

FACT SHEET

JOSEPHINE OUNDO ONGWEN V. THE ATTORNEY GENERAL & 4 OTHERS

Bungoma High Court Petition No 5 of 2014

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*Bungoma High Court
Petition No 5 of 2014*

On March 22, 2018, the High Court of Bungoma issued a ground-breaking judgment in the case of Josephine Oundo Ongwen v. Attorney General and 4 others.¹

In this landmark decision, the Court recognized that the neglect and physical and verbal abuse of women seeking maternity health care services constitutes a violation of rights as guaranteed by the Constitution of Kenya as well as international human rights instruments.

The Court declared that the physical and verbal abuse experienced by Josephine during her delivery amounted to a violation of her right to dignity and her right not to be subjected to cruel, inhumane, and degrading treatment. The Court also found that the National and Bungoma County Governments had failed to implement and monitor the standards of free maternal health care and services, thus resulting in the mistreatment of Josephine and the subsequent violation of her rights.

The Court's decision emphasizes the need to develop and implement policy guidelines so that quality and accessible health care services are available to all Kenyans, especially within the context of maternal health care.



Facts of the Case

In August 2013, Josephine went to the Bungoma County Referral Hospital to give birth. While in the maternity ward, she was forced to share a bed with another expectant woman, and despite the free maternal health policy, she had to buy her own induction medicine and cotton wool. While she was laboring, the nurses did not check or monitor her progress and, due to a lack of beds and support from the medical staff, she was forced to give birth unassisted on the cold concrete floor. Following this traumatic birthing experience, the nurses physically and verbally abused her for having given birth in this manner and asked her to walk unassisted to the delivery room for completion of the delivery.

The Center filed a petition against the Attorney General of the Republic of Kenya, the County Government of Bungoma, the Bungoma County Cabinet Secretary for Health, the Cabinet Secretary of the Ministry of Health, and the Bungoma County Referral Hospital on Josephine's behalf, stating that her rights as guaranteed under Kenyan constitutional law as well as international human rights law had been violated. The petition claimed that the neglect and physical and verbal abuse that Josephine suffered, as well as the lack of adequate staff, equipment, and basic supplies at Bungoma County Referral Hospital, a public health care facility, violated her right to health, including to reproductive health care. Additionally, the petition claimed that Josephine had received inadequate care *because* she had sought free maternity services, thus violating her right to be free from discrimination.

The petition asserted that the physical and verbal abuse as well as the neglect the Petitioner suffered, was humiliating and violated her right to be free from cruel, inhumane, or degrading treatment and her right to dignity. The severe neglect and lack of access to quality maternal health care exposed Josephine to a heightened yet preventable risk of dying during or post-delivery, thus violating her right to life.

Josephine's right to information was also violated when the hospital failed to publicly state or inform Josephine of its internal complaint mechanism or provide her with the identities of the staff members who had abused her. Finally, the petition contended that the National and Bungoma County governments' failure to ensure the availability of an internal complaints mechanism and failure to provide information on any external complaints mechanism violated the her right to access to justice and her right to reparations.

Background Information

Unfortunately, Josephine’s story is not unique, save for the fact that her abuse was captured on video and subsequently aired on national television, sparking a national outcry. According to the Ministry of Health, poor quality of care was identified in the care of **92.4%** of women who died in the hospitals involved in the Confidential Inquiry into Maternal Deaths in Kenya in 2014.² According to the report, improving the care for **88.1%** of the women who died could have resulted in a better outcome.³

The Constitution of Kenya guarantees every person the right to the highest attainable standard of health, which encompasses the right to health care services, including reproductive health care.⁴ In 2013, operationalizing the constitutional right to reproductive health care, President Uhuru Kenyatta issued a directive stating that free maternity services would be provided in public health facilities. Additionally, a patient’s charter was established which recognizes an individual’s right to the highest standard of health, the right to emergency treatment, and the entrenchment of a provision on dispute resolution.⁵

Despite a robust legal framework on reproductive health care, the quality of Kenya’s maternal care, especially with respect to labor and delivery, is dismal.⁶ According to a report by the Kenya National Commission on Human Rights, inadequate resources, insufficient infrastructure, and lack of physical access to health care facilities adversely impact maternal health care services.⁷ In addition, abuse and neglect in Kenya’s delivery and post-natal health care is systemic and widespread.⁸



Court Findings

In its decision, the High Court recognized that the actions of the Bungoma County Referral Hospital staff and the failures of the National and County Government of Bungoma violated the Petitioners' fundamental rights.

