should succeed.

2nd Respondent's case

74. The 2nd Respondent, (The Nairobi Hospital) called two witnesses who testified orally besides filing the Replying affidavit of Maxwell Maina sworn on 10th July, 2018 and a further affidavit that had annexed various documents dated 18th March, 2019. The witnesses for the 2nd Respondent were Samuel Odede (DW 2), who is 2nd Respondent's the Director of Medical Services and Research and a trauma orthopedic surgeon by profession. This witness testified before this Court on 18/10/2024.

75. In brief, Mr. Samuel Odede refuted the claim that the Petitioner and her baby were detained by the 2nd Respondent and detailed chronologically why the discharge of the Petitioner delayed between 24/2/18 and 6/3/2018; the period the Petitioner alleges was detained in hospital.

76. He explained that the Petitioner was to be discharged on 24/2/18 as per the notes of Dr. Brigit Monda upon review of Dr. Kiptoon and Dr. Wanyoike. However, on 25/2/2018 at 6.20 A.M. the patient began complaining of right chest pain and upon examination, it was discovered she had contracted hospital acquired pneumonia. A chest X-ray done on 26/2/18 confirmed pneumonia on the lower segment of both lungs (bi-basal pneumonia and AAR (3rd Respondent) was informed she could not be discharged due to the chest infection. She was started on intravenous treatment. On 28/2/2018,

the progress was good and the plan was to discharge her on Saturday, 3/3/18. However on 1/3/18; she developed severe abdominal pain and the plan was now to get the abdominal and ultra-sound and blood tests. On 2/3/2024, Dr. Kiptoon found that the patient had picked fluid in the lungs and the plan was to get ultra sound guided removal from the lungs and to continue with IV antibiotics-meropenem. Fluid extraction was done on 3/3/2024 and continued on IV medication. On 4/3/2018, Dr. Kiptoon reviewed her and recommended the removal of all drips and discharged her from his care.

77. She was taken over by another Doctor who noted she was doing well on 5/3/18 and discharged her on 6/3/2018.

78. The witness maintained on cross-examination by Ms. Kendi for 3rd Respondent that the delay in discharging the Petitioner was based on doctor's clinical findings and not the issues on insurance paying.

79. Cross-examined by Petitioner's Advocate on contracting on the manner of hospital acquired pneumonia, he said:

> " Even patients who are discharged immediately still go home and get hospital acquired pneumonia. It means there are organisms in hospital which are resistant. Even in sterile environment like theatre, you could find bacteria. Even hospital acquired pneumonia can be airborne. A patient with a cough, that droplet can be disseminated..."

80. The other witness called by the 2nd Respondent was Maxwell Mwangi Maina (DW 3) who adopted his replying affidavit sworn on 10/2/2018 and the one sworn on 18/3/2019 together with the annexures thereof as evidence in chief. He is the legal officer of the 2nd Respondent and also testified on 18/10/2024.

81. He deponed that the Petitioner undertook antenatal check-ups with the 1st Respondent who is an independent consultant with admission rights at the 2nd Respondent. He emphasizes that the Petitioner was at all times under the care of the 1st Respondent as her obstetrician.

82. He avers that the 1st Respondent recommended the Petitioner's admission for delivery on 10th February 2018. She was admitted on the same day. Following an evaluation of her condition, the 1st Respondent recommended that the baby be delivered through a caesarean section, which the Petitioner consented to. He informs that this procedure was successful and a healthy baby delivered.

83. He avers that while recuperating in the Ward, the Petitioner began experiencing abdominal discomfort and distention. In response, the Petitioner was administered with the requisite medication. A CT scan was subsequently conducted by the 1st Respondent to ascertain what the issue was.

84. The results indicated that the Petitioner had an acute colonic obstruction which caused perforation of her colon which is referred to as the Ogilvie's syndrome. Upon this diagnosis, a laparotomy procedure was conducted by Dr. Kiptoon on 16th February 2018. He thereafter monitored her condition until she was fully recovered.

85. He contends that the Petitioner's claims are false as at no point, the 2nd Respondent did not refuse to discharge her on the grounds of the pending hospital bill. He notes that the Petitioner was set to be discharged on 24th February 2018.

86. He depones that before this discharge, the Petitioner began complaining about pain in her lower chest which was revealed to be right basal pneumonia as per the CT Scan conducted. As such, she could not be discharged on this day so that she would undergo treatment.

