

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

CIVIL SUIT NO. 212 OF 2013

- 1. THE CENTER FOR HEALTH, HUMAN RIGHTS AND DEVELOPMENT
(CEHURD)**
- 2. MUBANGIZI MICHEAL**
- 3. MUSIMENTA JENNIFER.....PLAINTIFFS**

VERSUS

- 1. THE EXECUTIVE DIRECTOR, MULAGO NATIONAL REFERAL HOSPITAL**
- 2. ATTORNEY GENERAL DEFENDANTS**

BEFORE: LADY JUSTICE LYDIA MUGAMBE

JUDGMENT

a) Introduction

1. This is the judgment in civil suit No. 212 of 2013. The 2nd and 3rd Plaintiffs are a lay Ugandan couple and the 3rd Plaintiff is a Non Governmental Organization working on health and other human rights awareness and enforcement. This action is brought against the 2nd Defendant in representative capacity under section 10 of the Government Proceedings Act for the actions or inactions of staff of Mulago National Referral hospital (herein after the hospital), which is a government hospital. The 1st Defendant is sued, not for his individual actions, but in his capacity as the Executive Director of the hospital. The Plaintiffs are represented by Mr. Kabanda David of M/s. Kabanda & Co. Advocates and the Defendants are represented by Ms. Harriet Nalukenge, a senior State Attorney from the Attorney General's chambers.

2. On 14th March 2012 the 3rd Plaintiff who is the wife of the 2nd Plaintiff delivered two babies at the hospital's general labor ward. On 15th March 2012, she was discharged with only one baby. The Plaintiffs contend that she gave birth to two live babies while the Defendants contend that of the two babies, one was born dead. The 2nd and 3rd Plaintiffs reported the loss of their baby to police. Subsequently on 17th March 2012, they were given the body of a dead baby by a mortuary attendant at hospital.

3. The 2nd and 3rd Plaintiffs rejected this body because, in their assessment, it was of a baby who had just died and not of their baby who was 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 the 2nd and 3rd Plaintiffs had no biological connection to the body that had been given to them by the mortuary attendant. The Plaintiffs therefore brought this suit for the unlawful disappearance of their baby and seek several declarations and orders from which issues for resolution were framed. These are:
 - i) Whether the acts and/or omissions of the staff of the hospital violated the rights of the child of the 2nd and 3rd Plaintiffs enshrined in Article 34(1) of the Constitution.
 - ii) Whether acts and/or omissions of the staff violated the right to access health information and the right to health of the 2nd and 3rd Plaintiffs contrary to Articles 41(1), 8A, 45 and Objectives XX, XIV (b) of the Constitution.
 - iii) Whether their acts and omissions violated the right to family of the 2nd and 3rd Plaintiffs enshrined in Article 31(4) and 31(5) of the Constitution.
 - iv) Whether the 2nd and 3rd Plaintiffs were subjected to cruel, inhuman, degrading treatment and psychological torture contrary to Articles 24 and 44(a) of the Constitution.
 - v) Whether the Plaintiffs are entitled to the remedies sought.

4. The Plaintiffs pray for general damages of Ug. Shs: 300,000,000 Million for the loss of their baby. The Plaintiff had five witnesses - three proceeded by witness statements and two, the Police investigator and the Principal Government Analyst, testified orally. The Defendants had two witnesses who proceeded by witness statements. All witnesses were cross-examined.

b) Analysis

5. After looking at all the pleadings and submissions, the preliminary issue to be resolved is whether or not the second baby was born alive. This is pertinent for the resolution of issues 1 and 3. In the circumstances of this case, the best people to assist court with this determination are PW1, DW1 and DW2 who were present at the time of delivery.
6. The 3rd Plaintiff testified as PW1. In her witness statement tendered as PW1 Exhibit 1, she explained that after delivering her first baby, while the doctor attending to her was checking for cotton wool in the nearby box, she felt a lot of pain and thought she was pushing out the placenta. When the doctor turned back, he informed her that she had just given birth to her second baby and the doctor asked her to give him a sheet in which to wrap the baby. She gave him a sheet similar to the one used to wrap the 1st baby. The baby was wrapped and placed on the bed in the corner. Then the mid wife assisting the doctor returned and informed him that the first baby weighed 2kgs and then she took the 2nd baby. PW1 was then transferred to another room to rest. Later she asked for her second child and the midwife told her that she was dead.
7. DW1 Nsengiyumva Joseph was the doctor who attended to PW1 in the delivery room. He explained that he conducted this delivery with DW2 the midwife in his witness statement tendered as DW1 Exhibit 1. He further explained that he called DW2 after the 1st baby came out and also after the 2nd dead baby came out. PW1 told him that she did not want to see the dead baby. Because he had over 20 other mothers waiting to deliver, he left DW2 to handle PW1 and he moved on to attend to the next mother.