Violation of the petitioner's right to health and health care services

In analyzing the violation of the right to health, the Court noted that this right encompasses proper treatment and availability of necessary equipment, facilities, and medication and that Josephine received none of these while at Bungoma County Referral Hospital. The Court also noted that “the respondents failed to avail the basics; drugs and cotton wool are basic provisions in any healthcare and to require the Petitioner and other poor women to purchase basic necessities in a public facility where healthcare is anchored in the constitution and where a Presidential directive was specific on the provision of free maternal care is nothing short of violation of basic rights.”⁹

Violation of the petitioner's right to dignity

The Court observed that the Petitioner gave birth on a concrete floor in an open area where others watched and videotaped her and that she was abused and shouted at by the hospital staff for giving birth in such a manner, facts admitted by the hospital.¹⁰ The Court found that these acts were a derogation of the petitioner's dignity as "giving birth in an open place where third parties watch and although with good intentions, are able to video tape is degrading to say the least."¹¹ The Court was satisfied that Josephine had succeeded in proving that she had indeed been mistreated and subjected to inhumane and degrading treatment by the nurses, resulting in her pain and anguish.¹²

The Respondents had argued that the hospital and the health sector in general are under resource constraints, but the Court found the actions of the nurses inexcusable no matter how overstretched they were.¹³ According to the Court, "The nurses as health care providers owe a duty of care to their patients at all times, theirs is a calling to serve humanity in vulnerable circumstances."¹⁴ The Court further observed that the actions of the nurses at the hospital derogated and demeaned the petitioner's worth, thus infringing on her right to dignity.¹⁵

Violation of the right to information

The petition argued that Josephine's right to information was violated because the hospital failed to publicly state or clarify its internal complaint mechanism, nor did they provide her necessary information regarding the complaint process even after the video showing her being abused came to light. Additionally, the hospital refused to disclose the identity of the hospital staff who had mistreated her. Despite these infringements, the Court found that Article 35 of the Constitution of Kenya regarding the right to information was not applicable in this case.¹⁶

In the Court's opinion, during her admission and discharge, the Petitioner did not anticipate complaining against anyone nor did she testify to the fact that necessary information was not disclosed to her.¹⁷ The Court however observed that it is important that complaint mechanisms in public institutions, such as hospitals, be made public.¹⁸



Duty to establish policy guidelines to effectively implement the right to health care

On the contention that the National and Bungoma County governments failed to provide an internal complaints mechanism or provide information regarding an external complaints mechanism, the court found that Josephine’s right to access to justice and her right to reparations was violated. Additionally, the Court observed that the “National and County governments have not devoted adequate resources to healthcare services [and] have not put in place effective measures to implement, monitor and provide minimum acceptable standards of healthcare, thus violating our own very [sic] Constitution and [the] international instrument(s) that we have acceded to as a country.”¹⁹

Remedies

Based on the evidence, the Court found that Josephine’s right to maternal health care, as guaranteed by the Kenyan Constitution and international human rights law, was infringed upon by Bungoma County Referral Hospital. Furthermore, the Court also found that there was a violation of Josephine’s right to dignity as a woman and as a human as a result of the actions of the nurses and the hospital.²⁰ Finally, the Court found that both the National and the Bungoma County governments violated provisions of the Constitution and international instruments, and thus Josephine was deserving of reparations.²¹



Orders of the Court

The Court declared that the physical and verbal abuse meted out to the Petitioner at the hospital amounted to a violation of her right to dignity and her right not to be subjected to cruel, inhumane, and degrading treatment.²² It further declared that the neglect Josephine suffered was due to the National and Bungoma County government's failure to ensure health care services are both accessible and of quality standard.²³

