PROMOTING MATERNAL HEALTH IN UGANDA

A Case Digest on Judicial Court Decisions

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TABLE OF CONTENTS

FOREWORD

Article 1 of the Universal Declaration of Human Rights, adopted in 1948, sets out that we are all born free and equal in dignity and rights. In giving life, many mothers are putting their own lives at risk. Every day is a tragedy for the 830 women worldwide who die while giving birth, leaving behind their families and communities. In Uganda, the maternal mortality rate currently stands at 336 women per 100.000 live births[1]– many of these deaths are preventable, if we engage in concerted efforts to ensure that expectant mothers receive the care they are entitled to.

In 2014, the Human Rights Council adopted technical guidance on applying a human rights based approach to address and prevent maternal mortality and mortality. Applying this approach can contribute significantly to reducing the number of maternal deaths.

Efforts to ensure respect for maternal health rights are closely linked to efforts to promote gender equality. The power of couples to choose the number, timing and spacing of children can bolster economic and social development. Where people – including women themselves – can exercise their rights, they tend to thrive. Where these rights are stifled, people often fail to achieve their full potential, impeding economic and social progress.

Improvements in public health and better access to health services, including sexual and reproductive health services, progress in medicine, as well as the adoption of healthier lifestyles, are essential in promoting longer and healthier lives. Accelerated progress to address maternal mortality is critical because too many mothers are being left behind. Particular attention must be paid to reach women and girls who are vulnerable or marginalized, including women and girls with disabilities, those living in remote locations or from minority groups, as well as refugee or displaced women and girls.

In applying a Human Rights Based Approach (HRBA), we can contribute to empower women and girls, their families and communities, and create a better world with rights and choices for all. In doing so, we will also contribute significantly to achieving the Sustainable Development Goals (SDGs), in particular Goals 3 on well-being for all, as well as Goal 5 on gender equality. The freedom and right to make informed choices and decisions empowers individuals to fulfil their potential and participate fully in their communities and societies. The promotion and protection of sexual and reproductive health and rights are essential to achieving gender equality, social justice and sustainable development. And this in turn will make a significant contribution to poverty-reduction, inclusive growth, democratic governance, and peace and justice.

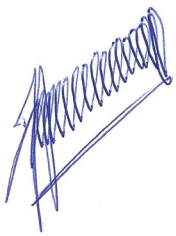
So what do maternal health rights mean in practice? Thanks to the judiciary in Uganda and in other countries, there is emerging jurisprudence which further advances our

1 Uganda Demographic and Health Survey 2016, available here: http://health.go.ug/sites/default/files/Demographic%20and%20Health%20Survey.pdf

understanding of what maternal health rights entail in practical terms. Civil society organizations, such as the Center for Health Human Rights and Development (CEHURD), have played a crucial role in supporting victims and their families in seeking justice. Their continued efforts to advance maternal health rights is commendable.

We hope that this Digest will be useful for duty-bearers in Uganda, in particular at district level, to assist them improve service delivery and to help them play their part in implementing maternal health rights. We wish to thank Counsel Kabanda David for having assisted in drafting this case digest.

Finally, OHCHR wishes to thank the Ministry of Health for its pioneering work in advancing a Human Rights Based Approach to maternal health, including by developing a multi-sectoral strategy on the issue. We all – policy-makers, government officials, including at local level, health workers, civil society, the United Nations and other development partners – have a role in ensuring that every mother can deliver healthy babies in a safe and dignified manner.



Robert Kotchani

OHCHR Uganda Country Representative

REFLECTIONS FROM A JUDICIAL OFFICER

Maternal health rights, like other economic, social and cultural rights, need concerted action and cooperation to be implemented. This requires the involvement not only of the Government and Parliament, but also the Judiciary.

The Judiciary plays a crucial role in ensuring that the protection of human rights enshrined in the Constitution of Uganda is effective. In adjudicating maternal health rights cases, judicial officers are enjoined to invoke constitutional provisions that protect women's human rights, taking into account their unique status and natural maternal functions in society.

In order to ensure that the Constitution is implemented correctly, judicial officers need to have a deeper understanding of the legal framework and nature of economic, social and cultural rights, including maternal health rights. Uganda is bound by its obligations under international law. This includes key human rights instruments, like the International Covenant on Economic, Social and Cultural Rights, which Uganda ratified in 1987. Members of the Judiciary are therefore under an obligation to draw on these instruments as well as customary international law when determining matters before them.

The decisions of the African Commission on Human and Peoples' Rights - whose Charter Uganda ratified in 2008 - are also instructive from a regional perspective. The Judiciary can also draw inspiration from jurisprudence on justiciability of economic, social and cultural rights from other jurisdictions. Examples of these include South Africa and India.

There is need to develop a greater sense of conscientiousness for economic, social and cultural rights. Judicial officers need to sensitize themselves to the concepts and issues related to these rights in order to interpret and implement them correctly. They should act in accordance with the power vested in them by the people under the Constitution and write well-articulated judgements. Their decisions must provide the much-needed justice for the individuals concerned. They should also provide critical guidance on the wider realization of these rights.

In issuing judgements, judicial officers help unpack the obligations incumbent on the State as the duty-bearer. To this end, the Judiciary can offer important practical guidance to Government officials, including at district level. This in turn helps prevent the recurrence of violations of these rights. Through their deliberations and decisions, judicial officers also help with identification of gaps in legislative guarantees for these rights.

The Judiciary needs to act - as an independent institution - on its mandate to uphold the provisions of the Constitution and offer appropriate remedies and protections to those who have suffered human rights violations. In the administration of justice, judicial

officers need to be particularly conscious of the situation of the most vulnerable, the poorest of the poor, in our country, with the view that if justice is achieved for them, equality in the protection of human rights for all is advanced.

The case digest is a useful tool both for the Judiciary and for Government officials. Local government officials should be aware of the judgements related to maternal health, as they bear the responsibility of implementing maternal health rights on the ground. They should also be empowered to effectively do so.

In order to serve the people who vested in them the power and mandates they hold, the Judiciary and other branches of Government must work together to address human rights violations that occur, ensure that justice is achieved for victims and take measures to prevent further violations. Local Government officials can assist courts make better judgements by providing accurate information and making meaningful submissions about the realities and challenges they face when required in court. Such evidence and submissions will help the presiding judges render well-reasoned judgements and adequate remedies for the wider community in these cases.

Overall, the different stakeholders need to appreciate their respective roles, and that they are working towards the same cause of ensuring that every mother can give life safely. This requires that we coordinate and cooperate, learn about each other's challenges, and together find solutions to ensure that maternal health rights are enjoyed by all.

Honorable Justice Lydia Mugambe

High Court Judge

1.0 BACKGROUND

Every woman has the right to safe and respectful maternal health care.[2] Human rights standards related to safe pregnancy, childbirth, and respectful maternal care are rooted in the human rights to life, health, equality, and non-discrimination.[3] Based primarily on commitments that they have made by ratifying international and regional human rights instruments, governments must ensure these rights by creating enabling conditions that support healthy women, healthy pregnancies, healthy births and healthy babies. Fundamental human rights are violated when pregnant and birthing women endure unnecessary suffering, including death, illness, injury, mistreatment, abuse, discrimination, and denials of information and bodily autonomy.[4]

Uganda has made progress towards improving the right to health, including improving life expectancy at birth in Uganda, which rose from 45.7 years to 62.2 years for men, and from 50.5 years to 64.2 years for women over the period 1991 to 2014. Uganda also attained one of the global Millennium Development Goal targets on child health: between 1990 and 2015, under-five mortality rate dropped from 187 to 55 deaths per 1,000 live births. Stunting rates also dropped from 38.3% in 1995 to 33% in 2011. The maternal mortality ratio dropped over the period 1995 to 2015 from 684 to 343 deaths per 100,000 live births.[5] However, the country still ranks among countries with very high maternal, newborn and child mortality rates.[6] This is an indication that there is still need for relevant stakeholders to better understand what is expected from them in terms of implementing human rights related to maternal health.

