FULFILLING THE RIGHT TO MATERNAL HEALTHCARE IN KENYA

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By

MELANIE TAMARA ANAMI

095834

Prepared under the supervision of

LILLY MBURU

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DECLARATION

I, **MELANIE TAMARA ANAMI,** 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: .....

Lily Mburu

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List of abbreviations

1. CESCR -Committee on Economic, Social and Cultural Rights
2. ICESCR-International Convention on Social Cultural Rights

Abstract

The Government of Kenya is legally bound to respect, protect, and fulfil the right to maternal health care, yet women continue to endure abuse and negligence when giving birth in public health facilities. The right to maternal health encompasses both freedoms and entitlements including the right to be free from torture, non-consensual procedures, detention and other related rights. Most importantly, an entitlement to a system of health protection which provides equality of opportunity for all women to enjoy the highest attainable level of maternal health. Cognizant to the fact that the rights to equality and non-discrimination regardless of gender, age, or financial resources are the substratum underlying; human rights doctrines, fundamental principles of regional law as well as facets of customary international law. Lack of assistance before, during, and immediately after labour; rough and degrading treatment during examinations; physical and verbal abuse; lack of basic infrastructure and supplies; inability to handle complications; and deliveries in unhygienic conditions continue to endanger the health and lives of marginalized women and their babies in Kenya. Prolonged traumas of these negative experiences have discouraged women from seeking reproductive health care services. This has continued to have an ongoing, adverse long-term impact on women living below the poverty line. A study conducted by the Maternal Health Task Force in 2017 showed that on average women living in the most impoverished areas of Kenya received 0.3333% of basic clinical antenatal care compared to women in the middleclass who received an estimated 60%. Similarly, only 8% of impoverished women had access to adequate delivery compared to 24% of women in the middle class With this issue becoming increasingly pervasive, there is need for the government to take steps to progressively realize and ensure that no woman is priced out of the right to the highest attainable standard of maternity healthcare.

1.0. CHAPTER I

Introduction

1.1. Background

For a long time, women seeking reproductive health services in Kenya have continued to agonize over the disrespect and the ill treatment experienced in most public health facilities. A pregnant woman in labour deserves the best medical care a hospital can offer, yet Kenyan women are discriminated against, threatened, and even physically abused.[1] Kenya's 2010 constitution explicitly states that every person has the right to the highest attainable standard of health, inclusive of the right to reproductive health care.[2] This right is also affirmed in the recently enacted Health Act. Section 6(1) specifically provides for, the right to access appropriate health care services that will enable parents to safely go through pregnancy, childbirth, and the post-partum period.[3] Legislating on the right to health in the 2010 constitution and other subsequent acts was definitely a step in the right direction, seeing that the repealed constitution did not contain such a provision. In the wake of new, inclusive legislation, has the government taken active steps to ensure that all women have access to quality maternal health care?

Substandard maternal health care, has had a disproportionate impact on women living below the poverty line precisely because of, their lack of individual economic resources.[4] In 2010, the Centre for Reproductive Rights reported a significant reduction

[1] Center for Reproductive Rights, Federation of Female Lawyers Kenya, *Failure to deliver*; *Violations of Women's Human Rights in Kenyan Health Facilities* 2007, 12.
[2] Article 43, *Constitution of Kenya*, (2010).
[3] Section 6(1), *Health Act*, (2017).
[4] Kenya National Commission on Human Rights, *Realising sexual and reproductive health rights in Kenya, a myth or reality?* 2012, 40–41.

in the number of women who went to hospital countrywide during pregnancy.[5] This was due to, fears of being physically and mentally harmed.[6]

Approximately 45.2% of the Kenyan population, lives below the poverty line thus susceptible to deplorable health care.[7] This is contrary to the notion that, women have a right to receive quality health care no matter their economic status.[8] For these women, it is a great burden to be pregnant and poor simultaneously. Kenya has been failing to extensively fulfil its obligation of, advocating against the mistreatment of the marginalized.[9] The government is obligated to ensure that, all women and girls have access to quality maternal health care and reparations in case of violations. Denying and failing to advocate for essential maternal health care as well as, illegally detaining those who seek health care but cannot afford it, is a human right violation yet women living in deprivation have no recourse.[10] Having ratified a number of treaties and instruments addressing the right to maternal healthcare, Kenya is obligated to refrain from acting in a way that would defeat the objects and purposes of these treaties and instruments.[11]

[5] Kenya National Commission on Human Rights, *Realising sexual and reproductive health rights in Kenya, a myth or reality?* 2012, 40–41.
[6] Kenya National Commission on Human Rights, *Realising sexual and reproductive health rights in Kenya, a myth or reality?* 2012, 7-10.
[7] The World Bank Group, *Kenya economic progress, In search of a fiscal space*, October 2018, 2-6.
[8] *CESCR General Comment No 14, The right to the highest attainable standard of health,* 11 August 2000, 5-6.
[9] Kenya National Commission on Human Rights, *Realising sexual and reproductive health rights in Kenya*, a *myth or reality?* 2012, 19 -21.
[10] Center for Reproductive Rights, Federation of Female Lawyers Kenya, *Failure to deliver, Violations of Women's Human Rights in Kenyan Health Facilities* 2007, 26-40.
[11] Javaid Rehman, 'The International Covenant on Economic Social and Cultural Rights' *International Human Rights law, a practical approach,* 2nd edition, Pearson Education, United Kingdom, 2003, 107-109.

