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Litigating to ensure access to quality maternal health care for women and girls in Kenya

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Abstract: *Access to comprehensive reproductive health care for women and girls, including access to quality maternal health services remains a challenge in Kenya. A recent government enquiry assessing close to 500 maternal deaths that occurred in 2014 revealed gaps in the quality of maternal care, concluding that more than 90% of the women who had died had received "suboptimal" maternal care. In Kenya, the Center for Reproductive Rights (the Center) has undertaken public interest litigation among other strategies to challenge human rights violations and systematic failures within the health sector. In 2014, before the High Court of Bungoma in Western Kenya, the Center filed a case on behalf of Josephine Majani who had been neglected and abused by the staff of the Bungoma County Referral Hospital, a public health facility where she had gone to deliver in 2013. This commentary addresses the situation of maternal health care in Kenya and the actions leading to litigation that was specifically aimed at enabling access to quality maternal health care. It provides an analysis of some of the outcomes of the litigation and highlights the implications thereof on implementation of maternal health care in Kenya and beyond.* DOI: 10.1080/09688080.2018.1508172

Keywords: Women, girls, quality maternal health care, maternal mortality and morbidity, comprehensive reproductive health care, pregnant, litigation, dignity, maternal health policies

Introduction

The rights to access quality maternal health care is connected to and can impact other fundamental human rights. Central to the provision of quality maternal care is the issue of whether pregnant and labouring women are treated by health providers in a respectful and dignified manner that promotes the woman's health and well-being. The absence of such treatment renders services disrespectful and/or abusive, and violates women's human rights. Sadly, not only are pregnant women treated all too often in a disrespectful manner, but their right to respectful treatment is also not recognised or institutionalised through complaint and redressal mechanisms. Even where such mechanisms may exist, women and their families may not have the information available that would enable them to seek redress.

Violations of women's rights during childbirth result in women distrusting the health system and care providers, making them less likely to seek facility-based maternity care or other health services. In a country such as Kenya, with a high burden of preventable maternal mortality and morbidity, where women are consistently encouraged to seek skilled birth assistance, such violations may have the opposite effect and should not be tolerated. In this paper, we explore the need for governments to recognise and ensure, to the best of the governments' capabilities, that all women and girls have access to quality maternal health care, and access to justice and reparations in case of violations. We present a judicial complaint filed in 2014 on behalf of Josephine Majani in Kenya, as a case that represents a positive step towards holding the Kenyan government accountable for pregnant women's health and human rights.

Josephine's case resembles other previous judgements, such as the case of *Alyne da Silva*

Pimentel V Brazil,[1] a poor Afro-Brazilian woman who died after multiple medical facilities failed to provide her with emergency obstetric care. The case was brought before the Committee on Elimination of All Forms of Discrimination Against Women (CEDAW) in 2008. In this case, the Committee found that Alyne had been discriminated against, based on her being a woman of African descent. The Committee highlighted that the failure to provide quality maternal health care constitutes a form of discrimination against women as only women require such services.[2]

Maternal health in Kenya

The Kenyan Constitution states that every person has the right to the highest attainable standard of health, including the right to reproductive health care. The Constitution also provides for devolution of government and clarifies that the delivery of health services is a function of the 47 county governments. The national government is responsible for development of health policies and remittance of funds to county governments for the delivery of health services.

According to the 2014 Kenya Demographic and Health Survey, the maternal mortality rate in Kenya for the seven-year period preceding the survey was 362 per 100,000 live births,[3] one of the highest maternal mortality rates in the world.[4] Moreover, for every woman who dies during childbirth in Kenya, an estimated 20–30 other women suffer serious injury or disability due to complications during pregnancy or delivery.[5]

