

A Critical Analysis of the Right to Emergency Medical Treatment in Private Facilities in
Kenya

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Declaration

I, EVERLYN NJERI NJOROGÉ, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Dr; Peter Kwenjera.

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DEDICATION

To the families of the victims who lost their loved ones-may the proper implementation of the right to emergency medical treatment be in the near future for you.

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ABSTRACT

A human being is prone to fall sick and require access to emergency medical treatment from any hospital regardless of whether or not they can pay the said access. Private hospitals, which are at first instance business ventures, need their patients to pay for services in order for the said hospitals to meet their day-to-day expenditures, and make profits. However, does the right to receive payment for services offered supersede the right to emergency medical treatment?

Accordingly, the study seeks to determine the nature and scope of emergency medical treatment, to determine the relationship between the right to receive payment for services offered by private medical practitioners and the obligation to protect the right to emergency medical treatment by private hospitals and the legal issues that emerge from the right to emergency medical treatment.

The study's contention is that the right to emergency medical treatment prevails over the right to receive payment for services offered in medical emergency situations and that the private sector is covered under this scope. The state has an obligation to ensure that the right is implemented effectively in the country. The private medical practitioners have a legal duty to provide medical services during emergency situations.

This study is based on a desktop research and a survey to gain insight from the private practitioners on how the actual practice is done. The survey was carried out to ascertain whether the private hospitals in Kenya violate the right to emergency medical treatment.

Based on the results, the study concluded by recommending a need to develop an organised national emergency care system, to facilitate special training on emergency medical treatment and promote public-private partnerships.

LIST OF ABBREVIATIONS

CESCR - Committee on Economic and Social and Cultural Rights

EMKF - Emergency Medicine Kenya Foundation

EMTALA - Emergency Medical Treatment and Labour Act

KMA - Kenya Medical Association

KMPDB - Kenya Medical Practitioners and Dentists Board

LMIC's - Low and Middle Income Countries

NHIF - National Health Insurance Fund

NTSA - National Transport and Safety Authority

LIST OF CASES

Allison v General Council of Medical Education and Registration [1894] 1 QB 750.

Luco Njagi & 21 others v Ministry of Health & 2 others [2015] eKLR

Parmanand Katara v. Union of India & Ors [1989]

R v Pharmaceutical Society of Great Britain, Ex parte Sokoh [1986]

Rebecca Nyokabi Githu V Medicins Sans Frontiers (FRANCE)[2013] eKLR

Soobramoney v Minister of Health (Kwazulu-Natal), [1997]

LIST OF LEGAL INSTRUMENTS

Constitution of Kenya (2010)

Health Act (No.21 of 2017)

International Code of Medical Ethics

Medical Practitioners and Dentists Board Act (No.12 of 2012)

Medical Practitioners and Dentists (Professional Fees) Rules (2016)

Universal Declaration of Human Rights

World Medical Association Declaration of Geneva

Chapter One: Introduction

1.1. Background

It is needless to say how important health facilities or medical services are in our lives. Hospitals provide medical treatment services and it is vital to understand that they are also business entities, especially private health facilities. Any hospital needs money to run, to buy resources and pay their employees. However, does the right to be paid the money for the services they offer supersede the right to emergency medical treatment?

It is a common practice in Kenya to pay deposit or to have medical insurance cover in order to be admitted in a private hospital. Private practice, as defined in the Medical Practitioners and Dentists Board Act, means the practice of medicine for a fee.¹

This issue was discussed in the National Assembly where a nominated member, Mr. Munyao, raised a concern that people in Ukambani were dying because of malaria. His issue was that private hospitals could not admit persons without a deposit even if it was late at night or weekends. He stated that hospitals, whether public or private, should admit patients in emergency conditions and then give them one or two days to raise the money.²

The Kenyan Constitution (hereinafter referred to as ‘the Constitution’) assures every person of their right to emergency medical treatment which shall not be denied.³ This means that if one has the ability to administer medical treatment or the ability to remove the patient from an emergency condition, there is no reason to withhold the said service or duty. Furthermore, the service should be of reasonable quality as the patient has the right to the highest attainable standard of health which includes the right to health care services.⁴

In addition to this, the patient is a consumer of medical services being provided by the hospital. Therefore, they have a right to have services of reasonable quality⁵ and to be compensated for any loss or injury suffered arising from defects in the service.⁶ It is clear

¹ Section 2, *Medical Practitioners and Dentists Board Act* (No.12 of 2012)

² Kenya National Assembly Official Record (Hansard) 15 April 1998.

³ Article 43(2), *Constitution of Kenya* (2010)

⁴ Article 43(1), *Constitution of Kenya* (2010)

⁵ Article 46(1)(a), *Constitution of Kenya* (2010)

⁶ Article 46(1)(d), *Constitution of Kenya* (2010)

that the provision does not exclude private practice. This means that the scope of emergency medical treatment is not only limited to public health facilities. However, this has been an issue in Kenya for a long time now.

In October 2015, an incident occurred that was widely reported by media. Alex Madaga, was involved in a hit and run accident on the 5th of October 2015 at 9pm. He was taken to Kikuyu Mission Hospital by an ambulance where he was referred to Kenyatta National Hospital. At Kenyatta National Hospital the staff claimed not to have any Intensive Care Unit (ICU) beds. They sought assistance from Coptic and Ladnan hospital where his wife was asked to deposit Kenyan shillings (Kshs) 200,000/= for Mr. Madaga to be admitted. Unfortunately, she could not raise the money. They returned to Kikuyu Mission hospital to refill the oxygen tank because it was running out. The paramedics in the ambulance said that he had internal head bleeding. They went back to Kenyatta National Hospital where he was admitted upon his cousin's complaint. He lost his life soon afterwards. Alex Madaga had spent 18 hours in an ambulance fighting for his dear life.⁷

Recently, another incident occurred around midnight on a Saturday. Chege Okach (not his real name) rushed his brother to hospital and was examined by a doctor, in Aga Khan hospital. It was confirmed that he had suffered a mild heart attack. According to the doctor, he was very likely to suffer another attack. Chege and his sister-in-law agreed that he needed to be admitted but were shocked when the receptionist demanded a deposit of Kshs 700,000/= in order for the patient to be admitted. They could only raise Kshs 40,000/= at the time and Chege's brother had no medical cover. The deposit at Nairobi Hospital was Kshs 600,000/= and MP Shah was Kshs 450,000/=. However, Chege's concern was that a bed at the ICU charges between thirty five thousand to forty five thousand per day. They were able to raise the money for a night and still the patient could not be admitted because of not proving the ability to pay the rest.⁸

Despite the effort of the families to achieve justice, the offenders still walk free. Alex Madaga's family is one of the few lucky victims who managed to get compensation.

⁷ 'Eunice Kilonzo: 'Car accident survivor spends over 18 hours waiting in ambulance', *Daily Nation*, 7 October 2015 <http://www.nation.co.ke/news/Pain-of-patients-18-hours-in-ambulance/1056-2903538-vvf181/index.html> on 23 January 2017.