1.2. Problem statement

Every woman has the right to safe and respectful maternal healthcare. Human right standards surrounding safe pregnancy, childbirth and respectful maternal healthcare are rooted in the right to life, health, and non-discrimination.[12] Yet, underprivileged women seeking reproductive health services in Kenya, have continuously endured dreadful maternal health care.[13] Some of the human rights pervasively being violated include; lack of access to quality maternity health care, unsafe conditions for delivery and degrading treatment by medical staff. [14] All of which contravene these women's human dignity.[15]

The Kenyan government has an obligation to ensure that necessary steps are taken towards the realization of the right to maternal health.[16] However, poor outcomes of the same are an underreported human rights crisis in Kenya.[17] The situation in public maternity facilities, vividly illustrates the Kenyan government's failure towards the progressive realization of these maternal health rights. The patients seeking public health services are among the poorest and the youngest women in Kenya, making them particularly vulnerable to discrimination and abuse.[18] The struggle to fight for proper maternal health care, must be adapted to the reality of Kenya's situation. In turn addressing the deeper underlying factors contributing to the retrogressive realization of maternal health care in Kenya.

Despite the gravity of the aforementioned violations, cases regarding maternal healthcare violations have only been brought before Kenyan courts twice. Evidently, this manifests an inadequacy in the complaint procedure mechanisms. In this regard,

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[12] Javaid Rehman, 'The rights of women', 357-359.
[13] Beatrice Odallo, Evelyne Opondo and Martin Onyango, 'Reproductive health matters *'An international journal on sexual and reproductive health and rights*,28th August 2018,3-5,< https://uniteforreprorights.org/wp-content/uploads/2018/09/untitled.pdf> on 26th February 2019.
[14] Kenya National Commission on Human Rights. *Realising sexual and reproductive health rights in Kenya: a myth or reality?* 2012, 1-2.
[15] Kenya National Commission on Human Rights. *Realising sexual and reproductive health rights in Kenya: a myth or reality?* 2012, 1-2.
[16] *CESCR General Comment No 14, The right to the highest attainable standard of health,* 11th August 2000, 11-16.
[17]Center for Reproductive Rights, Federation of Female Lawyers Kenya, *Failure to deliver*; *Violations of Women's Human Rights in Kenyan Health Facilities* 2007, 26-40.
[18] Center for Reproductive Rights, *Failure to deliver*, 2007,11-26.

the expensive cost of litigation definitely serves as an impediment to justice.[19] The lacuna in case law has largely contributed to the undeveloped jurisprudence, despite the justiciability of the right.

1.3. Purpose of the study

This paper is purposed at understanding the right to maternal healthcare both from an international and domestic perspective. My study will also explore the current state of maternal healthcare as well as the steps taken by the government to address the right. Lastly my research will delve into access to justice for the aggrieved. Concluding with feasible solutions that can be taken to fulfil the right to maternal healthcare.

1.4. Hypothesis

Indigent women continue to suffer poor maternal health care as a result of the Kenyan government, neglecting and failing to take the requisite steps towards fulfilling the right to quality maternal health care. In light of these violations these women have no means of accessing the needed justice

1.5. Research Questions

The following questions will inform this research;

1. What is the history of the right to quality maternal health care in the international human rights framework, and how has it evolved over the years?
2. What is the impact of Kenya's new constitutional dispensation on the state of maternal health care in the country?
3. What steps has the government of Kenya taken towards progressively realizing the right to maternal health care and, how effective have they been?
4. Do women whose right has been infringed on have access to justice?
5. How have the Kenyan courts interpreted the right to maternal health care, in comparison with other jurisdictions?

[19] Center for Reproductive Rights, *Detention and abuse of women seeking maternal health services; Fundamental rights violations*, 2017, 8-11.

1.6. Research objectives

1. To understand the history of the right to maternal health care from both an international and domestic perspective. In turn providing an insight as to what the objective to fulfil entails.
2. Provide a situational analysis of Kenya's maternal healthcare system, looking into how effective laws and policies have been in enforcing the right to quality maternal healthcare. In turn proving that the situation is as is because of government failure
3. To examine how the courts have interrupted the right to maternal healthcare in the two cases as well as highlighting the reasons as to why access to justice remains a fallacy for women whose maternal care rights are infringed on
4. To explain the need for; the development of a maternal healthcare policy, advocacy for rights awareness among these women, and institutionalized epistolary jurisdiction as formidable solutions to the established conundrum.