Of the Kenyan population, 9% live in counties which can only provide prenatal care of minimally adequate quality.[6] Only 44% of all births in Kenya are delivered under the supervision of a skilled birth attendant. Traditional birth attendants assist with 28% of births, while relatives and friends assist with 21% of births and 7% of pregnant women receive no assistance at all.[7] In fact, only 8% of impoverished women as compared to 24% of wealthier women had access to adequate delivery care in 2016.[6] While the World Health Organization recommends postnatal care starting an hour after delivery, and at least for the first 24 hours in order to address potential complications, only 51% of women in Kenya receive a postnatal check-up within two days of giving birth.[8] In an assessment of 484 maternal deaths reported in Kenya's District Health Information System in 2014, 81% were caused by substandard care, indicating that a better standard of care could have prevented many of these deaths.[9]

The poor quality of maternal care is attributable to many factors. Health facilities are not equipped to offer effective quality maternal health services and health professionals are not appropriately trained. Only 36% of public health facilities offering delivery services have the basic and necessary infrastructure and equipment, such as electricity and water. Facilities in rural and marginalised areas, and lower cadre facilities are mostly ill-equipped.[10] There is a shortage of 3091 equipped maternity facilities in Kenya, which greatly hinders the effective provision of quality maternity services.[11]

On June 1, 2013, as a step to improve access to facility-based maternal care to all expectant mothers and reduce maternal deaths and complications resulting from deliveries by unskilled attendants, President Uhuru Kenyatta issued a Directive abolishing maternity fees in public health facilities.[12] Following the directive, an influx of patients led to overcrowding in maternity wards,[13] and hospitals reported that nurses were overburdened. In addition, the Directive notwithstanding, women still had to purchase basic goods required for delivery, such as cotton wool and the medications used to induce labour.[14] Five years on, not much has changed. The lack of certainty about the services covered under the Directive means women still have to purchase medicines and other necessities for delivery, while the service providers' workload is still greatly increased.[15]

Disrespect and abuse: the case of Josephine Majani

In August 2013, Josephine Majani, a 28-year old mother of two, was admitted at Bungoma County Hospital in Western Kenya for an induction. At the time, the number of women admitted for delivery was more than the number of beds in the labour ward and some of the women, including Josephine, had to share beds. Not a single nurse was readily available to assist her or the other pregnant women while they were in the labour ward. Instead, the nurses told the women that if they wanted to receive any assistance, they should walk to the delivery room once labour began. When Josephine began experiencing intense labour pains, she called out repeatedly for help, but never received medical attention;

she walked to the delivery room where she found that all the beds were occupied. Unmonitored by the hospital staff, she ended up giving birth and falling unconscious on the hospital floor in her attempt to walk back to the labour ward. Rather than offering Josephine appropriate medical care upon finding her unconscious on the floor, two nurses repeatedly slapped and verbally abused her in anger because she dirtied the floor where she had been forced to deliver her baby. Unknown to Josephine, her ordeal had been recorded on mobile phone by a person who was attending the County Hospital. The video recording was later aired by a Kenyan television network seeking to highlight her plight.

In 2014, the Center for Reproductive Rights* filed a case on behalf of Josephine Majani in the Bungoma High Court, challenging the disrespectful and abusive treatment of her at a government health facility and demanding that the government address the infrastructural challenges bedevilling the health care system in Kenya. The case was filed against the Attorney General of Kenya, the County Government of Bungoma, the Bungoma County Cabinet Secretary for Health, the Cabinet Secretary of the Ministry of Health and the Bungoma County Referral Hospital. The complainants argued that the Kenyan government and Ministry of Health must be held accountable for the ill-treatment that Josephine endured, including human rights violations, under Kenya's constitution and international law.

Josephine alleged that as a woman, she was discriminated against because she was unable to access quality maternal health services and that the treatment she received amounted to cruel, inhuman and degrading treatment. She argued that the failure of the hospital to provide her information regarding a clear mechanism for her to formally lodge a complaint against the nurses who had abused her was a violation of her right to information. Josephine sought orders for general damages for physical and emotional trauma and a declaration that the abuse meted out on her amounted to a violation of her right to health among other rights.