⁸ 'Gatonye G. and Mohamed H, 'How huge medical bills are crippling millions of families' *Standard Media Group*, 11 April 2017 <https://www.standardmedia.co.ke/business/article/2001235904/how-huge-medical-bills-are-crippling-millions-of-families> on 9 August 2017.

Chief Magistrate Peter Gesora ruled that the family to get compensated Kshs 150,000/= for Mr. Madaga's suffering, minimum wage compensation of 20 years of Kshs 2,068,248/= and special damages of Kshs 189,659/=.⁹ However, little is done with other cases. The country still lacks an organised national emergency care system. Healthcare system in Kenya still has a long way to go.

1.2. Statement of the Problem

Despite having clear provisions in the Constitution to guarantee every person the right to emergency medical treatment, the private health facilities violate this right by demanding an unreasonable deposit before providing any emergency medical treatment.

1.3. Study Justification

Research into this topic was necessitated by the need to protect and implement the right to emergency medical treatment of individuals in the private sector. Thus there is a need to critically analyse how private medical practitioners or private healthcare providers can render emergency medical treatment services without their right to receive payment for services offered being infringed. Moreover, there is a need to examine whether the actions of the private medical practitioners who refuse to render emergency medical treatment can be rationalised within the framework of the law.

The Constitution clearly states that, 'A person shall not be denied emergency medical treatment'.¹⁰ In addition to this, it states that a right or fundamental freedom can be limited by law. However, this is only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.¹¹ Therefore, the right to receive payment for services offered for private medical practitioners is limited as far as Article 43 (2) of the Constitution is concerned. Moreover, the Kenya Health Policy (KHP) 2012-2030 states that emergency health services should be provided regardless of the ability to pay.¹²

⁹ 'Eunice Kilonzo, 'Death After Arrival: Terrible emergency services are killing by the thousand' *Daily Nation*, 7 November 2017 <http://www.nation.co.ke/health/Dead-after-arrival/3476990-4176182-n522p3z/index.html> on 13 January 2018.

¹⁰ Article 43 (2), *Constitution of Kenya* (2010)

¹¹ Article 24 (1), *Constitution of Kenya* (2010)

¹² Ministry of Health, *Kenya Health Policy*, 2012-2030, 21.

Despite private hospitals and doctors having a right to a fee, the fee should not hinder one from getting emergency medical treatment in cases where individuals lack funds.

However, the circumstances under which the right to emergency medical treatment can be enforced, especially against private practitioners, still need to be clarified. The Constitution has not defined what emergency medical treatment is or the scope and nature of an emergency medical treatment. However, it does not limit the duty to provide medical emergency treatment to public facilities only.

Patients find themselves being denied emergency treatment mostly because they lack the capacity to meet subsequent financial obligations. The Constitution states that equality includes the full and equal enjoyment of all rights and fundamental freedoms.¹³ This includes the equal treatment to patients with or without financial support during emergencies.

Not only do the private medical practitioners have a legal duty to provide emergency medical treatment, but also have a moral obligation derived from the Hippocratic Oath. Part of it reads: “I swear to fulfil, to the best of my ability and judgment, this Covenant: ... Most especially must I tread with care in matters of life and death? If it is given me to save a life, all thanks.... I will remember that I do not treat a fever chart, a cancerous growth, but a sick human being, whose illness may affect the person’s family and economic stability. My responsibility includes these related problems, if I am to care adequately for the sick. I will prevent disease whenever I can, for prevention is preferable to cure. I will remember that I remain a member of society, with special obligations to all my fellow human beings that sound of mind and body as well as the infirm.... May I always act so as to preserve the finest traditions of my calling and may I long experience the joy of healing those who seek my help.”¹⁴

This means that all medical practitioners, whether public or private, should attend to all patients in an emergency condition without favour, bias or discrimination and to the best of their abilities.

¹³ Article 27(2), *Constitution of Kenya* (2010)

¹⁴ Collins O, *No one shall be ‘Denied Emergency Medical Treatment’ in Kenya: Opportunities, challenges and strategies*, July 20, 2015 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662417 on 26 January 2017.

This dissertation addresses the gap between the laws in place and the implementation of the law. It also addresses the challenges that come with implementing Article 43 (2) of the Constitution focusing on the private sector and offers some recommendations. The right to emergency medical treatment should primarily be granted to all as stated in Article 43 (2) of the Constitution.

The hospitals have a right to ask for a deposit as it is this very same money that maintains the hospital and the resources that the patients use. This is argued after putting into account the fact that a hospital is a business and it follows the market rules.

Therefore, regardless of the financial capabilities of the person who needs the emergency medical treatment, he/she should be attended to with immediate effect. The life of a human person is far more valuable than any money and should not be gambled with. The human person is the subject and the goal of any institution.

Odour and Simiyu did a study of the right to emergency medical treatment in Kenya in 2015. This paper is limited to what the Constitution says in terms of the right to health including emergency medical treatment. When discussing and describing the nature and scope of emergency medical treatment and the legal issues arising from the right to emergency medical treatment, the authors are very limited to the Constitution. This is because the Health Act 2017 was then the Health Bill 2014. They refer to other Statutes such as the Medical Practitioners and Dentists Act.

Further, the scope of their study was wider as they also focused on imprisonment of patients after rendering emergency medical treatment for lack of paying money owed to the doctors. They consider the Medical Practitioners and Dentists Act and the International Covenant on Civil and Political Rights (ICCPR) which prohibit the imprisonment of a person, in this context a patient, merely on the ground of inability to fulfil a contractual obligation.¹⁵

¹⁵ Odour M. And Simiyu D, 'The Right to Emergency Medical Treatment in Kenya' *SSRN Journal* (2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2695134 on 14 January 2017.

Yadav also writes on the right emergency medical care in 2011. The paper critically reviews recent judgment of State Consumer Court of Delhi with regards to the right to emergency care. The author was limited to a geographical scope of India.¹⁶

Odhiambo did a study on the right to emergency medical treatment in Kenya in 2015. He focuses on the opportunities, strategies and challenges that arise from the right to emergency medical treatment in Kenya. He greatly relies on the Constitution and the Medical Practitioners and Dentist Act. The Health Act 2017 was then the Health Bill 2015. Therefore, limited in the statutory law in Kenya.

Darlene, Nyabera, Yusi and Rusyniak did a study in the Western Kenya concerning the emergency centres. The goal of this study was to determine the characteristics of emergency centre patients in Eldoret, Kenya. It will be difficult to generalize results derived from one part of the country to other emergency centres. Moreover, the study focused on both private and public medical facilities.¹⁷

In ‘Medical ethics and payment of fees before treatment’, David wrote a paper and discussed whether it is ethically acceptable for doctors to require payment of fees before treatment and whether refusal to treat before payment represents abandonment of a patient. He limits himself to the ethical responsibility of all doctors whether in private or public facilities. He does not discuss legal issues that emerge from the right to emergency medical treatment.¹⁸

Therefore, the study is justified as it discusses the right to emergency medical treatment of individuals in the private sector in Kenya in the new legal framework.