1.7. Justification

This study is necessitated on the ground that maternal health care violations remain unmonitored at the detriment of many women who continue to labor in agony. Through the years, there has been a repeated cycle in the petrifying experiences that marginalized women face while seeking maternal health care. In this regard, there exists sufficient ground to research on the extent to which the government has failed to progressively fulfil the right to maternal health care. In turn, examining the state of the public maternity health care system in Kenya. Understanding what the right to quality maternal healthcare entails, in comparison to what is being inculcated into the system is an important part of this analysis. Despite the justiciability of this right, it is also important to explore why violations of the right to maternal health care have only been tried twice before courts of justice countrywide.

1.8. Scope and limitations of the study

The question of fulfilling the right to maternal health care, has a number of facets which cannot be conclusively addressed in this research. This study will focus on the need to improve the quality and standard of health care in Public hospitals in Kenya in

accordance to the law. In addition, this paper will also look into the issue of access to justice for women who have been deprived of the right to maternal health care.

A limitation to this research will be in regard to mortality being classified as one of the eight sustainable development goals. As a result, the issue of quality maternal health care has been disregarded by most scholars who have instead focussed on, maternal mortality. Maternal mortality is purposed at demystifying and simultaneously addressing the issues surrounding maternal mortality. Although, quality of health care is one of these issues, it is not the primary focus. Most literature, mainly point out complications that may occur during pregnancy essentially form a medical perspective. In light of this limitation, my research will lack an in-depth scholarly understanding from both an international and local perspective. Another limitation will be that, most commentaries and reports have highlighted cases of poor maternal health care in the major counties in Kenya, disregarding smaller counties. Thus, this research will fail to document a wholesome analysis of maternal health care in Kenya.

1.9. Chapter breakdown

Chapter one

The chapter will introduce the study, giving an overview of the research and highlighting the research problems, objectives, and justifications for the study. Essentially, providing a roadmap for the research.

Chapter two,

Chapter two will provide a theoretical understanding of the right to maternal health care and the importance of access to justice. The main theories informing the research will include the need to respect human dignity and access to justice.

Chapter three,

Chapter three will provide a history of the right to maternal health care from an international perspective and how it has evolved through the years. This will entail looking at, how the law developed to accommodate maternal health care rights. It is important to understand the rationale as well as what the law makers envisioned.

Therefore, providing a better understanding the substantive nature of the right to maternal health care.

Chapter four

Chapter four will compare the standard of maternal health care under the old constitutional dispensation and the new constitutional dispensation. Taking into consideration that the right was not enshrined under the old constitution, this comparison will provide an analysis of whether legislation has aided in the provision of quality maternal health care. This chapter will also provide an analysis of the steps taken by the Kenyan government to fulfil the right to maternal health care post the 2010 constitution and how successful they have been.

Chapter five

This chapter will focus on access to justice for the affected women. Primarily delving into the cases that have been litigated in Kenya, understanding how the women approached the court, how the courts have interpreted the right to quality healthcare and the barriers preventing these women from seeking the needed justice.

Chapter six

The final chapter will conclude the research providing a summary of overall conclusions as well as recommendations to address some of the issues highlighted in my research.

2.0. Summary of overall conclusions

With the foundation of this paper being that poor women living below the poverty line are subjected to ghastly maternal healthcare, it was important to understand what exactly the right to maternal health care means. This implied looking at the right from an international and domestic stand point. From which it is clear to see that, maternal healthcare has been disregarded from both an international and domestic perspective. This is based on the fact that it is seen as subset of general healthcare, and not viewed as its own right. In relation to General comment 14, my research revealed that the four elements remain an untouched agenda in the Kenyan Public healthcare system. Although the Kenyan government has made constructive efforts to advance

reproductive health rights, the research revealed that the lack of proper systems in place will continue to put maternal healthcare on a losing streak. This research also discussed the situation in Pumwani Hospital, so as to illustrate how the Kenyan government is failing to take action for severe human rights violations in what is considerably the largest public maternity hospital in Kenya. Furthermore, with access to justice being an impediment due to the increased expense, these women are unable to have their voices heard, exercise their rights, challenge discrimination and hold decision makers accountable. My proposed solutions that could contribute to addressing some of the problems I identified include; an institutionalized maternal healthcare policy, creating rights awareness among patients and, institutionalized epistolary jurisdiction.

2.0 CHAPTER II

Theoretical Framework

The theoretical framework that informs my research is twofold. The first theory is founded on the inalienable right to human dignity and equality while the second theory is based on access to justice.