2 See Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality: Report of the Office of the United Nations High Commissioner for Human Rights, available here: https://www2.ohchr.org/english/issues/women/docs/A.HRC.21.22_en.pdf.

3 World Health Organisation: Prevention and elimination of disrespect and abuse during childbirth; available at https://www.who.int/reproductivehealth/topics/maternal_perinatal/statement-childbirth-rights/en/.

4 United Nations Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality.

5 See World Health Organisation: Country Cooperation Strategy, Uganda at glance 2016-2020 available at https://apps.who.int/iris/bitstream/handle/10665/136975/ccsbrief_uga_en.pdf;jsessionid=4034BF4A0CCABDC0D97544BCD7E579DD?sequence=1.

6 Investment Case for Reproductive, Maternal, Newborn, Child and Adolescent Health Sharpened for Uganda, 2016/17-2019/20, April 2016.

Maternal health is defined as safe motherhood, or the "health of women before, during pregnancy, at childbirth and during the postpartum period".[7] This definition comprises the following key major stages:

Before pregnancy: the overall health and lifestyle choices of parents can affect fertility, maternal health and their infants' probability of developing chronic conditions later in life. Indeed, a human rights approach to maternal health examines the extent to which individuals have control over the decision to become pregnant in the first place. People contemplating pregnancy should be screened for health problems, which need to be identified and managed.

During pregnancy: high-quality antenatal care is essential to ensure not only a healthy pregnancy for mother and baby, but also an effective transition to positive labour and childbirth. Services should include the provision of education and basic easily understood information on health care for expectant parents.

During delivery: high-quality, evidence-based obstetric and neonatal care is one of the highest priorities to reduce illness and death in mothers and their new-born babies.

In the postpartum period: it is critical to monitor maternal and new-born health, as the risk of death is higher during the first week postpartum for both. Timely detection and management of symptoms reduce the risk of mortality and complications.

7 WHO, Factsheet on Sustainable Development Goals; Health targets, 2017.

2.0 MATERNAL HEALTH AS A HUMAN RIGHT

2.1 Key human rights principles

Maternal health rights are about empowerment and entitlement of people with respect to certain aspects of their lives, including their sexual and reproductive health. International human rights law includes fundamental commitments of States to enable women to survive pregnancy and childbirth as part of their enjoyment of sexual and reproductive health rights and living a life of dignity. In applying a Human Rights Based Approach, the following principles are key:

Key human rights principles

Universality and inalienability: Human rights are universal and inalienable. All people everywhere in the world are entitled to them. The human person in whom they inhere cannot voluntarily give them up. Nor can others take them away from him or her. As stated in Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights".

Indivisibility: Human rights are indivisible. Whether of a civil, cultural, economic, political or social nature, they are all inherent to the dignity of every human person. Consequently, they all have equal status, and cannot be ranked as one being more important than another.

Interdependence and interrelatedness: The realization of one right often depends, wholly or in part, upon the realization of others. For instance, the realization of the right to health may depend, in certain circumstances, on the realization of the right to education or of the right to information.

Equality and non-discrimination: All individuals are equal as human beings by virtue of the inherent dignity of each human person. All human beings are entitled to their human rights without discrimination of any kind, such as race, colour, sex, ethnicity, age, language, religion, political or other opinion, national or social origin, disability, property, birth or other status.

Participation and inclusion: Every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realized.

Accountability and rule of law: States and other duty-bearers are answerable for the implementation of human rights. In this regard, they have to comply with the legal norms and standards enshrined in human rights instruments.

Human rights include sexual and reproductive health and rights, which are essential to an individual's self-determination and autonomy. Ensuring adequate reproductive and maternal health care is a core government obligation.[8]

A human rights-based approach to maternal health is especially powerful to ensure access to services for all on an equal and non-discriminatory basis. This is because the human rights based approach goes beyond isolated clinical pathologies, like morbidity and mortality, and instead empowers all women to claim their full set of human rights in order to live the healthiest lives possible. It recognizes that discrimination undermines the access of some women and girls to reproductive health care. A human rights based approach requires that duty-bearers pay particular attention to groups that are experiencing disparities, and consider their views and ideas in addressing the challenges they are facing.[9]

2.2 Obligations to respect, protect and fulfil

The international human rights framework identifies fundamental rights that apply to all people, and holds governments accountable for ensuring that these rights are realized in practice. States - including local government officials - are the main duty-bearers regarding human rights. This includes the following obligations:

Respect: The obligation to respect requires States to refrain from directly or indirectly interfering with the exercise by individuals of the right to sexual and reproductive health. States must not limit or deny anyone access to sexual and reproductive health, including through laws criminalizing sexual and reproductive health services and information, while confidentiality of health data should be maintained. The obligation to respect also requires States to repeal, and refrain from enacting, laws and policies that create barriers in access to sexual and reproductive health services. This includes third-party authorization requirements, such as parental, spousal and judicial authorization requirements for access to sexual and reproductive health services and information.

Protect: The obligation to protect requires States to take measures to prevent third parties from directly or indirectly interfering with the enjoyment of the right to sexual and reproductive health. The duty to protect requires States to put in place and implement laws and policies prohibiting conduct by third parties that causes harm to physical and mental integrity or undermines the full enjoyment of the right to sexual and reproductive health, including the conduct of private healthcare facilities, insurance and pharmaceutical companies, and manufacturers of health-related goods and equipment.

8 See Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality.

9 Ibid.

A nurse in the treatment room, with posters showing guidance on essential elements related to a women's right to a safe delivery. ©OHCHR

This includes the prohibition of violence and discriminatory practices, such as the exclusion of particular individuals or groups from the provision of sexual and reproductive health services. States are obliged to ensure that adolescents have full access to appropriate information on sexual and reproductive health, including family planning and contraceptives, the dangers of early pregnancy and the prevention and treatment of sexually transmitted diseases, including HIV/AIDS, regardless of their marital status and whether their parents or guardians consent, with respect for their privacy and confidentiality.

Fulfil: The obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to ensure the full realization of the right to sexual and reproductive health. States should aim to ensure universal access without discrimination for all individuals, including those from disadvantaged and marginalized groups, to a full range of quality sexual and reproductive health care, including maternal health care.

The obligation to fulfil also requires States to take measures to eradicate practical barriers to the full realization of the right to sexual and reproductive health, such as disproportionate costs and lack of physical or geographical access to sexual and reproductive health care. States must ensure that healthcare providers are adequately

trained on the provision of quality and respectful sexual and reproductive health services and ensure that such providers are equitably distributed throughout the State.

States must develop and enforce evidence-based standards and guidelines for the provision and delivery of sexual and reproductive health services, and such guidance must be routinely updated to incorporate medical advancements. At the same time, States are required to provide age-appropriate, evidence-based, scientifically accurate comprehensive education for all on sexual and reproductive health.

States must also take affirmative measures to eradicate social barriers in terms of norms or beliefs that inhibit individuals of different ages and genders, women, girls and adolescents from autonomously exercising their right to sexual and reproductive health.

For further elements of the obligations to respect, protect and fulfil, please see General Comment No. 22 issued by the Committee on Economic, Social and Cultural Rights.[10]

2.3 Availability, accessibility, acceptability and quality

A human rights based approach seeks to advance results in line with obligations incurred by State actors, as the main duty-bearers. This means that maternal health-care facilities, goods, services, and programs must be available, accessible, acceptable and be provided in sufficient quality and quantity in all areas, urban and rural.