8. DW2, Mandida Mariam, was the midwife on duty assisting PW1 the night in issue. Her witness statement was tendered as DW2 Exhibit 1. She explained that PW1 gave birth to twins. DW1 had taken the first baby for cleaning and weighing when the second baby was born and she was called in to the room when the 2nd baby born dead was delivered. When she returned to the room, the doctor told her that she should take care of the babies and transfer the mother to the post delivery resting room after cleaning her up. She confirmed that PW1 gave birth to two babies, one alive and the other dead.

9. Two things are common in the testimony of all these 3 witnesses; two babies were born and the first baby was born alive. Although PW1 thinks that her 2nd baby was born alive, DW1 and DW2 who conducted the delivery insist that the 2nd baby was born dead. Considering the state PW1 was in after delivery, it is difficult for me to solely rely on her thought that the 2nd baby was born alive. Since DW1 and DW2 were the ones undertaking the delivery and given their medical expertise, I find their evidence that the 2nd baby was born dead more reliable. So although it is highly emotive for PW1, considering that DW1 and DW2 as professionals vested with the same determination of life at birth, I take it in the circumstances of this case that the 2nd baby was born dead.

10. PW1 testified that for the whole pregnancy she went for antenatal care in a clinic only once in the early days and that for the rest of the pregnancy she was in the village taking herbs. When she went to old Mulago for delivery, it was suspected that her baby was very big since her stomach was too big and she was transferred to the maternity ward in new Mulago in an ambulance as an emergency case. It cannot be said with any certainty that the 2nd baby died while at the hospital. It could be that the baby died before she even went to hospital and this was the reason her stomach was abnormally large when she went to hospital for delivery. She did not even know the pregnancy had 2 babies. In these circumstances, it is difficult to impute negligence for the death of her 2nd baby on the hospital or any of the Defendants.

11. In arguing issues 1 and 3, the Plaintiffs rely on **The Center for Health, Human Rights and Development (CEHURD) & 4 Ors v. Nakaseke District Local Administration HCCS No. 111 of 2012**. However in my discernment, the facts in that case are distinguishable from those before me. In that case, the death of the mother and the baby were found by the court to be as a result of the negligence of the hospital staff. In this case, the death of the baby cannot be said to be as a result of the negligence of the hospital staff. On the same basis, the facts in this case are distinguishable from those in **Hon. Bernard Mulengani v. The Attorney General and 2 Ors HCCS No. 29 of 2011** where too, the court had evidence and was satisfied that the hospital staff was responsible in negligence for the death of the mother of the child that was delivered. Without any evidence imputing such negligent death on the hospital, issues 1 and 3 are redundant and /or resolved in the negative.

Issue two: Whether acts and/or omissions of the hospital staff violated the right to access health information and the right to health of the 2nd and 3rd Plaintiffs contrary to Articles 41(1), 8A, 45 and Objectives XX, XIV (b) of the Constitution

12. From the evidence of PW1 and PW2, it is not so clear whether they demanded for the body of their second child before they were discharged from the hospital. However I believe the testimony of PW1 and PW2 that when being discharged, they were given a discharge form indicating that PW1 had given birth to only one baby alive. They insisted that she had given birth to two babies and subsequently, the 1st discharge form was retrieved and they were given another one indicating that she had given birth to 2 babies one alive and the other dead. They were told to go to the mortuary for the dead baby.