2.1. The inalienable right to human dignity and equality

All human rights are basic rights in the fundamental sense that systemic violations of any human right preclude realizing a life of full human dignity. [20]

This theory affirms the idea that all individuals solely by virtue of being human, have natural rights which no society or state should deny.[21] Nelson Mandela, one of the advocates for this naturalist theory envisaged an Africa where issues of poverty, want, deprivation and inequality were in accordance with international standards.[22] Thus, recognizing the indivisibility of human rights.[23]

In his human dignity and equality theory, Nelson Mandala asserts two main ideas. His first idea is premised on the fact that, no right can be considered important over another. This notion was clearly reflected in many of his key state addresses. While warning against the capitalist tendency to restrict human rights to civil and political rights in South Africa,[24] he stated that;

> 'We must warn against the language of rights being used to conceal attempts to maintain in one form or another, the power privileges or speed status of one racial group. The bill of rights cannot be a device to secure the political or economic subordination of the majority or the minority. We must address the issues of

[20] Richard N. Rwiza, 'Concept of human rights'(eds) *Ethics of Human Rights, the African contribution*, 1st edition, CUEA Press, Nairobi Kenya, 2010 ,18-21.
[21]Rajni Kothari, 'A movement in search of a theory'(eds), *Human rights, Challenges for theory and action*, Oxford press, United Kingdom, 1989, 89.
[22] Nelson Mandela, 'Birth of a freedom fighter', *A long walk to freedom,* MacDonald Purnell, South Africa, 1994, 70.
[23] Mandla Langa and Nelson Mandela, '*Dare not linger',* Macmillan, New York U.S.A, 2018, 57-59.
[24] Ramon Mullerat, 'Cooperate Social Responsibility*', International Cooperate Social Responsibility*, Wolters Kluwer, Britain, 2010, 155.

poverty, want, deprivation and inequality in accordance with international standards which recognise, the indivisibility of human rights. The right to vote, without food, shelter and health care will create the appearance of equality and justice, while actual inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom.'[25]

His second idea is more inclined to the belief that, the human rights legal order should assist and protect rather than impede. In this regard, Nelson Mandela believed that the law should guarantee these fundamental rights to all sections of the population.[26] Mandela's principles coincide with how he despised the idea that quality fundamental services were often retained as exclusive rights of the minority.[27] Therefore, reducing majority of the population to a position of subservience and inferiority. [28] Mandela's theory and principles emerged from the apartheid regime that segregated black people in South Africa during the colonial period. [29] A significant discriminatory divide among the European settlers and the South African natives resulted in inequality and injustice.[30] The law failed to protect the majority who were subjected to inhumane treatment at the mercy of the white settlers.[31]

In the same light, my paper postulates a similar problem however by virtue of the different classes of society that exist in Kenya. Women from the lower classes in society are accorded mediocre maternal health care. These women have repeatedly been exposed to alarming degrees of disrespect and abuse.[32] Regardless of these social classes in society, Nelson Mandela strongly predicates that all fundamental rights associated with a democratic society must be protected.[33]

Respecting human rights demands that, every person is treated as an autonomous and moral subject.[34] Therefore, the dignity attached to a moral subject makes each person

[25]Ramon Mullerat, 'Cooperate Social Responsibility', 155.
[26]Nelson Mandela, '*A long walk to freedom*', 535.
[27]Nelson Mandela, '*A long walk to freedom*', 550- 600.
[28]Nelson Mandela, '*A long walk to freedom'*, 550- 600.
[29] Nelson Mandela, *'A Long walk to freedom'*, 86-95.
[30]Nelson Mandela, '*A Long walk to freedom'*, 500, 530.
[31] Nelson Mandela, '*In his own words',* Little Brown &Co, Boston U.S.A, 2003, 76.
[32] Kenya National Commission on Human Rights. *Realising sexual and reproductive health rights in Kenya, a myth or reality?* 2012, 1-2.
[33] Nelson Mandela, '*In his own words'*, 76.
[34] Oscar Schacter, 'The nature and reality of international law'(eds), *International law in theory and practice,* 1st edition, oxford press, United Kingdom 1991, 100.

to be a subject of a right.[35] Martin Luther King Junior was a strong believer that equality starts with the affirmation that all persons are equal in inherent worth.[36] As an American civil rights movement leader, he strongly advocated for equality, fighting against the racial divide in America. In 1963, while confined in a Birmingham jail following an arrest after participating in peaceful protests in Alabama, he wrote a gratifying letter eloquently explaining the injustice of the segregation system.[37] In the letter, King posed a very important statement expressing, that;

> 'Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly.' [38]

In this statement Martin Luther King insinuated that, if one's rights are violated it works to the detriment of another. At the time of the Civil rights war in America, all Americans lived in fear despite the fact that brutality was specifically targeted at black people.[39] In this regard, the whole society suffers when injustice is manifested in anyway. In light of this, violating maternal health care rights extends beyond affected persons. Failing to protect the lives and health of children jeopardizes the future of society as a whole. This interrelation, strongly affirms that the rights to equality and human dignity are inalienable regardless of laws, customs, or social stratifications.[40]