87. It is claimed that the Petitioner on 26th February 2018 through her Counsel wrote to the 2nd Respondent claiming that they had detained her unlawfully due to the outstanding medical bills. The 2nd Respondent in its letter dated 27th February 2018, refuted these claims stating that the sole reason the Petitioner was in the hospital was because she was not clinically sound to be discharged, not the outstanding bill.

88. He further informs that the Petitioner and 2nd Respondent's representatives had a meeting on 20th February 2018.The purpose of the meeting was to explain the procedures that had been carried out on the Petitioner. It was agreed that her condition would be maintained with ongoing treatment.

89. A further meeting was held on 5th March 2018 so as to discuss the outstanding bill. He avers that it was agreed that the relatives would instruct the 2nd Respondent when to discharge the Petitioner following the advice from their advocate. He depones that the Petitioner was discharged on 6th March 2018 when it was determined that she was clinically sound.

90. He emphasizes that the Petitioner has not demonstrated that the 2nd Respondent detained her and her baby due to the outstanding hospital bill. He notes that the nurses' occurrence notes indicate that the Petitioner continued to receive proper care and treatment until she was discharged. Owing to the care granted to the Petitioner and her baby, they incurred a bill of Ksh.1,761,536.64. However, on cross-examination by Miss Kendi for the 3rd Respondent, he stated that the total bill stood at Kshs. 2, 192, 887. He clarified that AAR only settled 245,000/- and stressed that the 2nd Respondent is entitled to recover the amount owed.

91. On cross-examination by Prof. Wangai for the Petitioner, he confirmed that on 24/2/2018; the patient was discharged by Dr. Kiptoon and Dr. Martin Wanyoike pending the writing of discharge summary by Dr. Monda and in fact Dr. Monda clinically discharged her but there was an issue of financial discharge/clearance which is done upon payment of bills which forms part of clearance. He thus explained:

> " Discussions were ongoing because she raised the issue concerning hospital bill. They indicated insurance, AAR was supposed to cover the full bill... financial discharge was ongoing...We held three meetings and it was after she was financially discharged...There were approximately three meetings- first was 20/2/18; issue no. 7 is talking about the Bill resulting from extra surgery..."

92. Challenged on cross-examination that the reason why the Petitioner stayed in hospital between 24/2/18 and 6/3/18 was inability to be cleared financially by the 2nd Respondent, he stated:

> " There was discussion but she also had acquired an infection. (Asked what would happen if a patient is discharged but is unable to pay) we enter into an agreement on how they would pay and release them..."

93. In view of the foregoing, Counsel submitted that the Petitioner's claim is untrue, frivolous and vexatious as the 2nd Respondent did not deny her freedom of movement or subject her to torture neither violate her constitutional rights. For this reason, he argues that the Petition lacks merit and so ought to be dismissed.

2nd Respondent's Submissions

94. The 2nd Respondent filed submissions dated 3rd March 2025 through Hamilton Harrison and Matthews.

95. Counsel submitted that the Petitioner's primary claim is her alleged detention from 24th February 2018 to 6th Mach 2018. To answer this, Counsel relied in Daniel Waweru Njoroge & 17 Others v Attorney General [2015] KEHC 1154 (KLR) where the Court noted as follows:

> " The gist of an action for false imprisonment is unlawful detention, without more. The commonly accepted definition of false imprisonment defines the tort as;-
>
> i. The unlawful restraint of another
>
> ii. Against their will, and
>
> iii. Without legal justification.
>
> Proving the first element of false imprisonment involves looking at the facts whether there was any force or threat of some kind used in restraining the accusing party. It is important to note that actual force is not necessary. Proving the second element of false imprisonment involves applying 'reasonable person' standard. Thus, the court will determine whether a reasonable person in the same factual situation would believe that they have been detained against their will. The final element of false imprisonment involves determining whether there is a legal basis for the detention. Many legal bases for detention do exist such as a lawful arrest by law enforcement. Determining whether probable or a legal basis for the detention exists is the key in false arrest cases.
>
> Harper & James in their book, The Law of Torts[4] authoritatively state that false imprisonment must include the following elements, namely:-
>
> i. There must be detention, i.e. unlawful restraint of a person's liberty or freedom of movement.
>
> ii. That the detention needs not be forceful. Threats of force by conduct or words coupled with the apparent ability to carry out such threats are sufficient.[6]
>
> iii. Detention must be total, i.e. it must be within boundaries. The restraint must be total rather than a mere obstruction of the right to go where the plaintiff pleases. Imprisonment is something more than a mere loss of freedom to go where one pleases; it includes the notion of restraint within some limits defined by a will or power exterior to our own.
>
> iv. Detention must be for an appreciable time, however short. In Prosser on Torts, [7] it authoritatively stated that the tort is complete with even a brief restraint of the plaintiff's freedom.
>
> v. The detention must be unlawful and must have been against the plaintiffs will.
>
> vi. Malice is not an ingredient in the tort of false arrest.