13. PW2 testified that on receiving that information, they went to the mortuary but the attendant there told them that they did not have the body of their dead baby. They went home that day without the second baby. The next day, PW2 reported the matter to Mulago causality police post where he was referred to Mulago police post.

14. In the circumstances of this case where it is not in dispute that PW1 delivered two babies, the failure by the hospital to give PW1 and PW2 any information by way of a death certificate or otherwise regarding their 2nd baby was a violation of their right to access this information as enshrined in Article 41 of the Constitution.
15. Needless to say PW1 and PW2 as parents of the 2nd baby were entitled to free and easy access to see and know all about their baby but this was not done. That the baby was dead does not diminish this entitlement. However although the Plaintiffs argue the right to information and health jointly, in the circumstances of this case, I find it more suitable to discuss the right to health under issue 4.

Issue 4: Whether the 2nd and 3rd Plaintiffs were subjected to cruel, inhuman and degrading treatment as well as psychological torture contrary to Articles 24 and 44(a) of the Constitution

16. Uganda is a state party to the International Covenant on Civil and Political Rights (ICCPR),¹ the International Covenant on Economic, Social and Cultural Rights (ICESCR),² the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT)³ and the African Charter on Human and People's Rights (the African Charter)⁴ which provide for the right to freedom from torture, inhuman and degrading treatment. The Constitution also guarantees this right for all persons.⁵ Any issues regarding domestication of the international and regional conventions do not arise since freedom from torture is embedded in Articles 24 and 44 of the Constitution and the right to health envisaged in the Directive Principles in the Constitution.
17. In its General Comment No. 20, the Committee on Civil and Political Rights explained that "the prohibition of torture in Article 7 of the ICCPR relates not only to acts that cause physical pain but also acts that cause mental suffering to the victim. ... It is

¹ Ratified on 21 June 1995.

² Ratified on 21 January 1987.

³ Ratified on 3rd November 1986.

⁴ Ratified on 10th May 1986.

⁵ Articles 24 and 44 of the Constitution of Uganda.

appropriate to emphasize in this regard that Article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.”⁶

18. The Committee on Economic, Social and Cultural Rights in its General Comment No. 14 explained that the right to health is not to be understood as a right to be healthy.⁷ The right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, including sexual and reproductive health, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection, which provides equality of opportunity for people to enjoy the highest attainable level of health.⁸

i) Obligations to respect, protect, promote and fulfill the right to health

19. The analysis of the right to health cannot be complete without a discussion of the internationally accepted ideas of the various duties or obligations engendered by it as an economic, social and cultural right. To this end, the African Commission in its principles and guidelines on the implementation of economic, social and cultural rights in the African Charter has explained that all human rights, including economic, social and cultural rights, impose a combination of negative and positive duties on States. A useful framework for understanding the nature of the duties imposed by economic, social and cultural rights is the duty “to respect, protect, promote and fulfill” these rights. No hierarchy is accorded to any of these duties and all should be protected through administrative and judicial remedies.⁹

⁶ General Comment 20, adopted at the forty fourth session of the Human Rights Committee on 10 March 1992.

⁷ General Comment 14, adopted at the twenty-second session of the Committee on economic, social and cultural rights on 11th August 2000.

⁸ Ibid.

⁹ African Commission on Human and People’s Rights Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights, adopted on 24 October 2011. See also the Commission’s Communication No. 155/96 Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria.

a) Obligation to respect

20. The obligation to respect requires that States parties refrain from interfering directly or indirectly with the enjoyment of economic, social and cultural rights. This entails respecting the freedom of individuals and peoples to use all of the resources at their disposal to meet their economic, social and cultural needs and obligations.¹⁰
21. The obligation to respect also requires States to take positive measures to ensure that all branches of government (legislative, executive and judicial) at all levels (national, regional and local), as well as all organs of state, do not violate economic, social and cultural rights.¹¹

b) Obligation to protect

22. The obligation to protect requires the State to take positive measures to ensure that non-state actors such as multi-national corporations, local companies, private persons, and armed groups do not violate economic, social and cultural rights. This includes regulating and monitoring the commercial and other activities of non-state actors that affect people's access to and equal enjoyment of economic, social and cultural rights and ensuring the effective implementation of relevant legislation and programs and to provide remedies for such violations.¹²
23. The obligation to protect is very much intertwined with the tertiary obligation of the State to promote the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.¹³

¹⁰ Ibid.