Availability: An adequate number of functioning healthcare facilities, services, goods and programmes should be available to provide the population with the fullest possible range of sexual and reproductive health care. This includes ensuring the availability of facilities, goods and services for the guarantee of the underlying determinants of the realization of the right to sexual and reproductive health, such as safe and potable drinking water and adequate sanitation facilities, hospitals and clinics.

Ensuring the availability of trained medical and professional personnel and skilled providers who are trained to perform the full range of sexual and reproductive healthcare services is a critical component of ensuring availability. Essential medicines should also be available. An adequate number of healthcare providers willing and able to provide such services should be available at all times in both public and private facilities and within reasonable geographical reach.

Accessibility: Health facilities, goods, information and services related to sexual and reproductive health care should be accessible to all individuals and groups without discrimination and free from barriers. This includes physical accessibility, affordability and information accessibility.

10 Available here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en.

Physical accessibility: Health facilities, goods, information and services related to sexual and reproductive health care must be available within safe physical and geographical reach for all, so that persons in need can receive timely services and information. Physical accessibility should be ensured for all, especially persons belonging to disadvantaged and marginalized groups, including, but not limited to, persons living in rural and remote areas, persons with disabilities, refugees and internally displaced persons, stateless persons and persons in detention. When dispensing sexual and reproductive services to remote areas is impracticable, substantive equality calls for positive measures to ensure that persons in need have communication and transportation to such services.

Affordability: Publicly or privately provided sexual and reproductive health services must be affordable for all. Essential goods and services, including those related to the underlying determinants of sexual and reproductive health, must be provided at no cost or based on the principle of equality to ensure that individuals and families are not disproportionately burdened with health expenses. People without sufficient means should be provided with the support necessary to cover the costs of health insurance and access to health facilities providing sexual and reproductive health information, goods and services.

Information accessibility: Information accessibility includes the right to seek, receive and disseminate information and ideas concerning sexual and reproductive health issues generally, and also for individuals to receive specific information on their particular health status. All individuals and groups, including adolescents and youth, have the right to evidence-based information on all aspects of sexual and reproductive health. Information accessibility should not impair the right to have personal health data and information treated with privacy and confidentiality.

Acceptability: All facilities, goods, information and services related to sexual and reproductive health must be respectful of the culture of individuals, minorities, peoples and communities and sensitive to gender, age, disability, and life-cycle requirements. However, this cannot be used to justify the refusal to provide tailored facilities, goods, information and services to specific groups.

Quality: Facilities, goods, information and services related to sexual and reproductive health must be of good quality, meaning that they are evidence-based and scientifically and medically appropriate and up-to-date. This requires trained and skilled healthcare personnel and scientifically approved and unexpired drugs and equipment.

For further elements related to availability, accessibility, acceptability and quality, please see General Comment No. 22 issued by the Committee on Economic, Social and Cultural Rights.[11]

11 Available here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en.

2.4 Non-discrimination and equality

Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights provides that all individuals and groups should be able to enjoy equal access to the same range, quality and standard of sexual and reproductive health facilities, information, goods and services, and to exercise their rights to sexual and reproductive health without experiencing any discrimination. Similar provisions can also be found in Article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).[12]

Non-discrimination and equality principles require not only legal and formal equality but also substantive equality. Substantive equality requires that the distinct sexual and reproductive health needs of particular groups, as well as any barriers that particular groups may face, be addressed. For example, persons with disabilities should be able to enjoy not only the same range and quality of sexual and reproductive health services but also those services which they would need specifically because of their disabilities.

Further, reasonable accommodation must be made to enable persons with disabilities to fully access sexual and reproductive health services on an equal basis, such as physically accessible facilities, information in accessible formats and decision-making support, and States should ensure that care is provided in a respectful and dignified manner that does not exacerbate marginalization.

Due to women's reproductive capacities, the realization of the right of women to sexual and reproductive health is essential to the realization of the full range of their human rights. The right of women to sexual and reproductive health is indispensable to their autonomy and their right to make meaningful decisions about their lives and health. Gender equality requires that the health needs of women, different from those of men, be taken into account and appropriate services provided for women in accordance with their life cycles.

The experiences of women of systemic discrimination and violence throughout their lives require comprehensive understanding of the concept of gender equality in the right to sexual and reproductive health. Non-discrimination on the basis of sex, as guaranteed in article 2 (2) of the above-mentioned Covenant, and the equality of women, as guaranteed in article 3, require the removal of not only direct discrimination but also indirect discrimination, and the ensuring of formal as well as substantive equality.

The realization of the rights of women and gender equality, both in law and in practice, requires repealing or reforming discriminatory laws, policies and practices in the area of sexual and reproductive health.

12 Available here: https://www.achpr.org/legalinstruments/detail?id=37. Uganda ratified the Protocol on 22 July 2010.

A happy mother with her newborn, following a successful delivery at a health centre. ©UNFPA

Removal of all barriers interfering with access by women to comprehensive sexual and reproductive health services, goods, education and information is required. To lower rates of maternal mortality and morbidity requires emergency obstetric care and skilled birth attendance, including in rural and remote areas, and prevention of unsafe abortions.

It is also important to undertake preventive, promotional and remedial action to shield all individuals from the harmful practices and norms and gender-based violence that deny them their full sexual and reproductive health, such as female genital mutilation, child and forced marriage and domestic and sexual violence, including marital rape, among others.

States parties must put in place laws, policies and programmes to prevent, address and remediate violations of the right of all individuals to autonomous decision-making on matters regarding their sexual and reproductive health, free from violence, coercion and discrimination.

Individuals belonging to particular groups may be disproportionately affected by intersectional discrimination in the context of sexual and reproductive health. Groups such as, but not limited to, poor women, persons with disabilities, migrants, indigenous or other ethnic minorities, adolescents, and people living with HIV/AIDS are more likely to experience multiple discrimination.

3.0 PURPOSE OF THE MATERNAL HEALTH CASE DIGEST

In spite of efforts in the area of the legal and policy framework, maternal mortality rates have seen only slow reduction in Uganda. Many women continue to die unacceptable deaths in both private and government hospitals, including at local government district hospitals and health facilities.

There is increasing jurisprudence on maternal health rights in Uganda. These court decisions provide clarity on the human rights obligations that must be met by State institutions, including local governments, towards the realization of maternal health rights.

Article 20 of the Constitution of the Republic of Uganda (1995), under Chapter Four on the Protection and promotion of fundamental and other human rights and freedoms, provides the following:

1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.
2) The rights and freedoms of the individual and groups enshrined therein shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.

Article 33 of the Constitution on the rights of women provides that:

1) Women shall be accorded full and equal dignity of the person with men.
2) The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement.
3) The State shall protect women and their rights, taking into account their unique status and natural maternal functions in society.
4) Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.
5) Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.
6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.

It is based on this constitutional mandate that Courts in Uganda have been able to pronounce themselves and build jurisprudence on matters concerning maternal health rights violations. It is therefore important that State institutions, as the main duty-bearers, are familiar with the jurisprudence in different maternal health decisions in courts of law,

in order to gain a better understanding of their legal obligations towards maternal health.

It is particularly important for local government officials to be aware what is expected of them in terms of advancing human rights related to maternal health. Local governments are the ones closest to the communities, and hence have a significant role in advancing human rights in practice.

The case digest is hence intended as a tool of reference for duty-bearers on maternal health rights. It is hoped that the Digest will be used to inform planning and implementation at district level, and that these decisions in turn will help duty-bearers to effectively achieve a reduction of maternal mortality and morbidity.