96. Counsel in view of this guidance submitted that the Petitioner is required to adduce the cogent evidence to support her allegations including those of being subjected to torture, cruel, inhuman or degrading treatment.

97. Reliance was placed in Kenya Tourist Development Corporation v Sundowner Lodge Limited (2018) eKLR where it was held that:

> "What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination."

98. Like dependence was placed in Michael Maina Kamami & another v Attorney General [2019] KECA 429 (KLR).

99. Counsel analyzing the adduced evidence by the 2nd Respondent and its witnesses, submitted that Dr. Kiptoon testified that as per the hospital's investigations it was established that the cause of the Petitioner's condition could be a case of Ogilvie's syndrome and further that the Petitioner already had symptoms of pneumonia. He added that when the Petitioner had first been discharged, she had been treated for the first pneumonia however contracted the new strain in the hospital.

100. Counsel noted furthermore that in the doctor's notes appearing at page 75 in the documents attached to Maxwell Maina's affidavit, the doctor's entry on 25th February 2018 at 6.20 am stated that the Petitioner had chest pains. The diagnosis was hospital acquired pneumonia and the doctor ordered that the patient be started on meropenem.

101. Moreover, at page 76, on the recording for 26th February 2018, the doctor wrote that the Petitioner was to be discharged, however she had had an infection. Equally, at page 79, Dr. Kiptoon on 2nd March 2018 recorded in the notes that he was called to review the Petitioner signed off on 24th February 2018. Dr Kiptoon then noted that the Petitioner had developed pneumonia and that she had been on meropenem.

102. Soon after on 4th March 2018, Dr Kiptoon wrote that the Petitioner could be discharged after medical review by Dr Wanyoike. On 5th March 2018, at page 84, the doctor wrote that the Petitioner could be discharged that day. On 6th March 2018, the doctor wrote that the Petitioner be discharged. The Petitioner thereafter went home. Counsel stressed that these facts are also be corroborated by the Petitioner's own discharge summary form annexed to her affidavit.

103. In light of this, Counsel submitted that it was not true that the Petitioner was detained as alleged neither subjected to torture, cruel, inhuman and degrading treatment. Counsel stressed that from the evidence, the Petitioner prior to her discharge and within the impugned period was receiving treatment from the 2nd Respondent owing to the acquired pneumonia.

104. Counsel added that the claim of detention owing to the pending hospital bill was false as the 2nd Respondent as evidenced in Maxwel Martin's affidavit, had already had a meeting with the Petitioner's family concerning these issues including her discharge.

105. Counsel noted further that the issue of medical negligence which is not a subject before this Court was dealt with by the medical council and the Magistrate Court and the same dismissed. This includes the Appeal to the High Court on the same.

106. That said, Counsel submitted that in the event this Court finds that the Petitioner has proved her case to the required standard, Counsel urged that the Court be guided by the finding in Daniel Waweru Njoroge (supra), where the Court awarded damages of Ksh.100,000/= for false imprisonment which would also suffice in this case.

3rd Respondent's Case

107. The 3rd Respondent in response filed grounds of opposition dated 16th November 2020 on the basis that:

   i. The Amended Petition does not disclose any cause of action as against the 3rd Respondent.

   ii. The Petitioner is a beneficiary of the medical cover by virtue of a contract between the 3rd Respondent and her employer the Lake Victoria Basin Commission Secretariat thus lacks the Privity of contract.

   iii. The corporate medical cover negotiated the maternity benefits for its staff at kshs 245,000/- which amount was fully paid for the Petitioner and the benefit exhausted.

   iv. The complaint arises from her hospitalization with the 2nd Respondent which is her choice of facility and which has nothing to do with the 3rd Respondent.

   v. The Prayers sought relate to the Petitioner's alleged detention by the 2nd Respondent and no wrong doing has been imputed or pronounced as against the 3rd Respondent.

   vi. The Inclusion of the 3rd Respondent is unnecessary and unrelated to the issues raised in the Petition.