1.4. Hypothesis

The right to emergency medical treatment shall not be denied as stated in the Constitution. The right to emergency medical treatment prevails over the right to receive payment for services offered in emergency medical conditions. This means that

¹⁶ Yadav M, Right to Emergency Care: Consumer Court, 2011, <http://medind.nic.in/jal/t11/i3/jalt11i3p248.pdf> on 8 February 2017.

¹⁷ Darlene R, Nyabera L, Yusi K and Rusyniak D, ‘Descriptive study of an emergency centre in Western Kenya’, *African Journal Emergency Medicine*, volume 4, March 2014, 19-24.

¹⁸ David M, ‘Medical ethics and payment of fees before treatment’, *South African medical journal*, Volume 101 (2011).

emergency medical treatment must be provided regardless of the financial capabilities of the patient at the time.

1.5. Objectives of the Study

The objectives of the study include:

1. To determine the definition of the nature and scope of emergency medical treatment.
2. To determine the relationship between the rights to receive payment for services offered by private medical practitioners and the obligation to protect the right to emergency medical treatment by private hospitals.
3. To analyse the challenges for non implementation of this right in the private sector.
4. To determine the legal issues that emerge from the right to emergency medical treatment.

1.6. Research Questions

This study addresses the following research questions:

1. What is emergency medical treatment within the context of the Kenyan Constitution?
2. What is the nature and scope of emergency medical treatment?
3. What obligation does this confer to the State in regards to the private sector?
4. Do private practitioners, as a matter of law and not simply moral obligation, have to provide emergency medical treatment in the absence of payment?

1.7. Assumptions of the Study

The assumption that there is a violation of the right to emergency medical treatment in the private practice will be considered to be true while carrying out the research.

1.8. Research Methodology

1.8.1. Desktop research

For this study, most of the information will stem from primary and secondary sources. The primary sources include Constitutions, Statutes, court cases, international instruments and administrative regulations.

Secondary sources include published journals and articles, law dictionaries, commentaries and philosophical works.

1.8.2. Qualitative approach

The use of questionnaires enables a researcher to gain a lot of information in a very short period of time. During the field study, questionnaires were administered to 5 (five) medical practitioners in private hospitals which are based in three counties in Kenya. That is; Nairobi, Nyeri and Mombasa County. The questionnaires were used to determine the percentage of private hospitals in Kenya which violate the right to emergency medical treatment.

1.9. Definition of Terms

Chargeable fees: The fees enumerated under the Schedule to be charged by practitioners offering medical or dental services, or both.¹⁹

Emergency: Health threats that are life threatening and beyond the capacity of the individual/community to manage, and lead to an irreversible damage if not addressed.²⁰

Emergency medical treatment: The Kenya Health Policy 2012-2030 defines ‘emergency medical treatment’ as health care services necessary to prevent and manage the damaging health effects from an emergency situation. In addition, emergency care involves arrangements for transfer of clients once the emergency nature of the service is stabilized. Execution of these transfer arrangements ends the emergency phase of health care.²¹

Health: refers to a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.²²

Health Care Professional: A person who has health professional qualifications and is licensed by the relevant regulatory body.²³

Health care services: The prevention, promotion, management or alleviation of a disease or illness, whether mental or physical and is delivered by healthcare professionals.²⁴

¹⁹ Section 3(1), *Medical Practitioners and Dentists (Professional Fees) Rules* (2016)

²⁰ Ministry of Health, *Kenya Health Policy*, 2014-2030, 66.

²¹ Ministry of Health, *Kenya Health Policy*, 2012-2030, 34.

²² Section 2, *Health Act* (No.21 of 2017)

²³ Section 2, *Health Act* (No. 21 of 2017)

²⁴ Section 2, *Health Act* (No.21 of 2017)

Medical emergency conditions: The Kenya Health Policy 2012-2030 defines ‘emergency conditions’, as the following:²⁵

- a) Those health conditions that are of sudden onset in nature;
- b) Those that are beyond the capacity of the individual/ community to manage;
- c) Those that are life threatening, or will lead to irreversible damage to the health of the individual/ community if not addressed.

Private Health Services: Health facilities that provide health services but are not owned by the national or county government.²⁶

Private Practice: Defined in the Medical Practitioners and Dentists Board Act, means the practice of medicine for a fee either in kind or in cash.²⁷

Referral: The process by which a health facility transfers a client service, specimen or client parameters to another health facility to assume responsibility.²⁸

1.10. Theoretical Framework

1.10.1. Procedural Justice

The study is supported by the theory of procedural justice, commonly known as due process. Procedural justice is concerned with whether there are standards and procedures for making any selection and whether they are followed. It states that everyone should be given equal treatment.²⁹ In other words, it negates discrimination.

Further, procedural justice is concerned with the creation of policies which apply to everyone fairly regardless of the race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.³⁰ Michelle Maiese outlines what makes a procedure fair. This includes consistency, impartiality and neutrality, representation and transparency.³¹ Consistency

²⁵ Ministry of Health, *Kenya Health Policy, 2012-2030*, 21.

²⁶ Section 2, *Health Act* (No.21 of 2017)

²⁷ Section 2, *Medical Practitioners and Dentists Board Act* (No.12 of 2012)

²⁸ Section 2, *Health Act* (No.21 of 2017)

²⁹ Summers J, *Principles of Health care Ethics*, Chapter 2, 53.

³⁰Tara Schofield, *Procedural Justice in the Workplace: Definition, Theory and Examples* <http://study.com/academy/lesson/procedural-justice-in-the-workplace-definition-theory-examples.html> on 9 August 2017.

³¹Michelle Maiese, *Procedural Justice*, January 2004 <http://www.beyondintractability.org/essay/procedural-justice> on 9 August 2017.

means that cases which are alike should be treated the same. The parties or persons making the decisions or policies should be impartial and transparent. In addition, they should conduct a fair hearing.

In this context, all medical emergencies should be treated the same regardless of the background of the person. The parties or persons making the decisions or policies of private medical institutions should be impartial and transparent. This will enable the patients in emergency medical conditions to be treated equally.

The theory of procedural justice is derived from justice which is a principle of medical ethics.³² The etymology of justice is *justus* which means sufficient.³³

There are procedural injustices occurring in the healthcare system. Summers gives a simple example: *if you are waiting to see your primary care physician, did others get to go ahead of you without any clear medical reason?*³⁴ Then there is the main issue of the deposit to be paid before admitting any person. It is legal to charge a fee in order to get any medical service and it is just to pay the fee as it is what is due or owed to the hospital for providing the medical services. However, does this right of being paid the fee prevail over saving someone's life? It is through the eye of procedural justice that one will be able to determine a criterion of admitting any patient in an emergency medical condition with no bias or prejudice.

For instance, in the United States of America, the law allows for flexibility in the determination of reasonable charges to accommodate reimbursement to the various ways in which health services are furnished and charged for. They take into account the customary charges for similar services generally made by the physician or other person furnishing such services. They also take into account the prevailing charges in the locality for similar services. In the case of physicians' services, the prevailing charges are adjusted to reflect economic changes among other considerations.³⁵

³² Summers J, Principles of Health care Ethics, Chapter 2, 47.

