

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION**

MISCELLANEOUS CAUSE NO. 327 OF 2016

**1.CENTRE FOR HEALTH, HUMAN RIGHTS
AND DEVELOPMENT (CEHURD)**

2.NAKAYIMA FATUMAH===== APPLICANT

VERSUS

**1.THE EXECUTIVE DIRECTOR,
MULAGO NATIONAL REFFERAL HOSPITAL**

2.THE ATTORNEY GENERAL =====RESPONDENTS

BEFORE: HON. MR. JUSTICE PHILLIP ODOKI

RULING

Introduction

[1] The Applicant filed this application, by Notice of Motion, under Article 50(2) of the Constitution of the Republic of Uganda, 1995; Sections 98 of the Civil Procedure Act Cap 71; and Order 52 rule 1 of the Civil Procedure Rules S.1 71 -1. The Applicants seek for, a declaration that the failure of the Respondents to give the 2nd Applicant her baby after birth and to provide her with information concerning the whereabouts of her baby, dead or alive, is a violation of her right to health and the right not to be subjected to cruel, inhuman and degrading treatment; an order that Mulago National Referral Hospital should immediately avail the child of the 2nd Applicant; general damages and the costs of this application.

Applicants' case:

[2] The Applicants' case was set out in the Notice of Motion and the affidavit of Prima Kwagala, the manager strategic litigation with the 1st Applicant in support of the application. The 2nd Applicant also filed an affidavit in support of the application and in rejoinder. According to the Applicants, on the 26th December 2015 the 2nd Applicant went to Mulago National Referral Hospital with labor pains and was admitted in Ward 5C. The following morning, she was transferred to the theatre for an emergency caesarian section. While in the theatre, a one Mr. Okwel, the anesthetist administered on her full anesthesia causing her to lose consciousness during the operation. Upon gaining her consciousness, she asked for her baby

but she was informed by a health worker that she gave birth to a baby boy who weighed 3.5 kgs. She was further informed that the baby lived for a while and died. From ward 5C she was transferred to High Dependency Unit (HDU) where she requested for her baby but a female worker told her that her baby's body could not be found. On the 28th December together with her mother they reported the matter to the police at Mulago Police Station. In the company of police officers, they went to Mulago National Referral Hospital mortuary. The mortuary attendant did not avail the body of her baby and there was no record to indicate entry of the body of her baby in the mortuary. She then approached the 1st Applicant for assistance. On the 10th May 2016, 2nd Applicant wrote to the 2nd Respondent demanding accountability of the missing baby but the letter was not responded to.

[3] The Applicants contends that the failure of the Respondents to protect the 2nd Applicant while performing her natural maternal functions at Mulago National Referral Hospital is a violation of her right to health. The Applicants further contended that the failure of the Respondents to provide information of the whereabouts of the 2nd Applicant's child is a violation of the 2nd Applicants right to health and access to information. Furthermore, the Applicants contend that the disappearance of the 2nd Applicant's child has subjected her to cruel, inhuman and degrading treatment and a violation of her child's right to know and be cared for by his parents. In addition, as a result of the failure by Mulago National Referral Hospital to avail her with her baby, dead or alive, her spouse abandoned her in belief that she gave the baby to another man.

The Respondents' case:

[4] The Respondents opposed the application. Kyokuwaire Teddy – an enrolled midwife and Dr. Barageine Justus Kafunjo – an obstetrician, gynecologist and fistula surgeon, both of Mulago National Referral Hospital swore affidavit in reply. Kyokuwaire Teddy confirmed that on the 26th December 2015 the 2nd Applicant went to Mulago National Referral Hospital with labor pains and was admitted in Ward 5C. The following morning, she was transferred to the theatre for an emergency caesarian section. The operation was done by Dr. Barageine Justus Kafunjo. Dr. Barageine Justus Kafunjo stated that the operation was done under spinal anesthesia and the 2nd Applicant was awake throughout the operation. He found that the uterus was ruptured and the baby was already dead. Kyokuwaire Teddy stated that she showed the 2nd Applicant the dead baby and the 2nd Applicant started crying. The dead body was labelled with the 2nd Applicant's name on the leg then thereafter wrapped in a baby sheet and labelled again

the second time on top of the sheet. Kyokuwaire Teddy further stated that she showed the sister of the 2nd Applicant the dead baby and she also started crying.