In the acclaimed novel, the Animal Farm, George Orwell coins the phrase 'all animals are equal, but some animals are more equal than others.' [41] The statement is an oxymoron on the basis that, to be equal means to be exactly the same, hence equal, or unequal. In the book, George Orwell satirizes human beings as animals to create a political allegory. Written in the wake of the second world war, George Orwell metaphorically depicts the Russian revolution in view of tyranny, power. greed, and

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[35] David Sidorsky, 'Contemporary reinterpretation of the concept of human rights'(eds), *Essay on human rights*, 1st edition, Oxford press, United Kingdom, 1979, 89.
[36] Martin Luther King Junior,' *Why we cannot wait'*, Beacon Press Boston U.S.A, 1964, 10-25.
[37] Martin Luther King Junior, '*Letter from Birmingham jai*',1963, 1.
[38] Martin Luther King Junior, '*Letter from Birmingham jai*',1963, 1
[39] Diane McWhorter *Carry me home*, Simon & Schuster, U.S.A, 2001, 1-15.
[40] Rosa Parks, '*Reflections by Rosa Parks, The quite strength and faith of a woman who changed a nation*', Zondervan, Michigan U.S.A, 2018, 69.
[41] George Orwell, *Animal Farm*, Penguin press, 1945, 112.

oppression.[42] Marked as an overarching commandment, the phrase in the book is used to point out the importance of governments striving to realize the equality of all citizens. George Orwell clearly brings out the fact that certain classes in society are extremely vulnerable and their needs cannot be ignored at any point. In consideration of this, legislation needs to primarily focus on ensuring that the right to quality maternal health care is provided on an equal footing. Neglect only serves as a disservice to the defenceless.

In line with Martin Luther King Jr and George Orwell, my paper seeks to highlight the plight of women living below the poverty line, and how they have been made to accept appalling maternal health standards by virtue of their economic status.[43] This is despite the fact that, these treatments go against human rights standards and human dignity. Quality maternal health care in Kenya has been perceived as a right that is out of reach for people who cannot afford private medical health care.[44] This misconception is one of the many aspects that has contributed to the gruesome cruel treatments experienced in these hospitals.[45] Principally, human dignity is the inherent value of a human person from which no one else may detract.[46]

Susanne Baer, a German legal scholar and one of the 16 judges of the federal constitution Court of Germany, emphasizes on the indivisibility of human dignity, liberty and equality.[47] She proposes that equality, liberty, and dignity need to be framed in a triangle.[48] The triangle, she argues is an adequate concept to capture a parallel understanding of equality, dignity, and liberty.[49] Thus, preventing the overstating of any one of these rights in isolation of the other. In her view, each right profits from being seeing in light of the other two.[50] Inherently, dignity can be linked to both liberty

[42] George Orwell, *Animal Farm*, Epilogue.
[43] Center for Reproductive Rights, Federation of Female Lawyers Kenya, *Failure to deliver, Violations of Women's Human Rights in Kenyan Health Facilities* 2007, 26-40.
[44] Center for Reproductive Rights, Federation of Female Lawyers Kenya, *Failure to deliver, Violations of Women's Human Rights in Kenyan Health Facilities* 2007, 26-40.
[45] Center for Reproductive Rights, Federation of Female Lawyers Kenya, *Failure to deliver, Violations of Women's Human Rights in Kenyan Health Facilities* 2007, 26-40.
[46] Richard N. Rwiza, 'Concept of human rights',18.
[47] Susanne Baer, 'Dignity, liberty, equality: A fundamental rights triangle of constitutionalism' Volume 59 *University of Toronto Law Journal* Issue No 4, 2009, 417-420.
[48] Susanne Baer, 'Dignity, liberty, equality, A fundamental rights triangle of constitutionalism',417-420.
[49]Susanne Baer, 'Dignity, liberty, equality,A fundamental rights triangle of constitutionalism', 417-420.
[50] Susanne Baer, 'Dignity, liberty, equality, A fundamental rights triangle of constitutionalism',417-420.

and equality. [51] Thus, a fundamental right that ought to be respected and protected.[52] Susanne Baer views dignity as a gateway to equal recognition.[53] She argues that without the triangle, either of the rights can become an abstract concept. Adapting the triangle helps address, equality liberty and dignity in a systematic and holistic way.[54]

As it is in Kenya, there has been an absence of a coherent concept of relationships among these fundamental rights. Dignity, equality and, liberty tend to be looked at in isolation and interpreted in unsatisfying ways. When women are abused, disrespected, or wrongfully detained, the three rights are contravened simultaneously yet the rights are not considered on the same plane as they should be. Just as the right to vote is considered a fundamental liberty for all Kenyans so should the right to quality maternal health care, as they are both provisions in the law. In respect of this, she believes that linking liberty, dignity, and equality in a triangle, can help address human rights in today's society. [55]