³³ <http://medical-dictionary.thefreedictionary.com/justice> on 9 August 2017.

³⁴ Summers J, Principles of Health care Ethics, Chapter 2, 53.

³⁵ 42 code of federation regulations, section 405.502.

1.10.2. Rawls's theory of justice

In addition, the hypothesis can be further supported by Rawls's theory of justice. Rawls is known to define justice through his concept of "original position" or the "veil of ignorance". Rawls wants us to imagine a group of persons who do not know their origin, sex, profession and race to be the persons who draw the principles of justice. In his book "*A Theory of Justice*" he states that this would be the finest way to determine what justice is because this group of people would not be biased. To him, justice is fairness.³⁶

He argues that each person is to have equal rights. In addition, social and economic inequalities are to satisfy two conditions: that they are to be attached to positions and offices open to all under conditions of fair equality of opportunity and that they are to be the greatest expected benefit of the least advantaged members of society.³⁷

Therefore, applying Rawls's theory of justice, it is fair or just to eliminate discrimination while admitting patients in emergency conditions on the grounds of financial ability. The right to emergency medical treatment, as enumerated in the Constitution, states that, "A person shall not be denied emergency medical treatment".³⁸ Meaning that whether or not you are capable of paying the deposit demanded, one should not be denied medical service while in an emergency condition.

Rawls did a significant work trying to simplify the concept of justice. However, there are some criticisms to his theory of justice. He focuses on primary goods and he seems to take little note of the diversity of human beings. In addition, it is almost impossible for anyone to be in this original position for we are already biased and limited as human beings. However, this does not mean we dismiss his theory.³⁹

To the objection he argues that it is important not to get too caught up in the theoretical fiction of the original position. It is not supposed to be realistic but a 'device of representation' or a 'thought experiment'. Therefore, these artificial persons at the original position represent the ideal free and equal rational moral persons whose judgments would be just.

³⁶Rawls J, 'A Theory of Justice', *Cambridge* (2005).

³⁷Rawls J, 'A Theory of Justice', *Cambridge* (2005).

³⁸ Article 43 (2), *Constitution of Kenya* (2010)

³⁹ Kerketta L, 'Theory of Justice by Rawls: its criticisms by Martha C. Nussbaum and Amartya Sen', 9 September 2015 <http://www.legalservicesindia.com/article/article/theory-of-justice-by-john-rawls-its-criticism-by-martha-c-nussbaum-and-amartya-sen-1897-1.html> on 9 August 2017.

1.11. Chapter Breakdown

In chapter 1, the study is introduced. It describes the purpose of the study by providing a historical background of emergency medical treatment in Kenya and stating the problem. It discusses theories in favour of the study, assumptions of the study, objectives and defines the parameters of the methodology to be used.

Chapter two discusses the nature and scope of emergency medical treatment in Kenya. The Kenyan legal framework is analysed and a comparison is drawn from Emergency Medical Treatment and Labour Act (EMTALA) of the United States. In addition, a criterion of deciding what is and what is not considered as an emergency condition is illustrated. The legal definition of emergency medical treatment and emergency condition is analysed.

Chapter three will address the right to receive payment for services offered by the private medical practitioners. It describes both the legal and moral obligations of the doctors and the role of the State in realising the right to emergency medical treatment in the private sector in Kenya. It also examines the rationale behind the violation of the right to emergency medical treatment in the private practice.

Finally, chapter four concludes the study. The findings of the study are stated and some recommendations given as well. Finally, a summary of the main topics is given.

1.12. Limitations

The study limits itself to the scope of private sector and not the public sector. The statistics on emergency medical treatment are also limited as it is very difficult to capture the data following the unpredictable and time-sensitive nature of emergencies. This is more limited in low and middle income countries (LMICs) because of their lack of well organised emergency medical treatment systems.⁴⁰

⁴⁰ Chang Y, Abujaber S, Reynolds A, Camargo A, Obermeyer Z, ‘Burden of Emergency Conditions and Emergency Care Utilization: New Estimates from 40 Countries’ *Emergency Medicine Journal* (2015) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5179323/> on 15 January 2018.

Chapter Two: Nature and Scope of Emergency Medical Treatment

2.1. Introduction

The Constitution does not define emergency medical treatment neither does it expound on the same. This Chapter discusses the nature and scope of emergency medical treatment in Kenya while looking at the existing legal framework. The study draws a comparison with the American medical system by looking at the Emergency Medical Treatment and Labour Act (EMTALA) of the United States. In addition, a criterion of deciding what is and what is not considered as an emergency condition is illustrated.

2.2. Right to health

The right to health is guaranteed in the Constitution under the economic and social rights stating that every person has the right to the highest attainable standard of health, which includes: the right to health care services and reproductive health care.⁴¹

The Banjul charter also dictates that every individual shall have the right to enjoy the best attainable state of physical and mental health.⁴² In addition, the right to health is protected in the international convention of economic, social and cultural rights which states that the right of everyone to the enjoyment of the highest attainable standard of physical and mental health must be recognised by every state party.⁴³

2.3. Nature of emergency medical treatment

The Health Act refers to emergency treatment as the necessary immediate health care that must be administered to prevent death or worsening of a person's medical situation.⁴⁴ Therefore, it is for the purposes of preserving life, which is protected under the Constitution as one of the fundamental rights. It is worth noting that the right to health, and by extension the right to emergency medical treatment, is intrinsically connected to the right to life. If the former is violated, it leads to a negative impact to the right to life. In addition, the United Nations Committee on Economic and Social and Cultural Rights

⁴¹ Article 43(1)(a), Constitution of Kenya (2010)

⁴² Article 16(1), *African charter on human and people's rights*, 1998, 26363 UNTS 1520.

⁴³ Article 12(1), *International convention on economic, social and cultural rights*, 16 December 1966, 14531 UNTS 389.

⁴⁴ Section 2, *Health Act* (No.21 of 2017)

(CESCR) stated in their General Comment that the right to health is indispensable for other rights as every person is entitled to this in order to live in dignity.⁴⁵

2.4. Scope of emergency medical treatment

An emergency is defined as an acute situation of illness or injury that risks life or can deteriorate the health of the person if not managed in time.⁴⁶ The deterioration must be to a point where if not attended to in time, the health of the patient has a high possibility of not being in a normal health status again. However, this does not apply to chronic illnesses.

In the case of *Luco Njagi v. Ministry of Health*, the petitioners were all suffering from renal failure. They required dialysis at least three times a week for treatment. Without dialysis, a person suffering from renal failure often dies. In Kenyatta National Hospital there were 20 dialysis machines, however, only 6 machines were functioning. The hospital gave the in-patients priority to use the machines hence the out-patients rarely got treatment. They were forced to get treatment in private hospitals. However, as in Kenyatta Hospital the charges were Kshs 5,050/= per visit, in private hospitals it could go as high as Kshs 10,000 per session. Seeing as most of them were unemployed or low income earners, they could not afford and in addition, the National Hospital Insurance Fund (NHIF) had refused to pay for them. The petitioners stated that the failure of NHIF to pay for their life threatening dialysis treatment violated Article 43 (2) of the Constitution.⁴⁷

J. Mumbi Ngugi at the High court of Kenya stated that emergency medical treatment would only be available to patients with acute illnesses as opposed to chronic incurable diseases. The need to access emergency medical treatment arises when an individual is faced with the real possibility of death, serious bodily injury or deterioration in health, as a result of sudden events or situations. She stated that even if the petitioners could not access the limited resources whenever they wanted to, this did not mean that they had been denied the right to emergency medical treatment.⁴⁸

In *Soobramoney v Ministry of Health*, the appellant was a 41 year old unemployed man who suffered a stroke which led to his kidneys failing. His condition was irreversible and

⁴⁵ General Comment No. 14, Committee on Economic and Social Rights, Para. 1.