The Court declared that the National and the Bungoma County governments failed to develop and/or implement policy guidelines on health care, including maternal health care, thus denying Josephine her right to basic health care.²⁴ The Court further declared that the National Government and County Government of Bungoma failed to implement and/or monitor the standards of free maternal health care and services, resulting in the mistreatment of the Petitioner and a violation of her right to dignity and to medical care that is not cruel, inhumane, or degrading.²⁵

The Court further ordered that a formal apology be made to the Petitioner by the Bungoma County Executive Committee Member for Health, the Bungoma County Referral Hospital and the three nurses involved in the incident.²⁶

Finally, the Court ordered for damages of Kshs 2,500,000 (approx. USD 25,000) and costs of the case to be paid to the Petitioner because of the infringement of her rights by the County Government of Bungoma and the Cabinet Secretary for Health equally.²⁷





Why This Case Is Important

Kenya has a significantly high maternal mortality rate, yet nearly all causes of maternal death can be managed or prevented with adequate medical attention and intervention.²⁸ Mistreatment, disrespect, and abuse by health care providers are key factors in a woman's decision on whether or not to seek skilled maternal care at birth.²⁹ Violations of women's human rights in Kenyan health facilities, including abuse, abandonment, unhygienic conditions, and possible detainment, result in long-lasting and harmful psychological and physical consequences. They discourage women from seeking skilled maternal health services from health facilities. This not only endangers a woman's own life but that of her baby as well. Improved quality of care and patient safety during delivery will accelerate reductions in maternal and newborn mortality.

The abuse and neglect of pregnant women take place despite a free maternal health directive. The intention of free maternal health care is for every woman to get dignified care and to reduce maternal mortality, thus addressing discrimination based on socio-economic status or place of residence. Free maternal health services must not simply be affordable, but they must be of high quality.

Health, including reproductive health, is a right guaranteed by the Constitution. More recently, Kenya's Health Act of 2017 affirmed the right to reproductive health care, explicitly providing for free maternity care³⁰ and the right to access "appropriate health care services that will enable parents to go safely through pregnancy, childbirth, and the postpartum period, and provide parents with the best chance of having a healthy infant".³¹ In addition, the Act provides that "[e]very person shall have the right to be treated with dignity, respect and have their privacy respected."³² The Act articulates what the State's fundamental duty to respect, protect, promote, and fulfill the right to the highest attainable standard of health, including reproductive health care and emergency medical treatment, entails. Since 2018, the government of Kenya has prioritized Universal Health Coverage (UHC) as one of its four key agenda items.³³ Access to free maternal health services continues to be one of the components of UHC through the Ministry of Health's Linda Mama program, a government initiative implemented by the National Health Insurance Fund since January 2017.³⁴ The goal of the initiative is to achieve universal access to maternal and child health services and contribute to the country's progress towards UHC.

Thus, the State has an obligation to provide quality maternal health care services to all Kenyans. This judgment provides an opportunity to both the National and County governments to examine some of the challenges that limit the effective realization of free maternal health services in Kenya and to put in place recommended measures to end abuse in health facilities across the country.

The *Josephine Oundo Ongwen v. Attorney General and 4 others*³⁵ decision builds on the decision issued in 2015 in the case of *Millicent Awuor & Another v. the Attorney General & Others*³⁶ that challenged the detention and abuse of women in public health facilities for the inability to pay their hospital bills. The legislative, policy, and administrative framework to end detention, abuse, and neglect in health facilities that the Ministry of Health was ordered to put in place will greatly complement this case.