Procedural history:

[5] Before the hearing could proceed on merit, the Respondents raised an objection regarding this application against the 1st Respondent. The Respondents argued that the 1st Respondent is not a body corporate who can sue or be sued. On the 12th March 2018 this Court gave a ruling striking out the 1st Respondent. The Application thus only proceeded against the 2nd Respondent.

Issues:

[6] The issues for the determination of the court are;

1. Whether officials of Mulago National Referral Hospital failed to give the 2nd Applicant her baby after delivery.
2. Whether the failure to give the 2nd Applicant her baby amounted to a violation of her right to health.
3. Whether the failure to give the 2nd Applicant her baby or to provide information of the baby's whereabouts amounted to a violation of her right not to be subjected to torture, cruel, inhumane and degrading treatment.
4. What remedies are available to the parties.

Legal Representation:

[7] At the hearing, the Applicants were represented by Mr. Ibrahim Nsereko and Ruth Ajaro of CEHURD Legal Aid Clinic. The Respondent was represented by a State Attorney from the Attorney Generals Chambers, who filed written submissions without disclosing his/her name.

Legal submissions:

[8] On issue 1, counsel for the Applicant submitted that both Dr. Barageine Justus Kafunjo who conducted the operation and Kyokuwaire Teddy who was the enrolled midwife did not mention in their affidavit that they gave or handed over to the 2nd Applicant or her relatives the baby after delivery. Counsel submitted that it is Kyokuwaire Teddy who knows the whereabouts of the baby since she confirmed in her affidavit that she received the alleged dead body of the baby.

[9] On issue 2, counsel submitted that the failure to give the 2nd Applicant her baby is a violation of her right to health which is clearly defined by the World Health Organization as a state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity. According to counsel, one cannot comprehend the mental torture the 2nd Applicant had to go through and still goes through having not seen her baby dead or alive.

[10] On issue 3, counsel submitted that the failure to give the 2nd Applicant her baby and to provide her with information on the whereabouts of her baby has subjected her to cruel, inhumane and degrading treatment. According to counsel, the 2nd Applicant has undergone and continues to undergo psychological torture and suffering occasioned by the failure of the hospital to give her baby. Counsel further submitted that the 2nd applicant has lost her marriage and was denied opportunity to bury her dead baby.

[11] In reply, counsel for the Respondent submitted that it is clear from the affidavit of Kyokuwaire Teddy that the dead body of the child of the 2nd Applicant was given to the sister of the Applicant at the time she requested to be shown the baby. On issue 2, counsel submitted that the Respondents did not violate the right of health of the 2nd Applicant because she accessed medical services and was treated by the doctors and nurses when she arrived in the hospital. On issue 3, counsel submitted that no evidence was adduced to prove that the 2nd Applicant was subjected to inhuman and degrading treatment.

Consideration and determination of the Court:

Issue 1: Whether officials of Mulago National Referral Hospital failed to give the 2nd Applicant her baby after delivery.

[12] Although counsel for the Respondent submitted that the dead body of the baby of the 2nd Applicant was given to sister of the 2nd Applicant, that submission is not supported by any evidence on the court record. What Kyokuwaire Teddy told the court was that she showed the 2nd Applicant and her sister the dead baby and labelled the baby with the 2nd Applicant's name. Kyokuwaire Teddy did not mention that she handed over the dead body of the baby to the 2nd Applicant or her sister. Given that it was Kyokuwaire Teddy with the dead body of the baby and there is no evidence that she gave it to the 2nd Applicant or any relative of hers, I find that Mulago National Referral Hospital failed to give the 2nd Applicant her baby after delivery.

Issue 2: Whether the failure to give the 2nd Applicant her baby amounted to a violation of her right to health.

[13] The right to health is not one of the human rights specifically mentioned in Chapter 4 of the Constitution. However, Article 45 of the Constitution provides that rights, duties, declarations and guarantees relating to fundamental and other human rights and freedoms specifically mentioned in Chapter 4 shall not be regarded as excluding others not specifically mentioned.

[14] Firstly, the above-mentioned additional rights, are provided for in the National Objectives and Directive Principles of State Policy of the Constitution. The right to health is specifically provided for in Objectives XIV and XX. Under Objective XIV, the State is under the duty to ensure that all Ugandans access health services and under Objective XX, the state is under obligation to ensure the provision of basic medical services to all Ugandans. Article 8A of the Constitution provides that Uganda shall be to be governed based on principles of national interest and common good enshrined in the national objective and directive principles of state policy and Parliament is mandated to make relevant laws for the purpose of giving full effect of the objectives.