108. The 3rd Respondent in addition filed its Replying Affidavit through its Senior Manager, Quality Assurance and Health Outcomes, Dr. Osoro Jared sworn on 24th May 2023.

109. He confirms that the Petitioner was a member of the 3rd Respondent under the health plan for Lake Victoria Basin Commission Secretariat with the membership no. AK023381-00.

110. He depones that as per the policy, the Petitioner was a beneficiary of a maternity package of up to a sub-limit Ksh.245, 000. In view of this, the 3rd Respondent on 12th February 2018 informed the 2nd Respondent that it would be responsible for the hospital expenses in relation to the maternal delivery up to Ksh.245, 000. He avers that this full amount was paid as stated.

111. In light of this, he avers that the 3rd Respondent's role was limited to making this payment which was done. He notes that the 3rd Respondent did not participate in handling of the Petitioner neither her alleged detention.

112. Considering this, he asserts that the 3rd Respondent was improperly joined in this suit. Likewise, that the Petitioner's claim against the 3rd Respondent fails the test set out in Anarita Karimi Njeru vs Republic (1976-1980) KLR 1272.On this basis, he states that the Petition is an abuse of the Court process, incompetent and incurably defective.

3rd Respondent's Submissions

113. Mboya Wangong'u and Waiyaki Advocates for the 3rd Respondent filed submissions dated 3rd March 2025. Counsel set out the issues for determination as: whether the Petition demonstrates any cause of action against the 3rd Respondent, whether the 3rd Respondent subjected the Petitioner to acts of torture, cruel, inhuman, or degrading treatment, unlawful detention, or any other constitutional violation and whether the insurance policy have a maternity sub-limit of Kshs. 245,000.

114. On the first issue, Counsel submitted that the Petition is bereft of particulars of the alleged complaints against the 3rd Respondent. This is since the Petition arises from the Petitioner's hospitalization at

the 2nd Respondent's facility, which bears no connection to the 3rd Respondent. Likewise, the Prayers sought exclusively relate to the alleged detention of the Petitioner by the 2nd Respondent and that no wrongdoing has been attributed to the 3rd Respondent.

115. Counsel relying in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR stressed that it is a well-established principle in constitutional litigation that a party claiming a violation of his or her constitutional rights must plead, with a reasonable degree of precision, how such a violation has occurred which this Petition lacks.

116. Like dependence was placed in Susan Wangari Mburu & 5 others v Eldoret Water & Sanitation Company Limited & another [2021] eKLR and Meru Cultural Center & 17 Others v Kisima Farm Limited & 24 Others [2023] KEELC 19863 (KLR).

117. On the second issue, Counsel submitted that both the Petition and the evidence adduced by the Petitioner and her witnesses does not disclose any action by the 3rd Respondent which amounted to subjection of the Petitioner to acts of torture, cruel, inhuman, or degrading treatment, unlawful detention or any other constitutional violation attributable to the 3rd Respondent. Counsel as such asserted that no cause of action had been established against the 3rd Respondent as there is no indication of how the 3rd Respondent contributed to the alleged detention of the Petitioner.

118. Counsel stated that the 3rd Respondent's only obligation to the Petitioner was with regard to the insurance policy which it met by settling the maternity fees to the limit of Kshs 245,000/-.

119. Counsel submitted that despite the insurance policy having an overall benefit of Ksh.10,000,000/- in the inpatient cover, it had various sub-limits for the various conditions. The maternity benefits which was capped at Ksh.245,000/-, was fully utilized by the Petitioner.

120. Counsel submitted further that in line with the principle of law that parties to a contract are bound by the terms and conditions thereof it is not the business of the Courts to rewrite such contracts. Counsel stated that the Petitioner through her employer having negotiated and entered into a Contract with the 3rd Respondent for an inpatient cover with a sub-limit of Kshs.245,000.00, cannot now claim that the maternity cover was Kshs.10,000,000.00.

121. To buttress this point reliance was placed in National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR where the Court of Appeal held that:

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved..."

122. Comparable dependence was placed in Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd (2017) eKLR.

123. In sum, Counsel submitted that it was evident that the 3rd Respondent had been improperly enjoined in these proceedings and that the Petition discloses no valid claim against it. Counsel for this reason argued that the costs in this suit ought to be awarded to the 3rd Respondent.