2.2. Access to justice; making human rights a reality

If equality disappears from the precinct of the law, justice is orphaned. [56]

This theory is premised on the idea that, a right without a remedy is a legal conundrum of the most distorted kind.[57] The ability to seek and obtain a remedy through formal and informal institutions of justice is a fundamental human right.[58] One of the most progressive thinkers of this theory is Justice Vaidyanthraprum Krishna, a visionary judge who reformed the Indian Justice System by standing up for the poor and underprivileged.[59] He strongly supported the notion that justice is not only meant for the elite but also for the butcher, the baker, and the candlestick maker.[60]

[51] Susanne Baer, 'Dignity, liberty, equality, A fundamental rights triangle of constitutionalism',417-420.
[52] Susanne Baer, 'Dignity, liberty, equality, A fundamental rights triangle of constitutionalism',417-420.
[53] Susanne Baer, 'Dignity, liberty, equality, A fundamental rights triangle of constitutionalism',417-420.
[54] Susanne Baer, 'Dignity, liberty, equality, A fundamental rights triangle of constitutionalism',417-420.
[55] Susanne Baer, 'Dignity, liberty, equality, A fundamental rights triangle of constitutionalism', 417-420.
[56] Roscoe Pound, *'Criminal Justice in America'* Transaction publishers, New Jersey U.S.A, 1971, 43-56.
[57] P.N Bhagwati and Krishna Iyer, '*National Judiciary on equality and Social Justice',* 2004, 1-2.
[58] Roscoe Pound, *'Criminal Justice in America'*, 43-56.
[59] Krishna Iyer, '*Of law and life'*, Universal law publishers, New Delhi, India, 1979, 14 -23.
[60] Krishna Iyer, '*Of law and life'*, 14 -23.

To this end he pioneered the legal aid movement which directly contributed to the reforms in the Indian Justice System.[61] In one of his landmark judgements, Justice Krishna stated that;

> 'Equality before the law is a guaranteed fundamental right, and legal systems should be fashioned in a way that, ensures that opportunities for seeking justice are not denied to any citizen by reason of economic disability.'[62]

Being a proponent of equality, Justice Krishna pushed for a justice system that empowered the disadvantaged groups in India.[63] His theories contributed to India's acclaimed constitutional order that braces access to justice.[64] For a long time before these reforms, courts in India were approached only by those who were wealthy leaving the poor disadvantaged.[65]

Parallel to what India was before, the narrative in Kenya is no different. The poor continue to be priced out of the judicial system at the detriment of their fundamental human rights.[66] This paper seeks to demonstrate on how pregnant marginalized women in Kenya have no recourse after their fundamental health rights have been violated, due to the expensive cost of justice. This is despite the fact that the right to access justice is a constitutional safeguard.

Francesco Francioni, a professor in international Law and Human rights respect believes that protection of human rights can only be guaranteed through the availability of effective judicial remedies.[67] For him when a right is violated or damage is caused, access to justice is of fundamental importance for the injured individual and an essential component of the rule of law.[68] The rule of law is a fundamental principle in a democratic society ensuring that all persons have equal protection and access to

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[61] Hon. Justice Brian J Preston, 'Celebrating the 99th birthday of Justice Krishna Iyer, Land and Environmental Court of New South Wales, a contribution to Festschrift, 2014, 1-4.
[62] *Fields Ltd* v *M.S Jaiswal Coal Co* (2002), The Supreme Court of India.
[63] P.N Bhagwati and Krishna Iyer,' *National Judiciary on equality and Social Justice',* 2004, 35 -46.
[64] Krishna Iyer, '*Wakeup call for Indian Republic',* Gyan Publishing House, India, 2010, 10-14.
[65] Krishna Iyer, '*Access to justice; a call for basic change',* Universal law publishing, New Delhi India, 1993, 20-56.
[66]Center for Reproductive Rights, *Failure to deliver*, 2007,11-26.
[67] Francesco Francioni, *Access to Justice as a Human Right*, Oxford University Press, New York, 2007, 1-15.
[68] Francesco Francioni, *Access to Justice as a Human Right*, 1-15.

justice.[69] An ideal justice system contributes to the overall wellbeing of society and its citizens.[70]

Connie Ngondi Houghton, a Kenyan legal scholar conceptualized justice not as an end result but as a continuum that begins with the inclusion of rights in the law.[71] In her view, justice is engendered and compounded in a range of widely acknowledged principles, verifiable values, and factual justifications.[72]

She briefly outlines some of the principles to being; the endowment and recognition of an individual rights at law and the determination of a proper balance of competing claims, the right to seek protection and vindication of those rights by full and equal access to law, the provision of equal protection by law of the rights of all without making any arbitrary distinctions between persons in the assigning of basic rights and duties, the right to corrective and restorative redress for violation of ones rights, and guaranteed security of effective remedies, the full and equal access to all judicial mechanisms for the protection of such rights, a respectful fair impartial and expeditious adjudications of claims by national tribunals and, the right to equal and humane treatment of all individuals in the enforcement of law.[73]