Endnotes

- ¹ Cited as JOO (also known as JM) v. Attorney General & 6 others (2018) eKLR (Kenya), *available at* <http://kenyalaw.org/caselaw/cases/view/150953>.
- ² MINISTRY OF HEALTH, SAVING MOTHERS' LIVES: CONFIDENTIAL INQUIRY INTO MATERNAL DEATHS IN KENYA FIRST REPORT 2017, EXECUTIVE SUMMARY 5 (2017) *available at* <http://cmnh.lstmed.ac.uk/sites/default/files/content/centre-news-articles/attachments/CEMD%20Main%20Report%20Sept%203%20FINAL-%20Full%20Report.pdf>.
- ³ *Id.*
- ⁴ CONSTITUTION art. 43(1)(a) (2010) (Kenya).
- ⁵ MINISTRY OF HEALTH, THE KENYA NATIONAL PATIENTS' RIGHTS CHARTER 4-5 (2013) *available at* http://medicalboard.co.ke/resources/PATIENTS_CHARTER_2013.pdf.
- ⁶ Jigyasa Sharma ET AL., *Poor Quality for Poor Women? Inequities in the Quality of Antenatal and Delivery Care in Kenya* 1 PLOS One (2017), *available at* <http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0171236&type=printable>.
- ⁷ KENYA NATIONAL COMMISSION ON HUMAN RIGHTS, 'IMPLEMENTING FREE MATERNAL HEALTH CARE IN KENYA: CHALLENGES, STRATEGIES AND RECOMMENDATIONS' 5-7 (2013).
- ⁸ CENTER FOR REPRODUCTIVE RIGHTS & FEDERATION OF WOMEN LAWYERS – KENYA (FIDA), FAILURE TO DELIVER: VIOLATIONS OF WOMEN'S HUMAN RIGHTS IN KENYAN HEALTH FACILITIES, CENTER FOR REPRODUCTIVE RIGHTS at 27 (2007), *available at* https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bo_failuretod Deliver.pdf [hereinafter FAILURE TO DELIVER].
- ⁹ JOO (also known as JM) v. Attorney General & 6 others, para 58.
- ¹⁰ *Id.* para. 59.
- ¹¹ *Id.* para. 60.
- ¹² *Id.* paras. 72 and 73.
- ¹³ *Id.* para. 62.
- ¹⁴ *Id.*
- ¹⁵ *Id.* para. 64.
- ¹⁶ *Id.* para. 67.
- ¹⁷ *Id.*
- ¹⁸ *Id.*
- ¹⁹ *Id.* para. 70.
- ²⁰ *Id.* para. 76.
- ²¹ *Id.*
- ²² *Id.* para. 73(a).
- ²³ *Id.* para. 73(b).
- ²⁴ *Id.* para. 73(c).
- ²⁵ *Id.* para. 73(d).
- ²⁶ *Id.* para. 73(e).
- ²⁷ *Id.* para. 73(f).
- ²⁸ FAILURE TO DELIVER, *supra* note 8.
- ²⁹ Charlotte E. Warren ET AL., *Manifestations and drivers of mistreatment of women during childbirth in Kenya: implications for measurement and developing interventions*, 17 BMC PREGNANCY AND CHILDBIRTH 1, 2-3 (2017), *available at* <https://bmcpregnancychildbirth.biomedcentral.com/track/pdf/10.1186/s12884-017-1288-6?site=bmcpregnancychildbirth.biomedcentral.com>
- ³⁰ The Health Act (2017) KENYA GAZETTE SUPPLEMENT No. 101 § 5(3)(b), *available at* <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/HealthActNo.21of2017.pdf>.
- ³¹ *Id.* at Section 6(1)(b).
- ³² *Id.* at Section 5(2).
- ³³ MINISTRY OF HEALTH, KENYA PRIORITIZES UNIVERSAL HEALTH COVERAGE (2018) <http://www.health.go.ke/kenya-prioritizes-universal-health-coverage/>.
- ³⁴ NATIONAL HEALTH INSURANCE FUND, LINDA MAMA SERVICES, http://www.nhif.or.ke/healthinsurance/uploads/lindamama/Linda_Mama_Brochure.pdf.
- ³⁵ JOO (also known as JM) v. Attorney General & 6 others (2018) eKLR (Kenya).
- ³⁶ Cited as M A & Another v Honorable Attorney General & 4 others [2016] eKLR, *available at* <http://kenyalaw.org/caselaw/cases/view/120675>.

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