The Digest is divided into several sections: the first section outlines court reflections on the constitutionality of obligations related to maternal health rights; the second section highlights court decisions on the four elements of maternal health right (availability, accessibility, acceptability and quality); the third section shares a case related to non-discrimination, and the fourth section highlights court decisions on negligence and on redress mechanisms.

Information is power, and health information is empowering, especially to young and adolescent girls in order to avoid unwanted early pregnancies. ©UNFPA

4.0 CONSTITUTIONALITY AND JUSTICIABILITY OF MATERNAL HEALTH RIGHTS

The constitutionality of maternal health rights and its justiciability has been subject of expansive legal debate, including in Uganda. Courts have since settled this and concluded that maternal health rights are indeed justiciable.

4.1 Constitutional Petition No. 16 of 2011 - Center for Health Human Rights and Development (CEHURD), Prof. Ben Twinomugisha, Rhoda Kukiriza, Inziku Valente vs. Attorney-General

Brief facts

This matter arose from the tragic fates of Sylvia Nalubowa, who died in Mityana Hospital on 19 August 2009, and Jennifer Anguko, who died on 10 December 2010 in Arua Hospital. In 2011, the Center for Health, Human Rights & Development (CEHURD) filed Petition No. 16 in the Constitutional Court of Uganda against the Ugandan Government, based on the failure to prevent the pregnancy-related deaths of Sylvia Nalubowa and Jennifer Anguko.

The case of Sylvia Nalubowa: On 19 August 2009, Sylvia Nalubowa delivered a baby at Manyi Health Centre III, a Government health care facility in Mityana. It was then established that she was to have twins and required emergency obstetric care to deliver the second baby. The mother was referred to Mityana Hospital. Unfortunately, the nurses could not attend to her and did not alert the doctor on call to assist her. The nurses asked for money and other consumables which the deceased and her attendant did not have. Sylvia was left bleeding until she died with her second baby still in the womb.

The case of Jennifer Anguko: On 10 December 2010 at 8:30 am, Jennifer Anguko went to Arua Regional Referral Hospital, after experiencing labour pains. She was admitted but for over 10 hours, the health workers in the hospital did not attend to her. Although they were in the hospital, the nurses and midwives were only conversing with each other, and did not provide care to her. Later a midwife realized that Jennifer's labour had been obstructed as there was no progress. She was in terrible pain and could not breathe well. The nurse called a doctor who took her for the caesarian, but Jennifer died in theatre during operation. The cause of death was indicated to be obstructed labour and rapture of uterus.

Expectant mothers and an accompanying husband of one of them, wait to receive medical attention at a health facility in Moroto district. Male engagement in maternal health matters is essential for safe delivery of babies. ©OHCHR

In the petition filed by CEHURD and three others, it was argued that the non-provision of basic indispensable health maternal commodities in Government health facilities, and the imprudent and unethical behaviour of health workers towards expectant mothers are inconsistent with the Constitution and constitute a violation of the right to health.

Furthermore, the petition attributed the high maternal and infant mortality rate in Uganda to the inadequate human resource for maternal health specifically midwives and doctors, frequent stock-outs of essential drugs for maternal health and lack of Emergency Obstetric Care (EmOC) Services at Health Centre III, IV and hospitals.

CEHURD argued that maternal health services and commodities, including mama kits, should be provided in Government health facilities free of charge, and further alleged that Uganda violated international and constitutional law by not having provided this indispensable basic maternal health care package[13] to Sylvia Nalubowa and Jeniffer Anguko, as well as hundreds of Ugandan women in similar circumstances.

It was argued that the inadequate financial and human resources, lack of capital investment and management issues had resulted in the public sector being unable to fulfil its mandate of providing medicines and other essential maternal health commodities to meet the requirements of universal access to health care.

13 See the World Health Organization, Safe Motherhood Baby Package: implementing safe motherhood in countries, e.g. basic medicines list and basic equipment for safe delivery at all levels.

The petitioners relied on a number of provisions of the law to make their case. These included Objectives I (i), XIV (b), XXVIII (b), Articles 33(2) and (3), 20(1) and (2), 22(1) and (2), 24, 34(1), 44(a), 287, 8A and 45 of the Constitution of Uganda. This was in addition to the provisions of the international treaties which Uganda has ratified, including the International Covenant on Economic Social and Cultural Rights (ICESCR), the Convention on Elimination of all forms of Discrimination Against Women (CEDAW) and the African Charter on Human and Peoples Rights (ACHPR).

What were the issues for the Court's determination?

1) Is the right to the highest attainable standard of health a constitutionally protected right in Uganda?
2) Does the non-provision of basic maternal healthcare services in health facilities contravene Article 8A,[14] Objective XIV[15] and XX[16] of the Constitution of Uganda?
3) Does the Government's non-provision of the basic maternal healthcare packages in Government hospitals, resulting in deaths of expectant mothers and their children, constitute a violation of Article 22[17] of the Constitution of Uganda?
4) Does the failure by health workers to attend to expectant mothers subject them to inhuman or degrading treatment, thereby contravening Articles 24[18] and 44(a)[19] of the Constitution of Uganda?
5) Do the high rates of maternal mortality in Uganda contravene Article 33(1), (2) and (3)[20] of the Constitution?

Decision-making process on the case

When the Court started hearing the case, government lawyers urged that because the case involved maternal health services, then it would only be for the Government cabinet

14 Article 8A: Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy.

15 Objective XIV: General social and economic objectives. The State shall endeavor to fulfil the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that:

(a) all developmental efforts are directed at ensuring the maximum social and cultural well-being of the people; and

(b) all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.

16 Objective XX. Medical services. The State shall take all practical measures to ensure the provision of basic medical services to the population.

17 Article 22. Protection of right to life.

18 Article 24. Respect for human dignity and protection from inhuman treatment

19 Article 44. Prohibition of derogation from particular human rights and freedoms.

20 See above page 10.

to provide and not for the Court to decide. Without deciding on the merits of the case, at first the court agreed and dismissed the case. However, on appeal, the Supreme Court overturned the decision and the case was referred back to the Constitutional Court to be decided on its merits.

The preliminary objection: Political Question Doctrine

The Attorney General of Uganda argued that the allegations made under the complaint required the court to make a judicial decision on a "Political Question Doctrine" involving state priorities and budget allocation best left to the legislative or executive branches of government. The Constitutional Court agreed and dismissed the case, stating that the court has "no power to determine or enforce its jurisdiction on matters that require analysis of the health sector government policies."

> *Excerpt from the Court's decision:*
>
> *We appreciate the concerns of the petitioners as regards what to them is the unsatisfactory provision of basic health maternal commodities and services towards expectant mothers that motivated them to lodge this petition.*
>
> *Much as it may be true that government has not allocated enough resources to the health sector and in particular the maternal health care services, this court is, with guidance from the above discussions reluctant to determine the questions raised in this petition.*

Constitutional Court's advice on other avenues for maternal health rights justice

It should be noted that the Court advised the petitioners that they can bring individual cases in the High Court: "Among the remedies that the High Court may grant is to require a public officer (including a district official) to carry out public duties that relate to this or her scope and course of employment in a public office. There are also the other prerogative remedies of prohibition, certiorari and injunctions." The Court therefore stated that "It would appear to us that the petitioners to this petition have available remedies that they can pursue in the law we have pointed out; the petitioners can apply for redress under Article 50 of the Constitution."

What happened in the Supreme Court?