In essence, when these principles are applied one is; recognized by law, is permitted by law and acts within the law.[74] Thus, empowered to access the benefits anticipated by the law.[75] According to Houghton, when one is in this position and the law is enforced efficiently and fairly then there is order, practicability, and justice in the society.[76] In her analysis she identifies high court fees, poor knowledge of legal rights,

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[69] Francesco Francioni, *Access to Justice as a Human Right*, 1-15.
[70] Francesco Francioni, *Access to Justice as a Human Right*, 1-15.
[71] Connie Ngondi Houghton, *Access to justice and the rule of law in Kenya, Commission on the Empowerment of the Poor*, 2008, 10.
[72] Connie Ngondi Houghton, *Access to justice and the rule of law in Kenya, Commission on the Empowerment of the Poor*, 2008, 12.
[73] Connie Ngondi Houghton, *Access to justice and the rule of law in Kenya, Commission on the Empowerment of the Poor*, 2008, 15.
[74] Connie Ngondi Houghton, *Access to justice and the rule of law in Kenya, Commission on the Empowerment of the Poor*, 2008, 28.
[75] Connie Ngondi Houghton, *Access to justice and the rule of law in Kenya, Commission on the Empowerment of the Poor*, 2008, 15.
[76] Connie Ngondi Houghton, *Access to justice and the rule of law in Kenya, Commission on the Empowerment of the Poor*, 2008, 28.

language barriers and lack of legal infrastructure in many rural areas as grave obstacles to access justice for most Kenyans. [77]

2.3. Conclusion

Looking at the principles identified, the justice system has clearly failed to give the victims of poor maternal health care a platform to seek redress for their violated rights. This has extensively denied them the opportunity to tap into expected benefits of the law. Inarguably, this has contributed to a laxity in addressing maternal health care rights in Kenya. Legal scholar Atsango Chesoni, notes that the justice system in Kenya is antiquated and urban biased.[78] The inadequate infrastructure for legal and judicial services brings about costs that the impoverished can barely afford. [79]

[77] Connie Ngondi Houghton, *Access to justice and the rule of law in* Kenya, Commission *on the Empowerment of the Poor*, 2008, 25.
[78] Daisy Okoti, 'When choosing your career, follow your heart' Daily Nation, 12 April 2018,32.
[79] Maitrayee Mukhopadhyay, Gender and access to justice in Sub Saharan Africa' Center for applied legal studies Conference, Johannesburg, South Africa, 28-30 October 2008, 3.

3.0. CHAPTER III

The history of maternal healthcare from an international perspective

This chapter will explore the history of maternal health care from an international perspective. In turn understanding how the right come to being and what the policy makers were hoping to address and in the long run achieve. Retracing the history of the right, enables us to clarify the scope of the state's obligations to realize the right. This part of my research will mainly be informed by conference papers and scholarly articles. Noting, significant milestones that have led to the legislation of the right to quality reproductive health care which in turn, addresses maternal health care.

3.1. The history and development of maternal health care from an international perspective

Pregnancy is not a disease but a normal physiological process that women must engage in for the sake of humanity. [80]

The right to primary health care and government obligation was first enlisted in the Alma Ata Declaration of 1978.[81] The declaration emerged as a major milestone of the twentieth century in the field of public health.[82] It identified primary health care, as the key to the attainment of the goal "Health for All" around the globe.[83] The declaration recognized the fact that;

> The right to health is a fundamental human right, and that the attainment of the highest possible level of health is an important world-wide social goal, whose realization requires the action of many other social and economic sectors. [84]

[80] Carla Abouzahr, 'Safe Motherhood, a brief history of the global movement 1947-2002 *British Medical Bulletin*, 2003, 18- https://academic.oup.com/bmb/article/67/1/13/330395/ on 10 May 2019.
[81] WHO, *Alma Ata Declaration on Primary health care expressing the need for urgent action by all governments, all health and development workers and the world community to protect and promote the health of all people of the world,* 12 September 1978.
[82] WHO, *Alma Ata Declaration on Primary health care.*
[83] WHO, *Alma Ata Declaration on Primary health care.*
[84] WHO, *Alma Ata Declaration on Primary health care.*

Despite its contribution to healthcare worldwide, the declaration did not recognize reproductive health care rights. Women's rights and the health of a mother during pregnancy and childbirth were never the focus for policy making, research and programming. This was mainly because, women were considered inferior and lesser individuals in society.[85] The development in maternal health care was triggered when there was a significant increase in maternal mortality worldwide.[86] This instigated the pivotal conversation of pushing for policy to safeguard this salient right.[87]

3.1.1. Convention on the Elimination of all forms of Discrimination Against Women

The revolution in women rights come about with the adoption of the Convention on the Elimination of all forms of Discrimination Against Women in 1981, which was centralized on promoting women's equality of rights and wellbeing.[88] Often called an international "Bill of Rights" for women, the Treaty for the Rights of Women was a culmination of more than 30 years of work by the United Nations Commission on the Status of Women and its member countries.[89] The creation of this Treaty was the first critical step in developing a standard for basic human rights for women.[90] These standards address abuses (physical, sexual, economic, and political) of women and promote women's equality of rights and well-being.[91] The convention recognized maternal health as an important right that no one woman should be deprived or discriminated against.[92] Although it did not expound on what the right should embody, the convention acknowledged maternal health care as a right that ought to be respected and protected.