¹¹ Ibid.

¹² See the SERAC case: Communication No. 155 of 1996.

¹³ African Commission on Human and Peoples Rights Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights, adopted on 24 October 2011.

c) Obligation to promote

24. The duty to promote economic, social and cultural rights requires States to adopt measures to enhance people's awareness of their rights, and to provide accessible information relating to the programs and institutions adopted to realize them. In this regard, the African Charter explicitly places an obligation on States Parties "to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood."¹⁴
25. It also includes an obligation to promote the values and objectives of economic, social and cultural rights in administrative and judicial decision-making. The training of the judiciary and administrative officials should expressly include economic, social and cultural rights.¹⁵

d) Obligation to fulfill

26. The duty to fulfill economic, social and cultural rights requires States parties to take positive steps to advance the realization of the rights. Such measures should be comprehensive, coordinated, transparent, and contain clear goals, indicators and benchmarks for measuring progress. This obligation is "a positive expectation on the part of the State to move its machinery towards the actual realization of the rights." The State should continually aim at improving both the range of individuals, communities, groups and peoples who have access to the relevant rights as well as the quality of enjoyment.¹⁶
27. The duty to fulfill includes the adoption of measures that enable and assist individuals and communities to gain access to these rights on their own. In cases where individual and communities are unable to gain access to these rights by the means at their disposal, the obligation will be, "to take measures necessary to ensure that each person

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

within its jurisdiction may obtain basic economic, social and cultural rights satisfaction.”¹⁷

28. The rights of vulnerable and disadvantaged groups should be prioritized in all programs of social and economic development, and particular attention must be paid to vulnerable and disadvantaged groups in programs aimed at ensuring access to appropriate services and resources.¹⁸
29. This last layer of obligation requires the State to fulfill the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realization of the rights. This is also very much intertwined with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).¹⁹

ii) Resources and progressive realization

30. Also central to any meaningful discussion of the right to health are the concepts of resources and progressive realization. The African Commission in its principles and guidelines explained that the obligation to progressively and constantly move towards the full realization of economic, social and cultural rights, within the resources available to a State, including regional and international aid, is referred to as progressive realization.²⁰ While the African Charter does not expressly refer to the principle of progressive realization this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in accordance with articles 61 and 62 of the African Charter. States parties are therefore

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ See the SERAC case: Communication No. 155 of 1996.

²⁰ African Commission on Human and People's Rights Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights, adopted on 24 October 2011.

under a continuing duty to move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights.²¹

31. The concept of progressive realization means that States must implement a reasonable and measurable plan, including set achievable benchmarks and timeframes, for the enjoyment over time of economic, social and cultural rights within the resources available to the state party. Some obligations in relation to progressive realization are immediate. For example, States have an obligation to take concrete and targeted steps to realize economic, social and cultural rights. The essential needs of members of vulnerable and disadvantaged groups should be prioritized in all resource allocation processes.²²
32. States need sufficient resources to progressively realize economic, social and cultural rights. There are a variety of means through which states may raise these resources, including taxation. The duty of the individual to pay taxes imposed by the African Charter implies that there is an obligation on the State to institute an effective and fair taxation system and a budgeting process that ensures that economic, social and cultural rights are prioritized in the distribution of resources.²³
33. In **Purohit and Moore v. The Gambia** the African Commission expressed that “ it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on part of States party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realized in all its aspects without discrimination of any

²¹ Ibid.

²² Ibid.

²³ Ibid.

kind.”²⁴ Clearly the notion of progressive realization within available resources must not be viewed as an excuse to defeat or deny economic, social and cultural rights like the right to health.

34. It is not in dispute that although PW1 gave birth to twins on the 14th March 2012, she left the hospital on the evening of 15th March 2012 with only one baby. I also take as true PW1’s testimony that by the time of discharge from the hospital with PW2, she was first given a discharge form showing that she had given birth to one baby, she complained and the discharge form was retrieved from her and another one showing that she had given birth to two babies one alive and the other dead was given to her.