After the ruling in the Constitutional Court, the petitioners appealed to the Supreme Court. On appeal, the following issues were raised:

1) The learned justices of the Constitutional Court erred in law when they dismissed the

maternal health case on grounds that they did not have mandate.

2) The learned justices of the Constitutional Court erred in law when they misdirected themselves upon deciding that the petition called upon them to review and implement health policies.

The decision of the Supreme Court

Finally, the Supreme Court ruled that maternal health rights are constitutional and that courts of law can allow petitions, and make decisions on allegations of their violations.

In its final decision, the Supreme Court held the following:

> **With great respect to the Constitutional Court, I think they misunderstood what was required of the Court. I do not think the Court was required to determine, formulate or implement the health policies of Government. In my view, the Court is required to determine whether the Government has provided or taken "all practical measures to ensure the basic medical services to the population."**
>
> **In this case, it is maternity services in issue. The allegation by the petitioners is that the Government has failed to do so. If the Court says it has no Constitutional mandate to hear and determine this allegation within the Constitution, then where does the citizen go?**
>
> **Bart M. Katureebe**
>
> **CHIEF JUSTICE**

The Supreme Court Learned Justices unanimously held that the Constitutional Court cannot abdicate its duty by declining to entertain a petition filed under Article 137[21] of the Constitution on grounds that the matter will be infringing on the discretionary powers of another organ of the State.

It was also held that the petition raised competent questions for the Constitutional Court to hear, interpret and determine with a view to establishing whether the petitioners' allegations were in infringement of the Constitution. The Learned Justices of the Supreme Court held that these matters were properly brought before court, and that the Constitutional Court was established and given power under Article 137 (1) and (3) to consider these allegations and determine them in one way or another.

21 Article 137. Questions as to the interpretation of the Constitution.

The Supreme Court concluded that the Political Question Doctrine does not rule out for the court to make constitutional interpretations where the other branches of Government act outside the powers granted to them by the Constitution.

In this particular case, the Constitutional Court was called upon to inquire into the alleged acts and omissions of the Executive with respect to the delivery of maternal health services in the country, and to make a declaration whether it was satisfied on the evidence before it that the allegations had been proven.

Significance of the case

Maternal health is a right in Uganda, and if violated, any person whether a relative or not, can get redress from courts of law and the duty-bearers, including local governments, can be found in violation of maternal health if they do not carry out their mandate of providing maternal health services in their areas of jurisdiction.

Note: The case was returned to the Constitutional Court to be heard again, and is currently awaiting a decision on its merits.

4.2 South Africa - Minister of Health vs. Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC)

Brief facts

The Government in South Africa devised a health programme to address mother-to-child transmission of HIV at birth and identified nevirapine as the anti-retroviral drug for this purpose. Despite the Government having been offered this drug for free for five years, the programme was restricted to particular pilot sites so that an assessment of the operational challenges could be made before countrywide provision. Doctors in the public sector outside of these pilot sites were consequently unable to prescribe the drug for their patients. The policy was challenged before the High Court by Treatment Action Campaign (among others), and court agreed that the policy was in violation of the health rights of mothers.

The Minster of Health appealed the decision to the South African Constitutional Court. The Constitutional Court of South Africa declared that the restriction of nevirapine to pilot sites failed to meet constitutional standards as it excluded those who could reasonably be included. The Court then ordered the Government to "remove the restrictions that prevented nevirapine from being made available" at public hospitals and clinics and to "devise and implement a more comprehensive policy that gives access to health care services to HIV-positive mothers and their new-born children, and that will include the

administration of nevirapine where that is appropriate."

In addressing the question of separation of powers, the Constitutional Court in South Africa noted that when "state policy is challenged, (…) courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations."

The Court ordered the Government to extend availability of Nevirapine to hospitals and clinics, to provide counsellors, and to take reasonable measures to extend the testing and counselling facilities throughout the public health sector. The Court rejected the argument advanced by one of the interveners for a distinction between a minimum core content of the right to healthcare and the obligations imposed on the state that are subject to progressive realization and available resources.

The Court concluded therefore that although "due regard must be paid to the roles of the legislature and the executive in a democracy, [w]hat must be made clear, however, is that when it is appropriate to do so, courts may - and if need be must - use their wide powers to make orders that affect policy as well as legislation."

Significance of the case

The decision established a conceptual and remedial framework for judicial review and enforcement of the obligation to ensure access to healthcare and other economic social and cultural rights. It provides an inspiring model for integrating political and legal action.

4.3 India - Laxmi Mandal vs. Deen Dayal Harinagar Hospital and others, W.P.(C) Nos. 8853 of 2008

Brief facts

In 2008, Shanti Devi was forced to carry a dead foetus in her womb for five days after being denied medical treatment at several hospitals because her husband was unable to show a valid ration card for medical services, despite being qualified for one. On 20 January 2010, Shanti Devi died immediately after giving birth at home to a daughter who was two months premature without any medical attention.

The High Court of Delhi found that there was a failure to properly implement the pre- and post-natal services that should have been available to her. They stated that it was inappropriate to place the burden on the poor to prove their eligibility for health services;

rather government should be facilitating their access to these essential services.

The Court related its finding to the decision in People's Union for Civil Liberties vs. Union of India on the right to food.

The Court noted that this petition highlighted two critical "survival rights" enforceable under the Indian Constitution that protects the right to life: firstly, the right to healthcare, including the right to access public health facilities, to receive a minimum standard of treatment and care, the enforcement of the reproductive rights of the mother, and the right to nutrition and medical care of a newly born child until the age of six years; and secondly, the right to food, which is integral to the right to health and life.

The Court noted that all of these rights are interrelated and indivisible and emphasized that the lack of effective implementation of health and nutrition schemes essentially creates a denial of the right to life and cited in support several international human rights treaties and relevant General Comments of the UN Committee on Economic, Social and Cultural Rights.

Significance of the case

This case is a clear example of the gap that exists between the existence of laws that protect women's economic and social rights, and implementation of policies which make these rights accessible and meaningful.

Maternal mortality is linked to the deep inequalities faced by women, and improving the situation requires substantive fulfilment of women's right to health, equality and non-discrimination.

5.0 MATERNAL HEALTH RIGHTS ELEMENTS OF AVAILABILITY, ACCESSIBILITY, ACCEPTABILITY AND QUALITY

As outlined above, the human right to health consists of four essential dimensions that duty-bearers must implement in practice. Local Governments and other stakeholders must ensure that health facilities, goods, and services are available in sufficient quantity throughout the state, accessible to all, ethically and culturally acceptable, and of good quality.

Recognizing that Governments may have inadequate resources in terms of health system capacity, courts of law have defined the right to health not as the right to be healthy, but rather as the right to the highest attainable standard of health. Some of these elements have been further elaborated by Courts through adjudication.

5.1 Background: Legal framework related to the role of Local Governments

Under the Ugandan health care system, local governments are primarily responsible for lower health care centres up to the District General Hospitals. In executing their mandate, local governments must supervise hospitals within their jurisdiction and make sure all the necessary goods, services and facilities are available, accessible, acceptable and adequate. In implementing this responsibility, local governments are guided by the following provisions:

The **Constitution under Article 176** provides that "the system of local government in Uganda shall be based on the district as a unit under which there shall be such lower local governments and administrative units and that the local governments shall oversee the performance of persons employed by the Government to provide services in their areas and to monitor the provision of Government services or the implementation of projects in their areas."

The **Local Government Act under Section 30** provides that a local government council shall, within its area of jurisdiction— (a) exercise all political and executive powers and functions; (b) provide services as it deems fit; (c) protect the Constitution and other laws of Uganda and promote democratic governance; and (d) ensure the implementation and compliance with Government policy.