⁴⁶ Section 2, *Health Act* (No.21 of 2017)

⁴⁷ *Luco Njagi & 21 others v Ministry of Health & 2 others* [2015] eKLR

⁴⁸ *Luco Njagi & 21 others v Ministry of Health & 2 others* [2015] eKLR

he was now at the last stages of chronic renal failure. His life could be prolonged by means of regular renal dialysis. The public hospital to which he sought treatment from had a limited number of machines and hence could not get the treatment. Thereafter, he sought treatment in private hospitals but soon could not afford it. He made an application to the court in order for the court to compel the hospital to give the treatment as he argued that it was an emergency medical treatment.⁴⁹

J. Chaskalson stated that the term “emergency medical treatment” is not to be open to a broad construction which would include ongoing treatment of chronic illnesses for the purpose of prolonging life. Suffering from chronic renal failure and requiring treatment two to three times a week is not an emergency that calls for immediate remedial treatment. It is rather an ongoing affair.⁵⁰

The Health Act dictates the scope of emergency medical treatment as: Pre-hospital care, stabilizing of the health status of the individual and arranging for referral in cases where the hospital cannot stabilize the victim or does not have the facilities.⁵¹

The Act does not define what pre-hospital care means. However, it is commonly taken to mean the first aid given in an ambulance and before admission to the hospital. Compared to the emergency medical treatment in the United States, this provision is quite vague and broad.

2.5. Emergency medical treatment and labour Act

The Emergency Medical Treatment and Labour Act of the United States has different definitions and has a more elaborate legal framework with regards to emergency medical treatment. It defines emergency medical treatment as: the necessary action taken after screening a person who is in an emergency condition, to stabilize the person and rendering further treatment for the purpose of preventing the person from aggravation of the medical condition and to ensure the safe delivery of the pregnant women and safeguarding the life of the woman and the child.

⁴⁹ Soobramoney v Minister of Health (Kwazulu-Natal), [1997]

⁵⁰ Soobramoney v Minister of Health (Kwazulu-Natal), [1997]

⁵¹ Section 7 (2), *Health Act* (No. 21 of 2017)

The EMTALA requires health practitioners to not only stabilise the patient, but also to take necessary steps to ensure that the person does not fall in an emergency condition again. Moreover, it safeguards the pregnant women and their unborn children.

In the US, there is need for a medical screening examination. According to Code 1395, when an individual arrives at the hospital, the emergency department must provide the appropriate medical screening examination to determine whether or not the patient is in an emergency condition.⁵²

The Code further provides that if an individual is declared to be in an emergency condition, they should be stabilized or a proper transfer to another medical facility be conducted. The hospital should not transfer an individual until they are stabilised. However, there are exceptions to this. These include: If a person who is legally responsible for the patient requests for the transfer in writing or, a physician has reasonable expectation that the provision of an appropriate medical treatment will be delivered by another medical facility and if a medical person has signed a certificate to authorise the transfer.⁵³

The Code defines an appropriate transfer to be a transfer provided by the transferring hospital that provides the medical treatment within its capacity and minimizes the risks of individual health or the health of the unborn child. Also it is that which the receiving facility has available space and qualified personnel and has agreed to accept the transfer. In addition, the transferring hospital needs to send all the medical records of the patient and provided the necessary medical life support measures during the transfer.⁵⁴

According to the Health Act, consent is not needed if the patient is being treated in an emergency situation. However, the Act is silent with regards to the patient refusing to be treated. The Code states that if one refuses the emergency medical treatment, the hospital should take reasonable steps to secure a written informed consent to refuse the examination and treatment.

⁵² Section 1395, Code of Federal Regulations 42 U.S.C

⁵³ Section 1395, Code of Federal Regulations 42 U.S.C

⁵⁴ Section 1395, Code of Federal Regulations 42 U.S.C

2.6. Private medical facilities not excluded

The Health Act makes it an offence for any medical institution that has the ability to provide these services, to refuse to render such services.⁵⁵ This clearly emphasises that the duty of treating patients during emergency situations, is on all health facilities whether public or private health facilities.

In the case of *Rebecca Nyokabi v Medicins Sans Frontiers*, the Claimant, who was the head nurse in-charge, was dismissed for failure to attend to a patient. She was in a meeting and refused to give emergency treatment to the patient which was a violation to the internal regulations of the hospital. The hospital's Charter required her to provide aid to people in need, victims of natural and manmade disasters, wars and civil wars, irrespective of race, religion, ideology or politics. The hospital stated that this was a neglect of duty.⁵⁶

J. Maureen Onyango stated that according to the evidence presented, it was clear that this was an emergency case. Therefore, by failing to examine the patient the Claimant was indeed negligent. Denying a patient emergency medical treatment because she was in a meeting went against the very purpose for which a medical facility is set up. Therefore, there was valid reason for taking disciplinary action against the Claimant.⁵⁷

In the case of *Parmanand Katara v. Union of India*, the Supreme Court of India noted that in cases of emergency medical treatment, there was no legal impediment for a medical professional to attend to an injured person. The effort to save the person should be the top priority not only of the medical professional but even of the police or any other citizen who happens to be connected with that matter or who happens to notice such an incident or a situation.⁵⁸

2.7. Conclusion

Therefore, medical practitioners are liable when they do not attend to a patient in an emergency situation because it is their legal duty to do so. The EMTALA has quite clear provisions on the latter as it enumerates what a proper transfer entails.

⁵⁵ Section 7 (3), *Health Act* (No. 21 of 2017)

⁵⁶ *Rebecca Nyokabi Githu V Medicins Sans Frontiers* (FRANCE)[2013] eKLR

⁵⁷ *Rebecca Nyokabi Githu V Medicins Sans Frontiers* (FRANCE)[2013] eKLR

⁵⁸ *Parmanand Katara v. Union of India & Ors* [1989]

Chapter Three: Right to receive payment for services offered and the duty of the state

3.1. Introduction

One might argue that limiting the right to receive payment for services offered in order to realise the right to emergency medical treatment is biased against the private medical institutions. The institutions operate in a normal market and have to follow the market rules. However, if compensation is provided to the doctors after rendering the services, limiting their right to receive payment for services offered cannot prejudice their practice.

3.2. Right to receive payment for services offered

It is the right of every person, whether natural or legal, to receive compensation after delivering a certain service. Oduor and Simiyu relate this right to receive payment for services offered to the right to property. They state that in this scenario, the property would be the money owed to the doctors after delivering the medical service.