35. DW2 Mandida Mariam was responsible for handling the second baby after delivery. From her statement and cross examination in court, DW2 explains that she used a green hospital linen sheet to wrap the dead baby, weighed the dead baby at 1.5 kg and that while the first baby born alive was taken to the mother at the post delivery area, the dead baby was taken to the room where dead bodies are taken. She explained that she was off duty on 16th March 2012, but she was called and asked about the whereabouts of the dead baby. When she reported on 17th March 2012, the deputy in-charge briefed her about the missing baby. She immediately went to the room where the dead bodies for newborns are put and she searched the entire room and found the body in a hard paper box still wrapped in the green hospital linen but the label had fallen off. She further testified that the mortuary personnel had not taken the body earlier since the label had fallen off. The mortuary team was called and they took the body.

36. PW1 and PW2 insist that they have never received the body of their dead child from the hospital. When PW2 went to the mortuary on 16th March 2012, they were told that there was no dead body of a baby in the mortuary. On 17th March 2012, DW2 called

²⁴ African Commission on Human and Peoples Rights Communication 241 of 2001.

and told PW2 that the dead baby had been found and they should go to the mortuary for this baby.

37. On going to the mortuary on 17th March 2012, PW2 was given a body of a baby. He doubted this was their baby because the body looked freshly dead and could not be their child who was born dead some days prior on 14th March 2012. PW2 also explained that the body he was being given had a fine and normal skin and not macerated skin that their baby had at birth. He refused to take the body. He explains also that the hospital insisted on giving him Ug. Shs: 400,000/= and an ambulance to take the body for burial but he refused.
38. By this time, the police had already been involved in the investigations of this missing baby and had already been to hospital to investigate this matter. PW4 No. 20730 Detective Woman Sergeant Nankumba Irene testified that on 21st March 2012 while at Wandegeya police station she was allocated a file CRB 26 of 2012 forwarded from Mulago police station. The complaint regarded PW1 and PW2 who had reported the theft of their baby. PW4 explained that when she discussed the case with PW2, he informed her that Mulago hospital had released a body of a child that wasn't theirs and that he was not comfortable with Mulago taking their samples for DNA taking. PW4 advised him to go home and return the next day with his PW1, his wife so that she takes them to the Government Analyst Laboratory.
39. As PW2 left, PW4 proceeded to the hospital mortuary where on arrival she met Dr. Kalungi, the pathologist who had conducted the post mortem on the disputed body. Dr. Kalungi showed PW4 the body, which was the only body of a dead baby in the mortuary and it was a baby girl. Dr. Kalungi told PW4 that he had already conducted a post mortem at the request of Detective Constable Ogowath Richard. He also informed PW4 that he had already extracted samples for the DNA testing and told the mortuary attendant to take them to the Government Analyst laboratories pending extraction of blood samples of PW1 and PW2 for testing.

40. The next day when PW1 and PW2 went back to PW4, she took them to the laboratory where blood samples were extracted from them for DNA comparison with the baby. The two forms regarding the extraction of these samples were collectively tendered as PW4 Exhibit 1. Later DW4 received the DNA analysis report, which was tendered as PW4 Exhibit 5. PW4 also recorded a statement, which was tendered as PW4 Exhibit 6.
41. PW5 Onen Geoffrey is a Principal Government Analyst at the laboratory. He acknowledged receiving instructions in this case explaining that he received 3 exhibits submitted on 22nd March 2012. These included a scalp with hair and a right femur bone under PM 001/12. The 2nd and 3rd exhibits were blood samples from PW1 and PW2 respectively. The request was to confirm whether there was any biological relationship between the blood samples and PM 001/12.
42. After an insight on how he conducted the tests, PW5 explained the conclusions in his DNA report and it was tendered as PW5 Exhibit 1. His conclusions were that the results of the analysis did not support PW2 as the biological father of the dead child and neither did they support PW1 as the mother of the dead child.
43. In cross examination he confirmed his report and explained the process of receiving samples at the laboratory and the process of extracting DNA from them. He also explained that as a matter of procedure, the laboratory could not consult with Mulago as it deals with what is submitted.
44. Although the Defendant counsel in submissions appears to question the samples of the dead baby that were used by PW5, I don't think counsel has capacity to do this in submissions. It would be to adduce evidence from the bar in submissions. If this was the contention of the Defendants, then counsel should have led such evidence through material witnesses at the hearing. Of the two witnesses that the Defendants brought, none of them testified on this. I therefore reject this evidence in submissions as baseless.