The national government denied that there had been any violation of human rights and argued that the resources availed to Bungoma County government for staffing, equipment and basic maternal care were limited. Bungoma County government argued that it had only taken up the administration of the facility in 2013 and since then, it had not received any funds to expand the facility. It also stated that in any case, the right to health was progressively realisable. Bungoma County posited that there was no discrimination simply because maternal care services are available to all women. The government further argued that the pain experienced by Josephine was a natural consequence in the process of childbirth and that there was nothing unique in her case. The county government also argued that the abusive nurses had been investigated by the Nursing Council of Kenya, the statutory body mandated to address professional misconduct among nurses, and they had been absolved of the allegations of abuse against Josephine.

The judgement: respecting and protecting human rights to dignity and non-abuse

In March, 2018, the Bungoma High Court ruled in favour of Josephine Majani,† pointing to a number of violations of her human rights. The ruling embraced substantive justice over legal procedural technicalities. The Court held that even if there were any shortcomings in the clarity of the case as presented, the Constitution of Kenya demands that in exercising judicial authority, Courts shall be guided by principles that include justice being administered without due regard to technicalities. Further, in line with earlier precedents, it stated that there need not be mathematical precision or profound formalism in drawing constitutional petitions. The Court thus upheld and affirmed an enabling standard for challenging constitutional violations without undue regard to technicalities.

Wider interpretation of the right to health

The Court elaborated that the right to health care "encompasses proper treatment at hospital,

*The Center for Reproductive Rights is a global organization, with headquarters in New York and regional offices in Nairobi, Nepal, Bogota, Geneva and Washington D.C. that uses the law to advance reproductive freedom as a fundamental human right that governments are obligated to respect, protect and fulfil. In Kenya, the Center works on several reproductive rights issues including access to quality maternal health care for all women and girls.

†Full text of the Judgement. Available at http://kenyalaw.org/caselaw/cases/view/150953/.

availability of necessary equipment, facilities and accommodation." The Court also observed that there was an admission by the government that the hospital was overstretched, because the number of beds and the number of health care providers who were present were few in comparison to the number of patients who sought maternal health care services and that

The fact that the respondents failed to avail the basics, such as drugs and cotton wool for women delivering when there is a right to health anchored in the constitution and where a presidential directive exists to provide specifically on the free maternal health care is nothing short of violation of basic rights.

This finding expanded on the previous understanding of the right to health as enshrined in the Kenyan Constitution which has many times been expounded upon terms of international provisions but has not been assigned much practical and local content.[‡] The Court articulated the minimal actions the government should take in order to be able to progress towards meeting its obligations to fulfil the right to health, including the right to quality maternal health care in light of the 2013 presidential Directive.

Emphasis on the right to dignity

In acknowledging that Josephine gave birth on a floor in an open area where others watched, and her experience captured on video and later shared with a national television station, the Court held that "giving birth in an open place where third parties watch, even if it's with good intentions, is a derogation of one's dignity." Further, "being shouted at and being forced to walk, carrying one's own placenta constitutes cruel, humiliating and demeaning actions." Relying on the African Charter and Kenya's Constitutional provisions on the right to dignity, as well as South African case law, the Court underscored the fundamental importance of human dignity in all societies and added that human dignity constitutes a recognition of the intrinsic worth of human beings, which dictates that they be treated with respect and concern.

A minimum expected standard for delivery of maternal health services

The Court called the actions of the nurses towards Josephine "inexcusable" and opined that

no matter how overstretched they were … The Petitioner was in a vulnerable state, what she needed was care and attention, which they failed to offer, she could not have possibly delayed her labour processes so as to await a vacancy in the delivery room, they were not available for her either in the hour of need. The Petitioner certainly did not deserve cruelty and abuses meted on her. The nurses as healthcare providers owe a duty of care to their patients at all times, theirs is a calling to serve humanity in vulnerable circumstances. What the Petitioner required was understanding and compassion at the time.