Interested Parties Case

124. These Parties responses and submissions are not in the Court file or Court Online Platform (CTS).

Analysis and Determination

125. Having regard to the facts and the law, the Court considers the following to be the issues for determination in this case:

i. Whether the Petition raises any cause of action against the 1st and 3rd Respondent.

ii. Whether the Petitioner' was unlawfully detained by the 1st and 2nd Respondent thus violating her rights under Articles 29(d) and 39 (1) of *the Constitution*.

iii. Whether the Petitioner is entitled to the reliefs sought.

Whether the Petition raises any cause of action against the 1st and 3rd Respondent.

126. A cause of action must have essential facts one that must be required to establish in order to get a remedy from another person, that is, specific components or requirements that must be established to prove a valid legal claim. The essential elements for constituting valid cause of action may be founded on the statutes, administrative regulations, contracts, torts, judicial precedents or *the Constitution*.

127. The Court in Isaiah Ondiba Bitange v & 3 others v Institute of Engineers of Kenya another [2017] KEHC 7565 (KLR) discussed as follows:

> " A cause of action was defined by Obi Okoye — Essays on Civil Proceedings,[1] thus — "By a cause of action is meant any facts or series of facts which are complete in themselves to found a claim or relief."[2] In the case of Drummond Jackson v. British Medical Associations & Ors.,[3] Lord Pearson stated as follows:-
>
> > "... the expression "reasonable cause of action"[4] ...No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some chance of success when... only the allegations in the pleading are considered, if it is found that the alleged cause of action is to fail, the statement of claim should be struck out."
> >
> > The Supreme Court of Nigeria in the case of Oshoboja v. Amuda & Ors;[5] held that a reasonable cause of action means a cause of action with some chances of success, when only the allegations in the Statement of Claim are considered. Our law is the law of the practitioner rather than the law of the philosopher. Decisions have to draw their inspiration and their strength from the very facts which framed the issues for decisions."

128. In the same way, the Court in Njunge v Ministry of Interior & Coordination of National Government & 3 others [2024] KEHC 4676 (KLR) citing a number of authorities with approval noted as follows:

> " ... In DT Dobie & Co. (Kenya) Limited v Muchina & Another [1982] KLR, the Court of Appeal defined reasonable cause of action to mean "an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer..." The court went further to define what constitutes a cause of action and held that a cause of action referred to an act on the part of the defendant which gave the plaintiff a cause of complaint. Up to this point the plaintiff has failed to disclose a reasonable cause of action which would enable him to seek a legal remedy against the 3rd Defendant. It is on this basis that we humbly invite the court to strike out the Plaintiff's application...

...

That in the case of Karl Wehner Claasen v Commissioner of Lands & 4 others [2019] eKLR the Court further defined a cause of action as follows:

A cause of action denotes a combination of facts which entitles a person to obtain a remedy in court from another person and includes a right of a person violated or threatened violation of such right by another person. The applicant did not disclose any such fact which is sufficient ground for the Court to strike out the application..."

129. In my view, the facts pleaded by the Petitioner if established by evidence would entitle her to get reliefs from the Respondents for unlawful detention, psychological and/or mental anguish and also neglect which are valid legal claims hence the argument that the Petition does not raise reasonable cause of action against the Respondents is misconceived and is thus rejected. If the facts as pleaded are established, legal remedies, including remedies for the violation of her rights under *the Constitution* would flow from her claim.

130. The next question thus becomes, whether the Petitioner was able to prove or establish the allegations made in the Petition against the Respondents.

131. It was up to the Petitioner to discharge her burden of proof as was held by the Supreme Court in Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] KESC 66 (KLR) where explained as follows:

"(49) Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

[50] This Court in Raila Odinga & Others v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

"...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

132. Similarly, in Edward Akong'o Oyugi & 2 others v Attorney General [2019] KEHC 10211 (KLR), the Court held:

"

"73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in Britestone Pte Ltd vs Smith & Associates Far East Ltd[38] :-

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him"

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses."

Whether the Petitioner' was unlawfully detained by the 1st and 2nd Respondent thus violating her rights under Articles 29(d) and 39 (1) of *the Constitution*.