45. In their submissions, the Defendants claim that the body of the baby in issue is still in the hospital mortuary. As earlier explained, this evidence should not come from the bar in submissions. Nonetheless even if I was to consider it as valid it is not understandable why the hospital did not to date cause more tests to compare the DNA of what it claims to be the body in the mortuary and the 2nd and 3rd Plaintiffs.
46. Summons for a one Nalongo who DW2 said was responsible for taking bodies from the hospital to the mortuary and DW2 were issued but they did not appear. In fact on the date set for them to appear, there was no explanation for their absence. In these circumstances, I reject the Defendant's attempts to adduce such evidence in closing submissions when it has no foundation in the circumstances of this case.
47. Be that as it may, at page 9 of their submissions and from a holistic reading of the evidence of DW2, the Defendants acknowledged mistakes on the part of DW2 who handled the dead baby. In her witness statement, DW2 says she labeled the baby and put it where dead bodies are placed. Yet in her police statement, she stated that she forgot to label the body because she was called to deliver another mother and by the time she finished work that day, she had not labeled the body and only remembered when she was at home.
48. These contradictions may point to a possibility of something sinister on the part of DW2 in regard to the missing body of the child. Having heard DW2 and watched her demeanor in court, although she was on oath, I was not satisfied that she was a truthful witness. I therefore exercise extra caution in relying on any part of her evidence regarding the missing dead baby. Having assessed the Plaintiffs' and Defendants' evidence, I am not convinced by the Defendants' theory. Rather I am convinced by the coherence of the Plaintiffs' evidence that samples used in the DNA test in issue were of the body given to PW1 and PW2 on the 17th March 2012 as the body of their baby. I am also satisfied that there was no interference in the movement of these samples from the hospital mortuary to the laboratory for the said analysis.

49. From the evidence, it is proven to my satisfaction that the body of the baby given to PW1 and PW2 as that of their baby was in fact not the body of their dead baby. In the circumstances of this case, I am also satisfied that the body of their baby got lost or was misplaced due to the negligence of DW2, an employee of the hospital for which the first Defendant is Executive director. I also find that DW2 in her actions or inactions had the dead baby get lost or misplaced while in her responsibility and care and in the course of her work as an employee of the hospital. This makes the hospital vicariously liable for the lost baby.

50. In **Blyth v. Birmingham Water Works Co. 11 Ex 784**, negligence was defined as “the omission to do something which a reasonable man would do; or doing something which a reasonable man would not do.” In **Donoghue v. Stevenson (1932) AC 362** the ingredients of negligence were outlined as: i) The Defendant owed a duty of care to the Plaintiff; ii) there was breach of that duty by the Defendant; iii) the Plaintiff has suffered as a result of breach of duty. In the facts before me where it is not disputed that the 3rd Plaintiff gave birth to 2 babies, there was a duty on the staff of the hospital to handle the dead baby safely and give her to the 2nd and 3rd Plaintiffs when they were being discharged. This was not done and the 2 Plaintiffs have suffered as a result of this breach of duty.

51. DW1 testified that for a dead baby to get lost, it would be the disorganization of the hospital and that it would be the negligence of the person responsible to pick the dead bodies. He clarified that the mortuary is part of the hospital. He also explained that if a mother delivers a dead child they are supposed to take that child with them on discharge and that PW1 had to take both of her babies dead or alive on discharge. By inference, DW1 also acknowledged that the hospital staff was negligent when they misplaced or otherwise failed to give PW1 and PW2 their dead baby on discharge. Negligence in the actions or inactions of the staff of the hospital is proved to my satisfaction.