Section 30 of the local government Act, Cap. 24, provides for the functions, powers and services of a Local Government council. Section 30(2) refers to part II of the second schedule to the Act for the services and functions of the council.

Part II of the second schedule of the Local Government Act, provides for Functions

and services for which district councils are responsible, subject to article 176(2) of the Constitution and sections 96 and 97 of the Act which include, but are not limited to medical and health services, including –

(a) hospitals, other than hospitals providing referral and medical training;

(b) health centres, dispensaries, sub-dispensaries and first-aid posts;

(c) maternity and child welfare services;

(d) the control of communicable diseases, including HIV/AIDS, leprosy and tuberculosis;

(e) control of the spread of disease in the district;

(f) rural ambulance services;

(g) primary health care services;

(h) vector control;

(i) environment sanitation; and

(j) health education.

Article 176 (2) (g) of the Constitution provides that the Local Government shall oversee the performance of persons employed by the government to provide services in their areas and to monitor the provision of government services or the implementation of the projects in their areas.

The above laws create legal obligations on the local government duty-bearers for health generally, and for maternal health specifically. Courts have decided a number of cases holding local governments accountable for their failure, omission and violation of rights, and particularly maternal health rights, as outlined hereunder.

5.2 Center for Health, Human Rights and Development (CEHURD) and two others vs. the Executive Director, Mulago National Referral Hospital and the Attorney General, High Court Civil Suit No. 212 of 2013

Brief facts

On 14 March 2012, Ms. Musimenta Jennifer, married to Mubangizi Michael, delivered two babies at the general ward of Mulago hospital. On 15 March 2012, she was discharged with only one baby. Ms. Musimenta conferred that she gave birth to two living babies, while the hospital stated that one of the two babies was born dead.

Ms. Musimenta and her husband reported the death of their baby to police. Subsequently on 17 March 2012, they were given the body of a dead baby by a mortuary attendant at the hospital. However, the couple rejected this body because, in their assessment, it was

of a baby who had just died and not of their baby, who had been born with macerated skin and had allegedly died about three days earlier at birth.

Later DNA examination conducted at the Government analytical laboratory confirmed that there was no biological connection between the couple and the body that had been given to them by the mortuary attendant.

The couple and CEHURD therefore sued the Executive Director of Mulago National Referral Hospital to Court in his official capacity and the Attorney General for the unlawful disappearance of their baby, demanding that the hospital surrenders their baby dead or alive. In addition, the plaintiffs sought several declarations and orders from court including asses to medical information, and general damages. The case was heard by Lady Justice Lydia Mugambe Ssali of the High Court, who delivered her judgment on 24 January 2017.

Issues raised in the case

1) Whether the acts / omissions of the staff of the hospital violated the rights of the child of Ms. Musimenta and her husband enshrined in Article 34(1) of the Constitution.
2) Whether acts / omissions of the staff violated the right to access health information contrary to Articles 41(1), 8A, 45 and objectives XX, XIV (b) of the Constitution.
3) Whether their acts and omissions violated the right to family enshrined in Article 31(4) and 31 (5) of the Constitution.
4) Whether Ms. Musimenta and her husband were subjected to cruel, inhuman, degrading treatment and psychological torture contrary to Article 24 and 44(a) of the Constitution.
5) Whether the plaintiffs were entitled to the remedies sought.

The High Court's decision

The Court resolved that the failure to give Ms. Musimenta and her husband any information by way of a death certificate or otherwise regarding their second baby was a violation of their right to access information as enshrined under Article 41 of the Constitution.

The denial by the defendants to give the couple their dead baby violated their right to health and freedom from torture as enumerated in the legal instruments (psychological torture). By failing to avail the body of the dead baby to be buried, the hospital subjected the couple to psychological torture hence violation of Articles 24 and 44 of the Constitution; Article 7 of the ICCPR, Article 2 (1) of the CAT and Article 5 of the African Charter. The psychological torture inflicted amounted to violation of their rights to health in contravention of Articles 45, objectives XX, XIV (b) of the constitution, and

Article 12 of the ICESCR and Article 16 of the African Charter.

Significance of the case

The Court outlined the duties of the state towards the citizens, which include to respect, protect and fulfil human rights. The court further noted that any meaningful discussion on the right to health should also embrace the concepts of resources and progressive realization. In view of this, the respondents' failure to provide sufficient human resource to the hospital clearly indicated retrogression for the right to health realization.

The Court also noted that health goods, services and facilities especially for maternal health must be available, accessible, affordable and of good quality and to all persons who need them particularly vulnerable women and children.

The issue of the midwife claiming that she was alone on the shift clearly demonstrates the failing of the state in its obligations towards the provision of adequate number of trained staff, as a key component of health care services. This indicates a failure regarding availability of services, as Governments are under an obligation to provide

A midwife in Adjumani hospital checking supplies in the medical store. ©OHCHR

hospitals with a sufficient number of competent health personnel to be able to respond to the needs of the population.

Structural interdicts by Court

In deciding on this case, the Court issued the following interdicts on issues that required follow-up:

1) The police must conclusively investigate the disappearance of the baby of Ms. Musimenta and her husband, and file a report on the same in court within 6 months from the date of the judgment at the latest.
2) The midwife who handled the baby at birth must be held to account for the movement of the baby from her care.
3) Mulago Hospital shall take steps to ensure and/or enhance the respect, movement and safety of babies, dead or alive, in its facilities.
4) For two years from the date of this judgment, the Mulago Hospital shall make written reports, every four months, regarding the steps or measures taken in fulfilling taking steps in safety of babies (iii) above.
5) CEHURD shall have free access to Mulago hospital and continuously oversee the implementation of the measures to ensure safety of babies and make counter reports on their effectiveness or otherwise within two months from the date of receipt.
6) CEHURD shall ensure that Ms. Musimenta and her husband access psychosocial care and counselling services as part of their healing. Mulago hospital shall pay for any attendant costs in this regard.
7) Where necessary, the Court reserves the right to make further orders regarding the implementation of ensuring safety babies in Mulago Hospital.

Significance of the case

This judgement highlights that maternal health rights include but are not limited only to mothers' survival but also safety of their newborns. Maternal health care must stretch to guarantee that the expectant mothers can go back home with their children after delivery.

Current status of follow-up to the case

Following the decision, the hospital administration has installed cameras to monitor the hospital and ensure against baby theft. The family has received part of the compensation

and the hospital has committed to a plan of full pay. CEHURD carries out quarterly visits to the hospital and meetings with the administration. However, the police have not yet finished investigations and have not filed any reports with the court.

5.3 Center for Health, Human Rights and Development (CEHURD) and four others vs. Nakaseke District Local Government, High Court Civil Suit No. 111 of 2012

Brief facts

Irene Nanteza, hereinafter referred to as the victim, together with her husband walked into Nakaseke District Hospital, after labour pains had started. The victim was admitted and examined by the midwives on duty. Her labour became obstructed and it required a doctor to carry out a caesarean intervention. The doctor on duty that day was not in the hospital at the time, but when the nurses called him, he indicated to them that he was nearby. The nurses and midwives called him repeatedly, and every time they did, the doctor told them to wait. The husband pleaded with the nurses to transfer the victim to another health facility, which they did not do. The doctor came to the hospital after 8.5 hours. By that time, the mother and her baby had died due to obstructed labour.

CEHURD submitted a case against the Nakaseke District Local Government on behalf of the husband of the victim and her four children.

What were the issues for the Court's determination?

1) Whether the human right to health of the deceased had been violated by the Nakaseke local district Government as the defendant.
2) Whether the rights of the children and husband of Irene Nanteza were violated by the defendant, in view of the death of the deceased as a mother and wife.
3) Whether the defendant is liable for violating the right of Irene Nanteza and her family.
4) What remedies are available?