133. According to the Petitioner, the 2nd Respondent unlawfully detained her in hospital from 24/2/2018 to 6/3/2018 because of the outstanding hospital bill. That the Petitioner had been admitted into the 2nd Respondent's facility with a view to giving birth on a maternity package guaranteed by the 3rd Respondent of up to Kshs. 245,000/-. Her admitting Doctor was the 1st Respondent, Dr. Brigit Monda. The Petitioner accuses Dr. Monda of negligence that brought about medical complication that caused her to undergo a second surgery to rectify the mistakes done by the 1st Respondent and also, the 2nd Respondent for failing to discharge her on date she was clinically cleared to leave hospital on 24/2/2018 by insisting on clearing the hospital bill first but in the due course she ended up being delayed contracted another infection (hospital acquired pneumonia) which led to further hospitalization and escalation of the medical bill beyond the maternity package covered by the 3rd Respondent. She also blamed the 3rd Respondent for leaving her to shoulder the hospitalization bill yet the medical cover was beyond what she had incurred at the 2nd Respondent facility.

134. The 1st Respondent denied vehemently that she was to blame for the resultant medical complications. She insisted that she was not negligent. She stated the C-section she did on the Petitioner was not the cause of the abdominal complication that necessitated the second surgery insisting that the surgeon who carried out the second surgery (Dr. Dan Kiptoon-PW 2) did not find any nexus between the Caesarean surgery she had done on the Petitioner and the abdominal distention the Petitioner subsequently developed. In any case, she pointed out that she had been absolved of any negligence by the Medical Board, the Chief Magistrate Court and the High Court after the Petitioner appealed the verdict.

135. For the 2nd Respondent, it also denied that it was responsible for the alleged unlawful detention. It gave a sequence detailing why the Petitioner's discharge was delayed. Firstly, after the initial surgery, she developed abdominal bloating and distention and could not be discharged until this was treated. Medical investigations revealed that she had to undergo a second surgery on 16/2/2018 and she was managed until 24/2/2018 the two doctors who had been managing her following the 2nd surgery, Dr. Kiptoon and Dr. Wanyoike indicated she could be released upon the writing of the discharge summary by the primary admitting doctor, Dr. Monda (1st Respondent). The clinical discharge having been completed, the Petitioner needed to be cleared financially as well and the issue of huge medical bill came up and discussions on the same ensued with the family. In the meantime, at 6.20 a.m. the following day, (25/2/2018); the Petitioner began complaining of chest complications which further investigations revealed chest X-Rays after that she had hospital acquired hospital pneumonia of which she could not be discharged until it was treated due to its stubborn resistance to drugs. This went on until 5/3/2018 and she was eventually released to go home on 6/3/2018.

136. Detention of a patient to enforce the payment of the medical bill is a matter that this Court has addressed before. In Kinoru v Labib Hospital [2025] KEHC 209 (KLR); I observed as follows:

> " 29. On the above issue, this Court cannot reinvent the wheel. The issue of whether it is unlawful and unconstitutional to detain a person in hospital to compel payment of medical bill or indeed any contractual debt is an already trodden path by courts in this Country. In Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort & Leon Muriithi Ndubai 2013] eKLR the Court observed thus:
>
> "28 ...Any form of detention not sanctioned by the law that seeks to procure performance of contractual debt is a violation of the right to liberty..."
>
> .... 31.The dilemma that the court faces in deciding such cases is thus self-evident but at least there is jurisprudential unanimity that it is unlawful to detain any person without the authority of the law so as to compel the payment of a debt. The legal process has to be followed fully when one's liberty or limitation of one's rights is at stake as this must comply with Article 24 of *the Constitution*.
>
> 32. The act of the Respondent of detaining the Petitioner to compel him to pay the outstanding medical bill exposed him to scorn and derision from his social circles and relatives and heavily impacted on his esteem thereby puncturing his inherent dignity. Further the confinement subjected him to psychological torture and restriction on his movement. There was thus violation of Articles 28, 29 (d) and 39 of *the Constitution*."

137. Equally in Maina v Registered Trustees of the Sisters of Mercy (Kenya) t/the Mater Misericordiae Hospital [2023] KEHC 22347 (KLR) the Court observed that:

> " 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..."

138. . Correspondingly, in Emmah Muthoni Njeri v Nairobi Women's Hospital [2021] KEHC 8797 (KLR) the Court observed as follows:

> " 46. The question of whether the Respondent illegally held the Petitioner on the basis of her debt can be answered by reference to the holding in Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort & Leon Muriithi Ndubai 2013] eKLR that:
>
> > "28. ...Any form of detention not sanctioned by the law that seeks to procure performance of contractual debt is a violation of the right to liberty. It is also an affront to human dignity to detain someone on account of a debt that cannot be enforced against them."
>
> 47. The Respondent herein is not empowered under the law to hold any person within the hospital for failure to pay medical bills.
>
> The Respondent's action of holding the Petitioner over an unpaid medical bill makes it culpable for illegally detaining the Petitioner. Although the Petitioner was in breach of her contractual obligation to pay her bill, the Respondent had other options open to it to recover the debt and should not have detained the Petitioner.
>
> 48. I, therefore, agree with the Petitioner that the Respondent unlawfully detained her for six months for failure to meet her medical expenses..."