Legally compelling private medical practitioners to administer emergency medical treatment without compensation, infringes on their property rights. Especially, when a patient is unable to pay for the services rendered. This is so because they have the right to receive payment for services offered. In addition, the private institutions operate in a normal market. This means that failure to follow the market rules might cause them to fall out of business.

Oduor and Simiyu state that as the Constitution justifies the limitation of the right to private property and provides for just compensation to the persons.⁵⁹ Therefore, the State has an obligation to compensate doctors. It would be assumed that the state deprived the doctors from owning their property for the emergency medical treatment to be issued if they are not justly compensated.⁶⁰ What are not justified are uncompensated emergency medical treatment services.

⁵⁹ Article 40(3)(b), *Constitution of Kenya* (2010)

⁶⁰ Odour M. And Simiyu D, 'The Right to Emergency Medical Treatment in Kenya' *SSRN Journal* (2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2695134 on 14 January 2017.

As discussed earlier, this is a limitable right. It is not one of the rights enumerated in Article 25 of the Constitution as rights that may not be limited. Hence, the right to receive payment for services offered or remuneration is subject to Article 24 of the Constitution.

The Constitution provides for a right or fundamental freedom to be limited by law and that the limitation should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Constitution takes into account the importance of the purpose of limitation and the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.⁶¹ This means that the right to receive payment for services offered should not be enjoyed at the expense of the realising the right to emergency medical treatment.

The right to health is indispensable for the exercise of other human rights. This includes the right to receive payment for services offered or profit by any medical private institution.⁶²

3.3. State's duties

It is the obligation of the State to protect the right to health of every person. This is enshrined in Constitution as it states that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.⁶³ The right to emergency medical treatment is tied together with the right to health. Hence the State has an obligation of ensuring that every person enjoys the right to emergency medical treatment.

In addition to this, the article further states that the State shall take legislative, policy and other measures to achieve the progressive realisation of the rights guaranteed under Article 43.⁶⁴ Article 43 provides for the right to the highest attainable standard of health of every person. Note that the realisation of the highest attainable standard of health is progressive. This is because it is based on attaining the resources to promote and protect the right.

⁶¹ Article 24(1), *Constitution of Kenya* (2010)

⁶² Paragraph 1 of General Comment No. 14, the Committee on Economic and Social Rights

⁶³ Article 21(1), *Constitution of Kenya* (2010)

⁶⁴ Article 21(2), *Constitution of Kenya* (2010)

In situations where the right to receive payment for services offered or the right to emergency medical treatment has been infringed, the State shall ensure access to justice for the affected persons and if any fee is required, it shall be reasonable and shall not impede access to justice.⁶⁵

Chirwa argues that the meaning of ‘protecting’ the peoples’ rights through the Bill of Rights is the State shielding the individuals’ rights from infringements by others. Further, the State should provide legal remedies if the rights have been infringed.⁶⁶ The State has an obligation of guaranteeing that everyone is equal before the law and has a right to equal protection of the law.⁶⁷ Oduor and Simiyu argue that the State can violate the right to emergency medical treatment by failing to prevent private medical practitioners from discriminating against people who are financially incapable, vulnerable or marginalised groups and refusing to offer emergency services.⁶⁸ Although the whole existence of private hospitals which offer very expensive services is already discriminatory, this should not be a hindrance to one getting emergency services.

The State has an obligation of providing resources to ensure the implementation of the right to health which extends to the right to emergency medical treatment. If the State claims that it does not have the resources, the onus is on the State to show this.⁶⁹ Some of these resources include the emergency fund from which the doctors are compensated when they render emergency services with no pay.

Mumbi Ngugi J. in *Luco V Ministry of Health* stated that “*the state has a duty to make the necessary budgetary allocation, as well as to take the necessary legislative and policy measures, to ensure that the right to health is realised.*”⁷⁰

3.4. Health Financing

Kenya has a prepaid healthcare coverage of approximately 25%. 75% of the Kenyan population does not have any health insurance.⁷¹ The Health Act provides that the State

⁶⁵ Article 48, Constitution of Kenya (2010)

⁶⁶ D M Chirwa, ‘The Horizontal Application of Constitutional Rights in a Comparative Perspective,’ (2006) *Law, Democracy and Development*, 559-560.

⁶⁷ Article 27(1), *Constitution of Kenya* (2010)

⁶⁸ Odour M. And Simiyu D, ‘The Right to Emergency Medical Treatment in Kenya’ *SSRN Journal* (2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2695134 on 14 January 2017.

⁶⁹ Article 20(5), *Constitution of Kenya* (2010)

⁷⁰ *Luco Njagi & 21 others v Ministry of Health & 2 others* [2015] eKLR.

should ensure the provision of a health service package at all levels of the health care system, which shall include services addressing financial access to health care.⁷² This means that even individuals who face challenges of accessing emergency services in private hospitals are covered. Moreover, the national government shall establish an emergency medical treatment fund for emergencies to provide for unforeseen situations calling for supplementary finance.⁷³ The private medical practitioners can get funding from the national government.

In the United States, the law is clearer on matters concerning funding. The Federal government funds the private hospitals. This allows them to render emergency medical treatment even in situations where the patient is unable to pay. This shows that the US government is going an extra mile in ensuring that there is a balance in this two competing rights.⁷⁴

3.5. The moral obligation of private medical practitioners

Odhiambo argues that ignoring individuals with need for emergency medical treatment would amount to an ‘infamous and disgraceful conduct’.⁷⁵ In addition, Mukesh Yadav expresses his opinions that all medical practitioners have a moral obligation to serve humanity. This is a primary consideration as opposed to earning money which is a secondary consideration. In addition, the right which protects public goods always prevails in the event that there is a conflict between two rights.⁷⁶

McQuoid states that doctors have a duty to provide medical treatment in any emergency situation. Legally and ethically, the doctors cannot refuse to treat persons who cannot pay in advance. He argues that the demanding of medical fees can only be ethically justified if the doctor is faced by a non-emergency situation.⁷⁷

⁷¹ Kenyan Healthcare Sector, Market Study Report: Opportunities for the Dutch Life Sciences & Health Sector, 2016, 7.

⁷² Section 4(d), *Health Act* (No.21 of 2017)

⁷³ Section 15(1)(x), *Health Act* (No.21 of 2017)

⁷⁴ Odour M. And Simiyu D, ‘The Right to Emergency Medical Treatment in Kenya’ *SSRN Journal* (2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2695134 on 14 January 2017

⁷⁵ Collins O, *No one shall be ‘Denied Emergency Medical Treatment’ in Kenya: Opportunities, Challenges and Strategies*, July 20, 2015 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662417 on 26 January 2017.

⁷⁶Yadav M, Right to Emergency Care: Consumer Court, 2011, <http://medind.nic.in/jal/t11/i3/jalt11i3p248.pdf> on 8 February 2017.