The Court's decision

The High Court decided that the Nakaseke Local Government was liable for maternal health rights violations in this case. The defendant Local Government was vicariously liable in damages for the violation of the maternal health rights of the deceased and that of her children. The Court considered various provisions in order to hold the District Local Government vicariously liable for the negligent acts of employees, including the Local Government Act (see above).

Liability of the hospital superintendent and administrator

The court in this case made particular finding on both the hospital superintendent and the administrator as key personnel in the local government health delivery. The Court held the following:

> *In the circumstances, the Local Government is charged with administrative and supervisory oversight on Nakaseke District Hospital, for which an administrator is deployed to monitor the observance of adequate health and services to patients in need.*
>
> *The Local Government as part of its oversight responsibility appoints a hospital administrator to oversee the management and provision of medical services at Nakaseke Hospital on behalf of the district.*

The Court in this case articulated the role of Local Government duty-bearers and their legal obligations towards maternal health in their areas of jurisdiction including duty-bearers' accountability in case of violation.

The Court based its decision on the shortages in essential medical supplies and limited dedicated medical personnel. It thus anchored the case in constitutional rights, addressing the Districts Local government's failure to provide basic maternal health care to pregnant women and creating an incentive for structural change, failing to carry out its duties. The court therefore ordered the Local government to pay damages to the family and children of the deceased mother.

> ***Significance of the case***
>
> The Court concluded that the local government had violated the right to emergency healthcare for failing to ensure provision of emergence obstetric care to the deceased, and supervision of the doctor deployed to offer such professional health care and services. The court therefore declared emergency healthcare as a right.

5.4 Center for Health, Human Rights and Development (CEHURD) and two others vs. the Registered Trustees of Mengo Hospital, High Court Civil Suit No. 176 of 2015

Brief facts

In 2015, Ritah Nantumbwe successfully delivered a baby boy at Mengo Hospital by way of a caesarean section. After delivery, she noticed that the baby had mild breathing challenges and immediately called a nurse who took him for treatment and observation.

The boy was later returned to his mother after the nurses ascertained he was in good condition. While the baby rested, the intern nurse entered the mother's room holding a tray with two syringes (one big and one small) that already contained mixed medication. The intern nurse injected the baby with the big syringe with an unknown drug, and the small one to the mother. Suddenly after the injection, the baby first turned blackish, then purple, and started crying and gasping.

The baby was taken to an emergency room for oxygen and was later transferred to the nursery. While at the nursery, a doctor examined the baby and informed the mother that her baby had been injected with an unspecified drug and that although the chest was clear, the baby was in critical condition and that there was not much hope for survival. The mother returned to her room and was later told that the baby had died. The post mortem results revealed that the cause of death of the deceased baby was hypoxia, i.e. failure in breathing.

Note: *While the case was brought before Court, it was discussed and settled at mediation level after the hospital administration agreed with the plaintiffs on the failings of the hospital with regard to ensuring the rights of the mother and her baby. The hospital agreed to supervise all interns, so as to offer quality maternal health services to all.*

Significance of the case

The hospital agreed to enforce the Uganda Medical Internship Guidelines to regulate the supervision of intern doctors and student nurses at Mengo hospital and to pay the mother general damages.

5.5 Kenya - Josephine Oundo Ongwen vs. Attorney General & 6 others (2018)

Brief facts

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 in labour, 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.

A petition was filed on Josephine's behalf against the Attorney General of the Republic of Kenya, the County Government of Bungoma, the Bungoma County Executive Member in charge of Health, the Cabinet Secretary of the Ministry of Health, and the Bungoma County Referral Hospital, 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 Court's decision

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. 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.

The Court declared that the physical and verbal abuse meted out against Josephine 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. 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.

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. 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.

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. 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.

Significance of the case

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.

Doctor and midwife in discussion at Adjumani referral hospital. ©OHCHR

6.0 NON-DISCRIMINATION AND MATERNAL HEALTH RIGHTS

Certain groups of individuals may face barriers in accessing health care, including barriers related to discrimination. These obstacles to accessing health care may be related to residency, to socio-economic status, or membership in groups that may suffer discrimination, including on the basis of race, ethnicity, language, physical or intellectual disability, age, sex, religion, sexual orientation and gender identity, migrant status, marital status, health status, or other grounds relevant in the national context. Health system users should not receive a lower level of care because of one of these factors.

Applying a rights-based approach to the reduction of maternal health and morbidity depends upon a just, as well as effective, health system. A society in which rich and poor women alike – irrespective or race, ethnicity, caste, disability or other characteristic – can rely on the health system to meet their sexual and reproductive health needs fairly is a more just society.[22]

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is one of the international human rights bodies setting out key standards related to non-discrimination and equality. Uganda ratified CEDAW in 1985. A Committee composed of independent experts is tasked to monitor implementation of CEDAW by State Parties, who are required to submit regular reports. The Committee is also mandated to receive and review individual communications regarding alleged violations in those State Parties that have accepted the Optional Protocol to CEDAW. One such decision related to maternal health is shared here.

6.1 Brazil - Alyne da Silva Pimentel Teixeira vs. Brazil; decision by the United Nations Committee on the Elimination of Discrimination against Women, Communication No. 17/2008

Brief facts

Ms. da Silva Pimentel Teixeira went to the Casa de Saúde Nossa Senhora da Glória de Belford Roxo (the health centre) suffering from severe nausea and abdominal pain. She was in her sixth month of pregnancy at the time. She was treated and when she returned, health workers identified that her baby had died in the womb. They induced her successfully but her health deteriorated. Although she needed transfusion services, the only hospital that had the facilities refused to send her an ambulance.

22 See Technical Guidance on the application of a human rights based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality; OHCHR report UN Document A/HRC/21/22; paragraph 16.

One of the examination rooms at Rupa Health Centre III, Moroto district, where expecting mothers are received for ante-natal care. ©OHCHR

She was pale and had blood on her mouth and on her clothes by the time she finally reached hospital. The hospital staff sent Ms. da Silva Pimentel Teixeira's mother to the health centre to retrieve her medical records. At the centre, she was questioned as to why she wanted the records and made to wait for them. Ms. da Silva Pimentel Teixeira died at 7 p.m. on 16 November 2002.

The autopsy found the official cause of death to be digestive haemorrhage. According to the doctors, this resulted from the delivery of the stillborn foetus. On 17 November 2002, at the request of the hospital, Ms. da Silva Pimentel Teixeira's mother again went to the health centre to retrieve her daughter's medical documents. The doctors at the health centre told her that the foetus had been dead in the womb for several days and that this had caused the death.

Decision by the UN Committee on the Elimination of all forms of Discrimination Against Women

The Committee concluded that Ms. da Silva Pimentel Teixeira was discriminated against, not only on the basis of her sex, but also on the basis of her status as a woman of African descent and her socio-economic background. The Court made the following recommendations:

The Government of Brazil must provide appropriate reparation, including adequate financial compensation, to the author and to the daughter of Ms. da Silva Pimentel Teixeira commensurate with the gravity of the violations against her right to freedom from discrimination.

In ensuring the right to freedom from discrimination against expectant mothers, the government of Brazil was instructed to ensure women's right to safe motherhood and affordable access for all women to adequate emergency obstetric care, in line with general recommendation No. 24 (1999) on women and health; to provide adequate professional training for health workers, especially on women's reproductive health rights, including quality medical treatment during pregnancy and delivery, as well as timely emergency obstetric care; to ensure that private healthcare facilities comply with relevant national and international standards on reproductive health care; and reduce preventable maternal deaths through the implementation of the National Pact for the Reduction of Maternal Mortality at state and municipal levels, including by establishing maternal mortality committees where they still do not exist.