The Court ordered that a formal apology be made to her, not only by the Bungoma County Cabinet Secretary for Health and the Hospital, but also by the nurses who had abused her. The Court observed that "in redressing the injuries suffered by the Petitioner, no amount of monetary compensation may compensate the pain and suffering that the Petitioner went through" and that "compensation is merely an acknowledgement of the infringement of rights, and an attempt to make reparation." It awarded Josephine Kenya Shillings 2,500,000 (approx. 25,000 USD).[§]

This order signifies recognition by the Court that despite the shortcomings that may be experienced at an institutional level, such as the lack of infrastructure for delivery of health, the government must still meet its core obligation to provide access to the right to health, including maternal health, in a manner that is, at minimum, acceptable. The personnel working at hospitals are a key component in government's provision of health care services that comply with human rights. To require that an apology be made to Josephine goes beyond holding the institutional heads in government accountable for infrastructural ineptitude. It establishes that treating individuals seeking services with dignity and respect is a key component of the acceptable, minimum standard of care.

[‡]For example, in the case of Mathew Okwanda v Minister of Health and Medical Services & 3 others [2013] eKLR. Full text of the judgement. Available at http://kenyalaw.org/caselaw/cases/view/88803.

[§]The Center is working with the Bungoma County Government to ensure that Josephine receives her compensation and the apology from the nurses involved in her mistreatment.

The judgement: missed opportunities to promote and fulfil human rights

Despite the important advances the judgement made towards protecting pregnant women's human rights, there were important missed opportunities to go even further.

Narrow interpretation of the right of access to information

Surprisingly, the Court found that there was no violation of the right of access to information even though the government failed to display or bring to Josephine's attention, the hospital's complaints procedure, citing that Josephine "did not, testify to the fact that the necessary information was [requested and] not disclosed to her."

Previous Kenyan jurisprudence on the right of access to information has solidified the position that one can only claim that their right of access to information has been denied or threatened once they have requested such information and have been denied the same.[**] The reasoning therefore is that institutions should be provided an opportunity to honour requests for information before they are ordered to provide information by courts. This position essentially absolves the government of being proactive in sharing information. Where the government holds information that may impact reproductive health, interpretation of the right of access to information would serve the public better if it required government to be proactive and provide such information even without specific requests from the public.

Failure to render substantive orders

The Court observed that the government's claim that it met its obligations in delivering quality maternal health services is half-hearted, especially considering the admission that the government lacks adequate resources for implementation thereof. Further,

the national and county governments have still not devoted adequate resources to health care services and have not put into place effective measures to implement, monitor and provide minimum acceptable standards of health care, thus violating our very own constitution and international instruments that we have acceded to as a country.

Thus, the Court declared that "the National Government and County Government of Bungoma failed to develop and/or implement policy guidelines on health care, including maternal health care, thus denying the Petitioner her right to basic health care."

By these declarations, the Court once again recognised the core obligation of the government to ensure the delivery of maternal health care services as well as the important role of policy guidelines in implementation of minimum standards in service delivery and monitoring of implementation to allow for improvement. However, having declared as such, the Court neglected to order any concrete and sustainable actions that the national and county governments should take to remedy the dire situation and meet its obligation of putting in place policies and standards for the delivery of quality maternal health care.

Failure to mandate human rights training for health providers

Even though the Court disregarded the findings of the Nurses' Council that absolved the nurses of mistreatment and abuse and found that the nurses violated Josephine's human rights, the Court neglected to mandate human rights training for the nurses involved. Such training could help providers understand and internalise the need to treat their patients with dignity and how to go about it; especially as their oversight body failed to recognise the importance of the same and continues to blame such violations on lack of infrastructure.