138. In the instant case, and looking at the totality of evidence; I do not think the continued stay/admission of the Petitioner was basically to enforce payment of the outstanding hospital bill. From the evidence before this Court, the continued admission was as a result of clinical findings by doctors that was due to the medical needs of the Petitioner. At first, she was set to be discharged on 14/2/2018 once she had successfully delivered her baby post caesarean operation but then, she complained of abdominal bloating and distension which was investigated and it was discovered that it was a serious condition that involved perforation of the abdominal lining of which emergency and surgery was required. When the doctors thought this was over discharged her on 24/2/2018, her discharge was delayed slightly as the discussion on medical bill ensued after the 3rd Respondent insisted that it was covering the maternity package only. As financial clearance aspect was going on, the following day at 6.20 A.M. the Petitioner complained of chest pain, X-rays taken confirmed she had hospital acquired pneumonia, a serious health condition which can only be treated in hospital due to resistance associated with such strain. This caused the discharge for 24/2/2018 to be put on hold to give the doctors a chance to deal with the new challenge. This was effectively managed until 5/3/18 and on 6/3/18; the Petitioner was released to go home.

139. Evidently, even though discussions on payment of medical bill featured briefly on 24/2/18 and any other time thereafter, this was not main reason for the Petitioner's continued admission in the 2nd Respondent's medical facility. The underlying reason in my humble view was the Petitioner's state of health. In fact, one would even be excused to say that when the Petitioner's discharge failed on 24/2/2018; it was to me a blessing in disguise because a few hours later, she was diagnosed with even a more serious condition which could have been a huge problem if she was not in a hospital set up. Moreover, despite the fact that there were unsettled issues on medical bill between the 2nd Respondent and Petitioner, the 2nd Respondent continued ensuring that she received all the treatment she required until she was given a clean bill of health and left the facility on 6/3/18. The hospital

(2nd Respondent) had every right to engage the Petitioner on how the bill would be settled and thus there was nothing wrong in engaging her and the family to get that commitment before her eventual discharge. In view of the evidence presented, I find the claim of unlawful detention effectively rebutted by the 2nd Respondent and dismiss the same accordingly.

140. Turning now to the 1st Respondent, the Petitioner claimed that the 1st Respondent caused the medical complication that led to the 2nd surgery which was meant to correct the mistake done by the 1st Respondent (Dr. Brigit Monda). The Petitioner and her sister (Ann Njeri PW 4) had in particular accused the 1st respondent of piercing her stomach lining and perforating it hence the abdominal infection that resulted, leading to corrective surgery. However, Dr. Kiptoon (PW 2) the surgeon who carried out the 2nd surgery said his findings on operation did not support the position advanced by the Petitioner and her sister.

141. Instead, Dr. Kiptoon testified that the diagnosis: acute necrotizing cellulitis with perforation and peritonitis"

142. He further explained that necrotizing is associated with cell death and meant it was for a short period. He also disputed theory that there could have been mechanical perforation when probed on this issue by Prof. Wangai who was leading him in his exam in chief. He stated:

> " Trauma to the colon is mechanical injury to the colon. The bacteria to the large intestine is very virulent and if there had been perforation six (6) days ago, what we would have found would have been very severe"

143. Further, it also became clear that although the Petitioner's sister had attributed the claim that the 1st Respondent (Dr. Brigit Monda) had perforated the Petitioner during surgery to what they had been informed by Dr. Kiptoon (PW 2); on cross-examination she became shifty.

144. Challenged by Mr. Mwihuri for the 2nd Respondent to pin-point where in her written statement she had indicated that Dr. Kiptoon had informed her that the perforation was caused by a sharp object, she said:

> " I don't seem to find it."

145. Still on further prodding by Mr. Mwihuri to confirm whether Dr. Kiptoon had told her that the perforation was due to a sharp object, she replied:

> " When he said perforation, I thought perforation is to pierce. He did not use the word sharp object, yaah, yes, he did not."

