

Litigation and access to health care: Strategies and lessons for lawyers.

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Averting maternal mortality through litigation in Uganda.

- CEHURD Case—uganda petition 16/2011
- Facts
- Sylvia Nalubowa had twin pregnancy
- Goes to a health Centre III, one gets retained
- Supposed to be referred 40 kms away on a non-tarmac road without an ambulance
- Gets into a pickup and reached hospital at around 8:30pm –no doctor—nurses ask for commodities and airtime to call doctor
- Both mother and attendant didn't have
- Her cries and yelling did not help much, blood oozed out profusely
- She died after midnight

Why litigation in this case

Human Rights or TORT-Negligence ???

- The health workers testified that
- Did not have the consumables—gloves, cotton wool, no telephone, few staff, and the hospitals were in a deplorable state
- 16 women in Uganda die every day from preventable maternal health related complications
- Govt phased out traditional birth attendants
- It also phased out all user fees in its hospitals

Make use of constitutional provisions.

- It is the supreme law
- In Uganda for example Art 33 of the constitution on the right of women as mothers
- CEDAW made recommendations that you this unacceptable death of women in giving birth is discriminatory.
- Women's rights to life, health, non-discrimination entitle them to the services and care they need to go through pregnancy and childbirth safely. .
- Uganda ratified all the international instruments on the right to health.
- Art 45.....legal principle of legitimate expectation.
- Systems issues and the use of legal tools

How we did it

- A petition in the constitutional court
- Then advocacy—civil society and other actors
- Building of a coalition on the case
- The court of public opinion
- Constant lobby meeting and engagements with several stakeholders
- Use of the media—local and international
- International agencies
- Professional engagements__ legal expert groups, highlight on the technical aspects

Results??

Even before the case could be heard

- Maternal death audits in regional referral hospitals, Mama kits, Parliament passed a motion, Midwives and other health workers increased, Renovation of hospitals-Nakaseke and Mityana, Coalition on health and a health rights platform

But the Political question doctrine

- Jurisprudence on reproductive health rights in Uganda and in the region
- The health literacy campaigns that followed the case up to date, Government response, public opinion and debate even in the media
- Ministry of health engaging us as technical advisors on the health, gender and human rights
- The health rights and gender manual and the resultant health workers training on sexual rights and reproductive health
- The supreme court processes

Courts further consideration

-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.....
- There are other legal alternatives that the Constitution and other laws provide for resolution of such.eg High court for redress

Court further advised

- Among the remedies that the High Court may grant is the one of the prerogative order of Mandamus requiring a public officer 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. See **Section 36, 37, and 38 of the Judicature Act.**

High Court maternal health case

- **Nakaseke case against Local administration.**
- WE challenged the violation of the fundamental rights of Nanteza Irene, deceased, who died from Nakaseke District Hospital after she had failed to access health services at the hospital while in labour.
- The case was for declaratory orders and damages on the grounds that the failure of the deceased to access health services in a public health service facility mandated to provide such services to all women violated her fundamental rights and freedoms including inter alia the right to health.
- The case sought declaratory orders and damages for violation of the rights to life, health, freedom from torture, inhuman and degrading treatment for the deceased Nanteza Irene and and of the second to fifth plaintiffs contrary to Articles 22 , 24 , 44 (a), 33, 34, 45 and 21 of the Constitution

outcome

- First positive judgment on maternal health rights
- Jurisprudence created
- Till to date no maternal death has happened again
- Renovation of hospitals
- Streamlining the administrative structures of the hospital
- Restored public trust in the hospital and the health services offered
- Strengthened relationship between CS and the Nakaseke Local Government administration.
- Training the health workers and the district officer in issues of health and rights

Mental Health Litigation

- CONSTITUTIONAL PETITION 64/2011 UGANDA
- Why?---The main thrust was to contest provisions of sections 45 (5), and 82(6) of the Trial on Indictments Act Cap 23 regarding the procedure in case of the insanity or other incapacity of an accused person or the victim
- The derogatory language used under section 130 of the PCA Cap 120 as unconstitutional in as far as they run contrary and against Articles 20, 21(1), (2) and (3), 23, 24, 28 and 35 of the constitution of the Republic of Uganda.

Good Decision and still counting.....