[15] Secondly, other additional rights are found in human rights treaties, agreements and conventions to which Uganda is party, such as the **African Charter on Human and People's Rights** (Ratified on the 10th May, 1986) and the **International Covenant on Economic, Social and Cultural Rights** (Ratified on the 21st January, 1987). Article 16 of the **African Charter on Human and People's Rights** provides that every individual shall have the right to enjoy the best attainable state of physical and mental health. The state parties are enjoined to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick. Article 12 of the **International Covenant on Economic, Social and Cultural Rights** provides that the States Parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The state parties are enjoined to take steps to achieve the full realization of this right.

[16] According to the **CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art.12)**, the Third Committee of the United Nations General Assembly adopted the definition of health contained in the preamble of the Constitution of World Health Organization to mean,

“a state of complete physical, mental and social well – being and not merely the absence of disease or infirmity.”

[17] In the instant case, the official of Mulago National Referral Hospital did not give the 2nd Applicant her baby after delivery. All her efforts to secure her baby, dead or alive, were not successful. She was restless. She had to report to the police for help, went to the mortuary all in vein. Even when she approached the 1st Applicant for assistance and on the 10th May 2016 1st Applicant wrote to the 2nd Respondent demanding accountability of the missing baby, officials of Mulago National Referral Hospital did not respond. From those facts it is very clear that the 2nd Applicant suffered terrible psychological torture which in my view affected her mental wellbeing and therefore a violation of her right to health.

Issue 3: Whether the failure to give the 2nd Applicant her baby or to provide information of the baby’s whereabouts amounted to a violation of her right not to be subjected to torture, cruel, inhumane and degrading treatment.

[18] Article 24 of the Constitution guarantees the right not to be subjected to any form of torture or cruel, inhumane or degrading treatment. Article 44(a) of the Constitution prohibits the derogation from the enjoyment of the freedom from torture.

[19] The Prevention and Prohibition of Torture Act, 2012 which was enacted by Parliament to, among others, give effect to Articles 24 and 44(a) of the Constitution, in Section 2(1) it defines torture as follows:

“(1) In this Act, torture means any act or omission, by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by or at the instigation of or with the consent or acquiescence of any person whether a public official or other person acting in an official or private capacity for such purposes as—

- (a) obtaining information or a confession from the person or any other person;*
- (b) punishing that person for an act he or she or any other person has committed, or is suspected of having committed or of planning to commit; or*
- (c) intimidating or coercing the person or any other person to do, or to refrain from doing, any act.”*

[20] In this case, no evidence was adduced to prove that there was intentional severe pain or suffering, physical or mental, inflicted by officials of Mulago National Referral Hospital onto the 2nd Applicant to achieve any of purposes mention in section 2(1) or related purposes. I therefore find that the Applicants failed to prove that the failure to give the 2nd Applicant her baby or to provide information of the baby's whereabouts amounted to a violation of her right not to be subjected to torture, cruel, inhumane and degrading treatment.

Issue 4: What remedies are available to the parties.

[21] Article 50(1) of the *Constitution of the Republic of Uganda, 1995* provides that any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.

[22] Section 9 of the *Human Rights (Enforcement) Act, 2019* also provides that where the competent court determines that a fundamental right or freedom has been violated, unlawfully denied or should be enforced, the court is enjoined to issue orders it considers appropriate, including an order for compensation. In this case, I have considered the amount of phycological trauma that the officials of Mulago National Referral Hospital made the 2nd Applicant to go through, I consider that compensation of UGX 50,000,000/=would be appropriate in the circumstances.

Orders:

[23] In the end, after carefully considering this application, the following orders are hereby made;

1. A declaration that the failure of the Respondents to give the 2nd Applicant her baby after birth and to provide her with information concerning the whereabouts of her baby, dead or alive, is a violation of her right to health.
2. The 2nd Respondent is ordered to pay the 2nd Applicant compensation of UGX 50,000,000/= (Uganda Shillings Fifty Million Shillings Only).
3. The compensation mentioned in 2 above shall attract interest of 15% per annum from the date of this ruling, till payment in full.
4. The 2nd Respondent to pay the 2nd Applicant the cost of the suit.

5. The 1st Applicant is not awarded any costs since it filed this application in public interest.

I so order.

Dated and delivered by email this 17th day of January, 2024.

A handwritten signature in blue ink, appearing to read 'PODOKI', with a long horizontal stroke extending to the right.

Phillip Odoki

JUDGE