⁷⁷ David M, ‘Medical ethics and payment of fees before treatment’, *South African medical journal* (2011)

World Medical Association Declaration of Geneva requires newly admitted medical practitioners and dentists to pledge themselves to serve humanity, to practice their profession with conscience and dignity, to make the health of their patients the first consideration and to maintain utmost respect for human life.⁷⁸

The International Code of Medical Ethics states that a doctor giving a patient an emergency service is a humanitarian duty and that he/she should not be motivated by financial or personal profits alone.⁷⁹

3.6. Legal and disciplinary issues created

The Constitution clearly states that every person has the right to institute court proceedings claiming that a right has been denied, violated or infringed, or is threatened.⁸⁰ Both private medical practitioners and patients are bearers of this right.

The Health Act mandates both the national and county governments to establish and publish the procedure for the laying of complaints within public and private health care facilities in those areas they are responsible for.⁸¹

Medical institutions have a legal obligation to provide emergency medical treatment. In situations where they fail to do so, while having ability, they commit an offence and are liable upon conviction to a fine not exceeding three million shillings.⁸² This creates a duty for private medical facilities and a right for any person whose right has been violated to claim damages in Court.

There are guidelines as to how much medical practitioner can charge their services. This is to avoid consumer exploitation and many people not having access to medical treatment. The general rule is that the medical fees shall be adhered to by all practitioners and institutions registered under the Medical Practitioners and Dentists Act and no practitioner may agree or accept fees above that which is provided under these Rules.⁸³ If

⁷⁸ World Medical Association Declaration of Geneva

⁷⁹ International Code of Medical Ethics

⁸⁰ Article 22(1), *Constitution of Kenya* (2010)

⁸¹ Section 14(2), *Health Act* (No.21 of 2017)

⁸² Section 7(3), *Health Act* (No.21 of 2017)

⁸³ Section 3(2), *Medical Practitioners and Dentists (Professional Fees) Rules* (2016)

a practitioner fails to comply with these Rules then the practitioner commits an act of professional misconduct.⁸⁴

A disciplinary action may arise in cases of cross referral of patients. This is referring a patient in a private medical facility to a public medical facility. It is illegal in cases which it is done unofficially and without the best interest of the patient which may be as a result of financial abuse.⁸⁵ This is because practitioners must adhere to Consumers rights according to Article 46 of the Constitution and seeing as this is an emergency situation, it is not only the financials which are at stake but also the life of the patient.

The Medical Practitioners and Dentists Board Act provides for a disciplinary process where a medical practitioner may be prosecuted, and sanctioned for what has been referred to as “any infamous or disgraceful conduct in a professional respect”.⁸⁶ However, the Act does not define “infamous or disgraceful conduct” hence is an ambiguous term. The Code of Professional Conduct and Discipline, explains that disciplinary measures may be undertaken where a medical or dental practitioner is alleged to have acted in a manner amounting to “serious professional misconduct”.⁸⁷ Serious professional conduct is, under the code, equated to “infamous conduct” in a professional manner. However, it does not clarify if this is the same as a professional misconduct. The Code further clarifies the matter and states that an infamous conduct by a profession means ‘no more than a serious misconduct’.⁸⁸

Lord Justice Lopes states that, “If a medical man, in the course of his professional duties has done something with regard to which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competence then he is guilty of an “infamous conduct in a professional manner.”⁸⁹ He gives a definition and states that ‘If it is shewn that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency’ then it is

⁸⁴ Section 5, *Medical Practitioners and Dentists (Professional Fees) Rules* (2016)

⁸⁵ Medical Practitioners and Dentists Board, *The Code of Professional Conduct and Discipline*, 2012, 26-27.

⁸⁶ Section 20, *Medical Practitioners and Dentists Board Act* (No.12 of 2012)

⁸⁷ Medical Practitioners and Dentists Board, *The Code of Professional Conduct and Discipline*, 2012.

⁸⁸ International Code of Medical Ethics

⁸⁹ *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750.

open to the General Medical Council to say that he has been guilty of ‘infamous conduct’ in a professional respect’.⁹⁰

In the case of **R v Pharmaceutical Society of Great Britain, Ex parte Sokoh**, Webster J attempts to define ‘serious professional misconduct. In that case, a registered pharmacist had been reprimanded by the statutory committee for professional misconduct because he failed to confirm a prescription with a doctor. Webster J held that a single serious error is capable of constituting misconduct under section 8 of the Pharmacy Act, 1954. He said that in order to define the word “misconduct” it was unhelpful to define it by any adjective having moral overtones. He clearly stated that, “If the word has to be defined then it means incorrect or erroneous conduct of any kind, provided that it is of a serious nature.”⁹¹

The Constitution guarantees every person the right to have that dignity respected and protected as everyone has the inherent dignity.⁹² Hughes defines human dignity as “a special status given to all individuals by virtue of being human”.⁹³ It goes without saying that it is truly inhuman to abandon a patient in an emergency condition only for lack of a pecuniary gain. This is a violation of their right to their human dignity being respected.

One of the main purposes of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities.⁹⁴ Oduor and Simiyu argue that the preservation of dignity is the preservation of life. Therefore, failing to act in a manner consistent with maintaining life is violating human dignity.⁹⁵ All human beings are born free and equal in dignity and rights.⁹⁶

3.7. Emergency medical system

It is the obligation of the national government to provide policy and training, maintenance of standards and co-ordination mechanisms for the provision of emergency healthcare.⁹⁷

⁹⁰ Allinson v General Council of Medical Education and Registration [1894] 1 QB 750.

⁹¹ R v Pharmaceutical Society of Great Britain, Ex parte Sokoh [1986]

⁹² Article 28, Constitution of Kenya (2010)

⁹³ Anne H., Human dignity and fundamental rights in South Africa and Ireland, 2014, 36.

⁹⁴ Article 19(2), *Constitution of Kenya* (2010)

⁹⁵ Odour M. And Simiyu D, ‘The Right to Emergency Medical Treatment in Kenya’ *SSRN Journal* (2015), 10 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2695134 on 14 January 2017.

⁹⁶ Article 1, Universal Declaration of Human Rights, 10 December 1948.

⁹⁷ Section 15(1)(z), *Health Act* (No.21 of 2017)

Kobusingye states that the goal of an emergency medical system should be to provide universal emergency care that is, emergency care should be available to all who need it. He equates ambulances to be the pre-clinical care. However, this is insufficient as the first aid in the ambulance will not stabilise the individual in a critical condition. In addition, there are mandatory components of an emergency medical system. This includes the pre-hospital care, personnel, equipment and communication, transport and health facilities. The medical practitioners should be highly trained in order to stabilise an emergency situation in the shortest time possible.⁹⁸

3.8. Conclusion

It is a matter of legal duty, as well as a moral obligation, to provide emergency medical treatment even in the absence of a deposit or fees. The right to receive payment for services offered by private medical practitioners should be limited for the right to emergency medical treatment to be realised. However, this does not mean that the right to remuneration is less of a right compared to the right to emergency medical treatment. The economic aspect of it must balance with the legal aspect to ensure a proper emergency medical treatment system.

⁹⁸ Bulletin of World Health Organisation, Emergency medical systems in low- and middle-income countries: Recommendations for action, August 2005, 2.