The Court's restraint can be interpreted as adherence to the general rule that Courts should not venture into the realm of policy making since this is a function of the executive branch. In this case, however, there was room to direct the national and county governments to take appropriate action to remedy the situations identified without proceeding to elaborate the processes/policy actions that would constitute appropriate government action. This distinction would ensure that the Court steer clear of policy but deliver a judgement with requisite vigour.

Conclusion

On balance, despite limitations, the judgement in the Josephine Majani case sets a powerful precedent for women's ability to demand legal redress for disrespect and abuse. It sets a precedent in Kenya and has value to other countries of Africa

**See for example, Njuguna S. Ndung'u v Ethic & Anti-Corruption Commission & 3 others [2015] eKLR and Charles Omanga & 8 Others v Attorney General and Another [2014] eKLR.

and even beyond. In Kenya itself, the ruling follows on a previous judgement recognising women's human rights in the case of *Millicent Awuor (Maimuna) and Margaret Anyoso Oliele V AG and others,* High Court Petition No. 562 of 2012. In that case, the High Court awarded damages to two women who had delivered babies and had been detained for their inability to pay medical bills upon discharge. The Court declared that they had been discriminated against based on their gender and socio-economic status and that they had been subjected to cruel, inhuman, and degrading treatment, amounting to a violation of their right to dignity.

While our discussion of the Majani case points out that much remains to be done, these cases together provide a promising direction to advance pregnant women's rights to dignity and non-abusive treatment in health care institutions.

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Résumé

L'accès à des soins de santé reproductive complets pour les femmes et les jeunes filles, notamment à des services de santé maternelle de qualité, reste problématique au Kenya. Une récente enquête gouvernementale qui a évalué près de 500 décès maternels s'étant produit en 2014 a révélé des lacunes dans la qualité des soins maternels. Elle a conclu que plus de 90% des femmes décédées avaient reçu des soins maternels « sous-optimaux ».

Resumen

El acceso a servicios de atención integral a la salud reproductiva para mujeres y niñas, que incluye acceso a servicios de salud materna de calidad, continúa siendo un reto en Kenia. Una reciente investigación gubernamental, que evaluó casi 500 muertes maternas que ocurrieron en 2014, reveló brechas en la calidad de la atención materna y concluyó que más del 90% de las mujeres que murieron habían recibido atención

Au Kenya, le Center for Reproductive Rights (le Centre) a introduit des procédures judiciaires d'intérêt général, parmi d'autres stratégies pour lutter contre les violations des droits de l'homme et les manques systématiques du secteur de la santé. En 2014, devant le tribunal de grande instance de Bungoma, au Kenya occidental, le Centre a déposé plainte au nom de Josephine Majani pour défaut de soins et maltraitance de la part du personnel de l'Hôpital de référence du comté de Bungoma, un centre de santé publique où elle s'était rendue pour y accoucher en 2013. Ce commentaire aborde la situation des soins de santé maternelle au Kenya et les actions aboutissant à la plainte qui visait spécifiquement à permettre l'accès à des soins de santé maternelle de qualité. Il analyse certains des résultats du procès et met en lumière les conséquences sur les soins de santé maternelle au Kenya et au-delà.

materna "subóptima". En Kenia, el Centro de Derechos Reproductivos (el Centro) ha emprendido litigios de interés público, entre otras estrategias, para cuestionar las violaciones de los derechos humanos y fallas sistemáticas en el sector salud. En 2014, ante el Tribunal Supremo de Bungoma en Kenia occidental, el Centro presentó una demanda en nombre de Josephine Majani, quien fue descuidada y maltratada por el personal del Hospital de Referencia del Condado de Bungoma, el establecimiento de salud pública a donde acudió para tener su parto en 2013. Este comentario aborda la situación de los servicios de salud materna en Kenia y las acciones que llevaron al litigio con la finalidad específica de permitir acceso a servicios de salud materna de calidad. Ofrece un análisis de algunos de los resultados del litigio y destaca sus implicaciones para la implementación de servicios de salud materna en Kenia y más allá.