146. Clearly, there is thus no evidential basis for blaming the 1st Respondent with the post caesarean medical complications that befell the Petitioner. It was up to the Petitioner to establish that, Counsel for Petitioner had urged this Court to take judicial notice that doctors will not testify against their colleagues in medical negligence cases. Unfortunately, the Court cannot disregard evidence and make decisions based on conjecture. I thus do not find any evidence that the 1st Respondent was responsible for the Petitioner's post-caesarean medical issues.

147. In respect to the 3rd Respondent, it was categorical that it was not responsible for the alleged detention by the 2nd Respondent between 24/2/18 to 6/3/2018. That is self-evident, and I so find.

148. It was also vehemently submitted on behalf of the 3rd Respondent that it was not responsible for the additional hospitalization expenses incurred by the Petitioner beyond the maternity package limit of 245,000/- it had authorized in its letter to the 2nd Respondent on 12/2/2018.

149. In the Replying affidavit of Dr. Jared Osoro sworn on behalf of the 3rd Respondent, he acknowledged that the Petitioner was member of the 3rd Respondent health plan for the Lake Basin Commission under the membership number AKO 23381-00. In that package, her maternity limit was Kshs. 245,000/- which it authorized the 2nd Respondent to be the amount it was to pay prior to the admission of the Petitioner. In its submissions, the 3rd Respondent counsel argued that although the overall inpatient benefit was Kshs.10,000,000/-; the policy had sub-limits and conditions and the parties were bound by those terms and it was not the business of the court to rewrite contracts for them. He said what had been negotiated before admission of the Petitioner was maternity cover of 245,000 and could not now be extended into the 10,000,000-inpatient benefit.

150. The 3rd Respondent readily admits it had authorized the admission of the Petitioner on maternity package of up to Kshs. 245,000/- which it duly paid. It further indicated the total inpatient benefit was up to 10,000,000/- but states that this could not be availed to cover the treatment of the Petitioner because that was not what was negotiated prior to her admission by the 2nd Respondent since that is strictly regulated by the contract.

151. The facts of this case clearly demonstrate the Petitioner was admitted based on the undertaking of the 3rd Respondent to pay for the maternity cover. She underwent a Caesarean Procedure which was covered under that package but while still admitted, she developed further health complications of emergency nature and which necessitated subsequent surgery and treatment thereby prolonging her stay in the hospital and escalation of medical bill beyond what had been anticipated.

152. Can the 3rd Respondent avoid responsibility for the additional hospitalization arising from these further emergency medical situations that were post-delivery yet they were neither the petitioner's fault nor her doctors and yet they were not beyond the overall inpatient benefit of the cover she enjoyed with the 3rd Respondent?

153. In my view, 3rd Respondent's position in this regard is indefensible. This court finds that this stand by the 3rd Respondent in this case to unreasonable denial of the Petitioner's medical claim am act of bad faith insurance practice.

154. Under the Article 23 of *the Constitution*, this Court is permitted to grant an appropriate relief if it considers necessary depending on the circumstances of each case.

155. The Court of Appeal addressing the nature of a constitutional relief in Gitobu Imanyara & 2 others vs Attorney General [2016] KECA 557 (KLR) pronounced as follows:

> "...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of
>
> society as a whole that ought as far as possible to be served when considering an appropriate remedy."

156. In my view, the distress that the Petitioner went through was after she suddenly realized that the 3rd Respondent whom she legitimately expected would clear the medical bill abandoned her opting only

clear the maternity portion of the bill and leaving her with the chunk of the bill that arose from the additional hospitalization. Considering her overall in-patient medical cover had been not exceeded, that action by 3rd respondent was unconscionable. I consider the maxim "Equity suffers no wrong to be without a remedy" to apply in this case. The Petitioner had a right to have this medical bill cleared based on the cover she had in respect of additional hospitalization that followed after prior authorization for admission. Where there is a right, there is a remedy.

157. Consequently, having regard to the foregoing, the reliefs that commend themselves in this case shall be as follows:

a. A declaration is hereby issued that the 3rd Respondent's rejection to settle medical bill incurred in respect of additional hospitalization of the Petitioner in the circumstances of this case is unconscionable, unreasonable and a an act of bad faith insurance practice that is unlawful and legally unenforceable.

b. The 3rd Respondent is hereby ordered to clear the outstanding medical bill of Kshs. 2,192,887 arising from additional hospitalization of the Petitioner due to post-delivery complications as it falls within the total overall inpatient medical cover limit available to the Petitioner.

b. Each Party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF AUGUST, 2025.

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L N MUGAMBI

JUDGE