- Court noted that the problem first stems from the language of **Sub-section (5)**, which empowers the Minister after considering the record; to order by warrant that the accused be confined as a **“criminal lunatic”**
- Court observed that this language is unfortunate because mental illness/impairment is a disability. It noted that the potential of persons living with disability cannot be realized if their dignity is not ensured.
- Court further observed that **Article 35 of the Constitution** enjoins the State and society to take appropriate measures to realize the full mental and physical potential of persons living with disabilities

EXECUTIVE DIRECTOR, MULAGO NATIONAL REFERRAL HOSPITAL
ATTORNEY GENERAL.....DEFENDANT

ORDER

The matter came up for hearing on the 20th of January, 2014 before Her Lordship Justice M. Mugambe in the presence of Counsel Kabanda David for the plaintiffs and Counsel Ms. Nalukenge for the defendants.

THE COURT HEREBY ORDERED THAT:

The first defendant furnishes the plaintiffs' counsel with documents relevant to the case between the 14th-16th of March 2012 including the mortuary record, hospital records, children delivered, patients file, list of health workers on duty, antenatal records; copy of the DNA results.

Uganda and HIV Litigation

- Namubiru's case
- Rosemary Namubiru, a licensed and experienced 65-year-old Ugandan nurse, was arrested on January 7, 2014, after a mother of a young patient raised the possibility that a needle was re-used following an accidental needle-prick. A media frenzy ensued after it was revealed that Rosemary is living with HIV, with headlines of "Killer Nurse" spread across the front pages of major newspapers. The police responded with a trumped-up charge of attempted murder, which only fueled the public outcry.
- On the opening day of Rosemary's trial, the charges were downgraded to negligence, and she was denied bail. Her trial began on February 11, 2014, and she was subsequently convicted on May 20th, 2014. She was issued a harsh three-year prison sentence for what would, in most jurisdictions, be dealt with in the workplace rather than in the courts.

High Court sentence on appeal

- She acted so recklessly that she exposed a baby to the risk of infection of a disease dangerous to life.
- There is need to protect society from such reckless behavior. This country continues to grapple with various life threatening diseases. Court cannot shut its eyes from reality of the situation in which we live. The confidence and trust put in health care professionals by the people should not be abused or misplace. It should not also be taken for granted either.

The courts considerations

- On the other hand medical practitioners need some degree of protection. It was pointed out
- ...if the hands be trembling with the dangling fear of criminal prosecution in event of failure for whatever reason, whether attributable to him or not , neither a surgeon can successfully wield his life saving scalper to perform an essential surgery, nor can a physician successfully administer a life saving dose of medicine...

Outcome.

- **Am satisfied that the circumstance of this case requires a sentence which is lighter than, that meted out by the trial court. The appellant is hereby sentenced to such period of imprisonment as shall enable her to go home immediately**
- Wide spread discussions
- Stigma to counsel
- More cohesion in the fraternity and partnership building.

We should go Litigation.

- litigation has exhibited itself as a tool that that helps to clarify the obligations of the state and transforms them into legal duties the state must implement. Litigation is also a tool that brings into the public arena matters of human rights concern, and once successful, judgments become tools of advocacy for human rights activists.

Why litigation

- Litigation provides a unique opportunity to mobilize and rally different actors around a common cause and, even when the final ruling is not favorable, the process will create long- term partnerships, coalitions and networks that could be important in future work.

A health rights lawyer beyond courts of law

Role in civil society.

- Mainstreaming Human Rights Based Approach
- Legal research and Trainings
- Government Institution
- Rapport with line ministries—not always adversarial
- Law institutes/faculties—moot competitions
- Working with the bench—Judicial colloquiums

Beyond courts

It should be noted however;

-that using litigation as an advocacy tool in isolation will bring only limited success. Indeed, the success of litigation in bringing about change very much depends on what happens outside the court.

Litigation and beyond

- Litigation must be complemented and supported by other non-judicious strategies, such as
 - political lobbying,
 - media campaigns,
 - public mobilisation, among others.
- Political lobbying can be done by activists for policy reform who could use an ongoing or completed case as bargaining chip for reform,
- This could be done even when the case was lost since it would have put disputed issues in the **public arena**.

Court of public opinion.

- The case could have been lost in court but won as a matter of public opinion.
- Media campaigns are important in laying the foundation for filing the case by informing the public about the problem, while at the same time preparing the judiciary to receive the case.
- Campaigns keep the public informed about the progress of the case and inform the public of the outcome.
- Public mobilisation build coalitions for the case. In extreme cases, public mobilisation could include picketing at the courts.

conclusion

- The legal barriers to access health care manifest in three fold:- systemic, social and the practical.
- **As lawyers, it is our central role to unpack the law and use it to promote health and social justice.**
- Public interest litigation is a strong tool as it engages courts of law and court of public opinion