52. The Defendants contend in their submissions that PW1 and PW2 did not suffer psychological torture any more than that which they would have suffered if the body had not been misplaced or lost because in any case, any parents who lose a baby suffer psychologically. On the other hand PW1 explaining that she gave birth to two babies but went home with one broke down, profusely crying, when explaining that people ask her why she calls her baby Babirye when she has only one child and she has no answer. PW3 Nakibuuka Noor Musisi - the Program Manager for Strategic Litigation at the first Plaintiff drew the nexus between psychological torture and the right to health to my satisfaction. I am more convinced by the claim of psychological torture by PW1 and PW2. The Defendant's claim is aimed at diminishing the responsibility of the Defendants for the lost baby and I find it deplorable in the circumstances of this case.
53. As an African couple, the 2nd and 3rd plaintiffs were denied the opportunity to carry out burial rituals for their child which in my view would have constituted a fundamental part of their healing process. These plaintiffs have been denied the opportunity have closure in regard to their second baby. By denying them the opportunity to bury their baby the Defendants compounded their pain and subjected them to more psychological torture. Clearly this violated their right to health and freedom from torture as enumerated in the legal instruments above.
54. This case also points to a bigger problem in the country. PW1 explained that for the 9 months of her pregnancy, she only went for antenatal care once in the early stages and for the rest of the pregnancy she was in the village taking local herbs. PW1 did not even know that she was carrying two babies in the pregnancy. In the circumstances of this case, it is easy to infer that the reason PW1 had only one antenatal visit and did not know she had twins was because she could not afford the costs of accessing health care services. This points to a violation of the obligations of Uganda enumerated above. In particular it points to a violation of the obligation to fulfill the right to health.

55. It also reflects a violation of Article 2(a), (b) of the Protocol to the African Charter on Human and Peoples Rights on the Rights of women in Africa which requires state parties to take appropriate measures to provide adequate, affordable and accessible health services, including information, education and communication programs to women especially those in rural areas; establish and strengthen existing pre-natal and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding.²⁵
56. DW2 in an attempt to explain her actions or omissions seems to explain that she failed or forgot to label the dead body because she was rushing to attend to another mother and that she was alone on the shift. PW1 clearly demonstrates a failing of the state in its obligations to provide health care. DW2 on the other hand, demonstrates that health care providers are over burdened with too much work and that they are unable to competently provide the health care services required of them in such circumstances.
57. DW1, the doctor who delivered PW1's baby testified that because he had over 20 mothers waiting to deliver, after PW1 delivered her second baby, he moved on to attend to the other mothers waiting. He also testified that if deliveries are normal, a doctor can deliver ten to twelve mums in a day. DW1 also demonstrates the systemic problem in the hospital, where he had over 20 mothers waiting yet his efficient capacity, according to him should be a maximum of about 10. In fact in cross-examination he estimated that he conducted about 14 normal deliveries that day. This was above his standard normal of ten to 12 a day. In all events, DW1 also drives home the point that certainly medical practitioners in the hospital are over burdened in their work, which may hinder their effective performance. This is retrogressive for the right to health.
58. This case also points to a systemic problem concerning respect and handling of the dead generally and babies in particular while in medical facilities in Uganda. This problem is also demonstrated in the matter of an inquiry by the **Uganda Medical and Dental Practitioners Council into alleged professional misconduct by Dr. Asinja**

²⁵ Uganda ratified this Protocol on 22 July 2010 with a reservation on abortion.

Kapuru at Mulago national referral hospital.²⁶ In this case, a baby boy of a couple died at birth but the couple was given the body of a baby girl. It is noteworthy here that even this incident was in the hospital in issue before me now.

59. In the case before me, one is left wondering about what happened to the couple whose fresh baby was being given to PW1 and PW2 and whose samples were taken for the DNA comparison. Chances are those parents also had no baby to take for burial when being discharged or were given the body of the child of other parents. With such cases, it is not farfetched to consider that several cases of this nature may go unnoticed and unpunished, which is absurd.

60. All these instances when put in context point to the bigger problem at the National Referral hospital and paint a bleak picture; they demonstrate the psychological torture that parents and relatives endure when they go to Mulago hospital for delivery of their babies. Issue 4 is resolved in the affirmative.