Significance of the case

This case is significant given the finding that the State was accountable even though the violations took place in a private hospital. Governments have a responsibility not only with regard to public hospitals and health facilitates, but also have an obligation to regulate and oversee private clinics and hospitals.

7.0 MATERNAL HEALTH RIGHTS AND NEGLIGENCE

Health workers often work under considerable pressure and constraints, including lack of supplies, adequate number of staff, long work hours and other challenges. It is important to reflect on the challenges faced by health workers, who are key partners in pointing out system failures, that – if left unaddressed – increase the risk of negligence by health workers.

In a number of maternal health cases, filed in courts of law as tort, especially from public health facilities, courts have found duty-bearers vicariously liable. The test such cases are subjected to considers the quality of care and supplies.

7.1 Sarah Watsemwa Goseltine and Baby David Goseltine (through mother of Ms. Goseltine and next friend) vs. Attorney General of Uganda, High Court Civil Suit No. 675 of 2006

Brief facts

On 28 October 2004, Sarah Watsemwa Goseltine gave birth to a baby boy at Mulago Hospital by emergency caesarean section. During the ninth month of her pregnancy, Ms. Watsemwa made antenatal visits to Mulago Hospital where she used to be examined by a specific doctor. She had also been examined by the same doctor at Christa Clinic, a private clinic in Nakasero, Kampala. On 28 October 2004 at about 8.30 a.m., Ms. Watsemwa arrived at the private wing of Mulago Hospital to deliver her child. About an hour later, she was admitted and taken to the labour room where she was put on drip. Ms. Watsemwa alleges that when her cervix was only half dilated at 6cm, a midwife ruptured her membrane which caused a cord prolapse. After waiting for another 40-50 minutes, she was taken to the theatre where her boy was delivered by caesarean section. Ms. Watsemwa alleged that the birth was negligently handled by Mulago Hospital staff and as a result the baby boy's brain was irreversibly damaged, as he was diagnosed with severe asphyxia.

Issues agreed by the parties to be determined by the Court:

1) Whether the medical staff at Mulago Hospital negligently handled the birth of the baby boy.
2) If so, whether the negligence led to the permanent brain damage of the baby boy.
3) Whether the defendant is vicariously liable for the negligence of Mulago Hospital staff.
4) Whether there were remedies available to the victims.

The Court's Decision

The Court held the health workers liable not only for negligence, but also for being incompetent on behalf of Mulago Hospital. The medical staff of Mulago Hospital breached the duty of care owed to the plaintiffs, including the duty to ensure that the Ms. Watsemwa was attended to in a professional way. The Court held that this lack of duty of care had resulted in the permanent brain damage of baby boy.

The defendant was held vicariously liable for the torts committed against the plaintiffs. The Court therefore awarded UGX 450,000,000 as an appropriate award for the pain, suffering and loss of amenities suffered by the baby boy and awarded UGX 50 million for the pain and suffering of his mother.

The Court enumerated the following principles of medical negligence

- A doctor can be held guilty of medical negligence only when he/she falls short of the standard of reasonable medical care. A doctor cannot be found negligent merely because in a matter of opinion he made an error of judgment.
- For negligence to arise, there must have been a breach of duty. Breach of duty must have been the direct or proximate cause of the loss, injury or damage. By proximate

At Nyumanzi health centre, expecting mothers and their families learn about the importance of nutrition for the health of both mother and child. ©OHCHR

it means that the cause which in a natural and continuous sequence, unbroken by any intervening event, produces injury and without which injury would not have occurred. The breach of duty is one equal to the level of a reasonable and competent health worker.

- On the first issue, medical negligence was first defined to constitute an act or omission by medical personnel that deviates from a required standard of the profession. Medical negligence occurs when a doctor, dentist, nurse or any other medical professional performs their job in a way that deviates from the accepted standard of care.
- Medical professionals are required to conduct themselves at least in accordance with the standard of their professional peers, but they are not expected to guarantee the success of their procedures or the perfect safety of the patient. The test is employing reasonable skill and is not the test of a man on Clapham omnibus because he has not got this skill, the skill expected from the doctor is that, that is reasonable in the eyes and judgement of the fellow skilled doctors.

Significance of the case

Although this case was purely handled as a negligence case, the court also took a view of embracing the element of quality in this matter by recognizing that the mother was being handled in an unprofessional way, which led to the breach of duty. Because quality implies professionalism, deviation therefrom leads to a penalty.

Duty-bearers must be aware that in respect of this case which happened in a public hospital, the liability was visited on the hospital and not the doctors. It is important therefore that doctors are equipped with all the necessary equipment to enable them give maternal health services professionally.

7.2 South Africa - N.S. vs. Member of the Executive Council for the Department of Health, Eastern Cape, Case No. CCT 8/02 Constitutional Court of South Africa

Brief facts

The plaintiff in this case sued in her representative capacity as mother and natural guardian of Y.S., a girl born in 2004. She also sued in her personal capacity, claiming damages arising from the alleged negligence of the defendants' servants during her period of labour in 2004 at the Zitulele hospital during the course of birth of Y.S. which caused her to suffer hypoxic ischemic damage to her brain and consequently led to cerebral palsy.

The Court decided on the issue of whether the defendants' servants were negligent. It was noted that this issue would be discharged where the onus of proof lied on the plaintiff to establish, on a balance of probability, that a reasonable medical practitioner in the circumstances in which the nurses would have foreseen the likelihood of harm occurring (in this matter the likelihood of harm occurring to Y.S.) and would have taken steps to have guarded against its occurrence, and the practitioner concerned failed to take such steps. In the case of an expert, such as a surgeon, the standard is higher than that of the ordinary layperson and the Court must consider the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.

The Court held that the evidence clearly established a prima-facie case of negligence on the part of the hospital relying on the fact that the plaintiff remained in the hospital for many days prior to the caesarean section, that the plaintiff ought to have been fully monitored and finally that the care and treatment given to the plaintiff was found to be sub-standard.

Significance of the case

Medical staff need to exert due diligence in carrying out monitoring of patients, and need to take required action to prevent negative consequences. Duty-bearers must be aware that health workers employed in their areas of jurisdiction must be availed with health goods and facilities to enable them properly carry out their duties, including maternal health services.

8.0 CONCLUSION

Every woman has the right to safe and respectful maternal health care. Fundamental human rights are violated when pregnant and birthing women endure preventable suffering, including death, illness, injury, mistreatment, abuse, discrimination, and denials of information and bodily autonomy.

Courts have begun unpacking what the right to maternal health means in practice. As clearly articulated in this Digest, the human right to health has four essential elements: Governments, including at local level, must ensure that health facilities, goods, and services are available in sufficient quantity throughout the state, accessible to all, ethically and culturally acceptable, and of good quality.

This Digest is set to aid duty-bearers in preventing maternal mortality and morbidity and ensuring safe, respectful care to all mothers seeking care. Local governments must respect and uphold human rights of mothers seeking maternal health services by adhering to the laws and policies promoting maternal health rights. Local governments and other duty-bearers must be cognizant of the decisions already made by the courts of law, and must disband institutional and other practices that make maternal health services inaccessible or decisions that do not enable its provision. The personnel must be well-trained and supervised at all levels of health care, to protect the rights of everyone without discrimination of any sort, and to prevent maternal deaths. By delivering in these areas, duty-bearers - including at local government level - have a significant role in reducing maternal mortality rates, and in helping to uphold maternal health rights.

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