Chapter Four: Conclusion and Recommendations

4.1. Introduction

The problem identified by this dissertation is that private medical practitioners violate the right to emergency medical treatment with the argument that they have a right to receive payment for services offered. Therefore, they ask for very high amounts of deposits in order to access their emergency medical services even when in an emergency condition.

In this respect, the hypothesis of the dissertation was that the right to emergency medical treatment shall not be denied as stated in the Constitution. The right to emergency medical treatment prevails over the right to receive payment for services offered in emergency medical conditions. This means that emergency medical treatment must be attended to regardless of the financial capabilities of the patient at the time.

In order to arrive at an answer the following questions were posed including: What is emergency medical treatment within the context of the Kenyan Constitution? What is the nature and scope of emergency medical treatment? What obligation does this confer to the State in regards to the private sector? Do private practitioners, as a matter of law and not simply moral obligation, have to provide emergency medical treatment in the absence of payment?

4.2. Findings

From my desktop research and questionnaires, the following were the findings from the study:

4.2.1. **The right to emergency medical treatment prevails over the right to charge fees by doctors in emergency conditions**

In chapter two the study found that the right to health is indispensable for other rights as every person is entitled to this in order to live in dignity. In chapter three the right to receive payment for services offered is a limitable right. However, it is taken as the right to property. This is the property would be the money owed to the doctors after delivering the medical service. Hence doctors have the right to be compensated by the State after delivering their services.

4.2.2. The scope of emergency medical treatment includes the private sector

In chapter two the study found that emergency medical treatment would only be available to patients with acute illnesses as opposed to chronic incurable diseases. The Health Act makes it an offence for any medical institution that has the ability to provide these services, to refuse to administer emergency medical treatment. This includes the private medical facilities. Therefore, medical practitioners are liable when they do not attend to a patient in an emergency condition because it is their legal duty to do so.

4.2.3. The State has legal obligations of ensuring that the right to emergency medical treatment is realised

Chapter three illustrates that the state has an obligation to ensure that no one is denied emergency medical treatment as stated in the Constitution. This is regardless of whether it is in the private or public sector.

4.2.4. Private medical practitioners have a legal obligation to provide medical treatment without pay in emergency conditions

Chapter three illustrates that the failure of medical institutions, extending to private medical practitioners, to provide emergency medical treatment in situations where they have the ability to do so, commit an offence and are liable upon conviction to a fine not exceeding three million shillings. This creates a duty for the private medical facilities and a right for any person whose rights have been violated to claim damages in Court.

4.2.5. Findings from the questionnaires

The questionnaires were given to doctors in Pandya Memorial hospital, Agakhan hospital, Consolata hospital, Jamii hospital and PCEA Tumutumu hospital. Out of the five hospitals, three hospitals ask for deposits regardless of whether a patient is in an emergency condition or not. However, they provide their services if the patient has an insurance cover. From this we can state that 60% of private hospitals in Kenya require deposits at all times. According to the results, the hospitals require a deposit of less than Kshs 50,000/=.

The hospitals receive an average of 4-10 patients in emergency conditions per week. Each hospital has a different procedure of admitting the patients. From the results, 40% of private hospitals in Kenya do not require a deposit. They have different mechanisms of dealing with slow payments or no payments. However, they waive the cost incurred if adequate investigation confirms that the patient, the relatives or the accompanying

persons are unable to pay. The overall feedback is that there will be no change in the hospital policies since the enactment of the Health Act 2017.

The fact-finding research proves that the right to emergency medical treatment is being violated by 60% of the private hospitals in Kenya. It is the duty of the State to ensure the proper implantation of the right and protect the citizens from the infringement of their right.

4.3. Recommendations

There is a need to develop an organised national emergency care system. Following the Health Act 2017, the healthcare system specifically with regards to emergency medical care, needs to improve. Emergency services are important to a proper healthcare system. This should be a priority of the government of Kenya.

The counties should also be encouraged to draw their own emergency care legislation and regulate the same. They should also sensitize the public on the same. This will put pressure on the private medical facilities to perform better.

There should be special training on emergency medical treatment and its relevance. The training should focus only on emergency medical treatment and emergency medicine. In addition, the government should supply a framework for training personnel.

There should be public-private partnerships (PPPs). This is supported by the Health Act which states that the national government has the responsibility provide policy guidelines in public-private partnerships for health to enhance private sector investment.⁹⁹ PPPs are important because they are cost-effective. The partnership is able to handle better financial and legal challenges. PPPs accelerate delivery of health services and social services.

4.4. Conclusion

The study proves that the right to emergency medical treatment prevails over the right to receive payment for services offered in emergency medical conditions. The private hospitals are within this scope. In addition, the study proves true the assumption that private hospitals violate the right to emergency medical treatment.

⁹⁹ Section 15(1)(y), *Health Act* (No.21 of 2017)

The study is supported by the theory of procedural justice and Rawls's theory of justice. Through procedural justice, one will be able to determine a criterion of admitting any patient in an emergency medical condition with no bias or prejudice. Applying Rawls's concept of "original position", it is fair or just to eliminate discrimination while admitting patients in emergency conditions on the grounds of financial ability.

When it comes to emergency medical treatment, one should not be faced by the challenge of choosing whether to go to a private or public health facilities. This should not be the thought lingering in anyone's mind during emergency situations. It is the obligation of the state to ensure that there is an efficiently working emergency medical system.

According to statistics at the World Health Organisation, emergency conditions form a large part of the global burden of disease. Therefore, there is a need to facilitate and encourage emergency care of high quality.¹⁰⁰ In addition, a substantial proportion of the world's deaths could have been prevented if proper emergency care was administered.¹⁰¹

In conclusion, the near future looks bright. With the enactment of the Health Act and the frequent debates being held in parliament and the public, the national emergency medical system and medical care at large should get better with time in Kenya. Consequently, the law creates a platform for proper implementation; the right to emergency medical treatment will be implemented better.

¹⁰⁰ Hirshon J, Risko N, Calvillo E, "Health Systems and Services: The Role of Acute Care" *Bulletin of the World Health Organization* (2013) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3646345/> on January 2018.

¹⁰¹ Chang Y, Abujaber S, Reynolds A, Camargo A, Obermeyer Z, 'Burden of Emergency Conditions and Emergency Care Utilization: New Estimates from 40 Countries' *Emergency Medicine Journal* (2015) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5179323/> on 15 January 2018.

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ANNEX 1: SAMPLE QUESTIONNAIRE

QUESTIONNAIRE FOR DOCTORS IN PRIVATE HOSPITALS IN KENYA

Hospital:

Date:

1. How many emergency cases are there in a week (average)?
2. Is it a requirement to pay a deposit before being admitted during emergency situations?

If yes, what is the range of the deposit required?

- a) Less than 50,000/=
- b) Between 50,000-200,000/=
- c) More than 200,000/=

3. What is the procedure of admitting a person requiring emergency services?
-
-

4. Are there instances where one can be provided with emergency services without paying the deposit?

If yes, which instances?

5. Do foreigners receive the same treatment?

6. How does the hospital recover the costs not paid by the patients?

7. Do you foresee a change after the enactment of the Health Act?