Issue 5 - Remedies

61. In General Comment 22 of 2016, the Committee on Economic Social and Cultural rights explained that States must ensure that all individuals have access to justice and to a meaningful and effective remedy in instances where the right to sexual and reproductive health is violated. Remedies include but are not limited to adequate, effective and prompt reparations in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as appropriate.²⁷ Although this General comment concerns sexual and reproductive rights, the remedies presented are applicable in the same way to the right to health in issue before me since they are all socio economic rights.

²⁶ This case was decided in Kampala, Uganda by the Medical and Dental Practitioners Council on 10 July 2013.

²⁷ General Comment No. 22 of 2016 on the right to sexual and reproductive health in Article 12 of the ICESCR.

Even if one does not consider this case as one for sexual and reproductive rights, to the extent the right to health and right to sexual and reproductive health are social economic rights, the principles enumerated on remedies are applicable to this case.

62. The 2nd and 3rd Plaintiffs seek a total of Ug. Shs: 300, 000,000 as damages for the violation of their rights and the psychological torture suffered. General damages are awarded at the discretion of Court. However I find this amount manifestly too high in the circumstances of this case where not all issues framed are resolved in the Plaintiffs favor. However in determining the amount to be awarded as general damages, I am alive to the psychological torture suffered by the 2nd and 3rd Plaintiffs for the failure to be availed the body of their baby, the failure to have a decent burial for their baby, the failure to have closure in respect of their dead baby and the violation of their right to health and access to information. I am also alive to the fact that although their second baby was born dead, this does not diminish the pain suffered through the hospital's failure to give them this dead baby.
63. Based on all the above, having considered the evidence and submissions of the Plaintiffs and Defendants, I am not satisfied that the 2nd and 3rd Plaintiffs were subjected to cruel, inhuman or degrading treatment. I am also not satisfied that there was a violation of the dead child's right to know and be cared for by her parents or a violation of the 2nd and 3rd Plaintiffs right to a family by the staff of the hospital.
64. For the failure to provide information regarding the dead baby of PW1 and PW2, the hospital violated their right to access this information under Article 41(1) of the Constitution.
65. By failing to avail the body of their dead baby to be buried, the hospital subjected the 2nd and 3rd Plaintiffs to psychological torture in 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.
66. The psychological torture inflicted on PW1 and PW2 amounted to a violation of their right to health in contravention of Article 45, Objectives XX, and XIV (b) of the Constitution, Article 12 of the ICESCR and Article 16 of the African Charter.

67. Accordingly, the Plaintiffs claim is allowed in part with the following declarations and consequential orders:

- i. The police must conclusively investigate the disappearance of the baby of PW1 and PW2 in issue and file a report on the same in court within 6 months from the date of this judgment at the latest.
- ii. Ms. Mandida Mariam the midwife who handled the baby at birth must be held to account for the movement of the baby from her care.
- iii. Mulago hospital shall take steps to ensure and/or enhance the respect, movement and safety of babies, dead or alive, in its facilities.
- iv. For two years from the date of this judgment the 1st Defendant shall make written reports, every four months, regarding the steps or measures taken in fulfilling (iii) above and serve the same on the 1st Plaintiff.
- v. The 1st Plaintiff shall have free access to Mulago hospital and continuously oversee the implementation of the measures in (iii) above and make counter reports on their effectiveness or otherwise within two months from the date of receipt of the 1st Defendants reports.
- vi. The 1st Plaintiff shall ensure that the 2nd and 3rd Plaintiffs access psycho-socio care and counseling services as part of their healing. Mulago hospital shall pay for any attendant costs in this regard.
- vii. Where necessary this Court reserves the right to make further orders regarding the implementation (iii) above.

viii. The 2nd and 3rd Plaintiffs are awarded Ug. Shs: 85,000,000/=(Eighty five million only) as general damages for the psychological torture, violation of their rights to health and access to information resulting from the disappearance of their baby at Mulago hospital.

ix. Since this was a public interest litigation case there was no prayer for costs and I will not make any order for the same.

I so order

LYDIA MUGAMBE
JUDGE - CIVIL DIVISION
24th JANUARY 2017.