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[85] Mahmoud F. Fathalla, 'Why did Mrs X die', Safe Motherhood Conference, Nairobi, 1987, 1-2 – Launch of the safe motherhood conference, presentation of the human side story.
[86] Mahmoud F. Fathalla,' Why did Mrs X die', 1-2.
[87] Tim Thomas, 'Maternal Health from 1985-2013, Hopeful Progress and Enduring Challenges', Population and Reproductive Health program, Research working paper 1, 2013, 1-2- https://www.macfound.org/media/files/MHRetrospective_FINAL.pdf on 7 October 2019.
[88] *Fact Sheet No 22, Discrimination against women*, 1-2.
[89] *Fact Sheet No 22, Discrimination against women*, 2-3.
[90] *Fact Sheet No 22, Discrimination against women*, 3-4.
[91] *Fact Sheet No 22, Discrimination against women*, 3-4.
[92] Article 4, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, Volume 1249.

3.1.2. Where is the M in Maternal and Child Health?

In 1985, a seminal paper written by Alan Rosenfield and Deborah Maine surfaced[93] The paper which was titled 'Where is the M in Maternal and Child Health', posited that little was being done to reduce the source of unnecessary suffering and death of mothers during childbirth.[94] In addition, they expressed their difficulty in understanding why maternal mortality had been receiving miniscule attention from health professionals, policy makers and politicians.[95] They specifically highlighted the fact that, the trend was prevalent in third world countries.

3.1.3. The Safe Motherhood initiative

The Safe Motherhood Initiative come about in 1987 through Jill Sheffield and Anna Faris.[96] The initiative was premised on the fact that women endure debilitating damage to their health as result of their pregnancies.[97] The initiative identified that women are the primary care takers of children and managers of the household, thus contributing significantly to the development of a nation's economy.[98] Consequently, working towards safe motherhood was both humanitarian and economic.[99]

The initiative which was birthed during the Safe Motherhood Conference in Nairobi outlined a four-pronged policy approach to improving maternal health care outcomes.[100] They included; increasing access to and use of family planning services, improving community based maternal health care services, providing adequate obstetric care, and addressing the social and economic inequalities that contribute to women's poor health status.[101]

In the interest of fulfilling the agendas set out in the conference, governments, and non-governmental organizations around the world were prompted to plan and implement activities designed to make motherhood safer.[102] These included; advocacy and

[93]Alan Rosenfield and Deborah Maine were researchers at Columbia University, who worked at the department of Population and Family Health.
[94] Alan Rosenfield and Deborah Maine, 'Where is the M in Maternal and Child Health' Columbia University,1985,1https://www.sciencedirect.com/science/article/pii/S0140673685901886?dgcid=api_sd_search-api-endpoint on 10 October 2019.
[95] Alan Rosenfield and Deborah Maine, 'Where is the M in Maternal and Child Health', 1
[96]The World Bank, *Progress and Prospects the Safe Motherhood Initiative*, March 1992, 1.
[97] The World Bank, *Progress and Prospects the Safe Motherhood Initiative*, March 1992, 3-5.
[98]The World Bank, *Progress and Prospects the Safe Motherhood Initiative*, March 1992, 3.
[99] The World Bank, *Progress and Prospects the Safe Motherhood Initiative*, March 1992,3.
[100] The World Bank, *Progress and Prospects the Safe Motherhood Initiative*, March 1992,3.
[101] The World Bank, *Progress and Prospects the Safe Motherhood Initiative*, March 1992,3.
[102] The World Bank, *Progress and Prospects the Safe Motherhood Initiative*, March 1992,3.

information efforts, research projects and service delivery programs.[103] All to be addressed at the local, national, regional, and international levels.[104]

3.1.4. Too Far to Walk: Maternal Mortality in context

In 1994, another great milestone in addressing maternal health care rights was reached. This was through a seminal paper published by Sereen Thaddeus and Deborah Maine at Columbia.[105] The paper laid out three principal delays in health seeking behaviour among, resource poor women.[106]The three principals they identified were; a delay in the decision to seek maternal health care, a delayed arrival at a health facility, and a delay in the provision of adequate care.[107]

For the first time, policy makers were given an evidence-based framework for addressing pragmatic challenges experienced by women with obstetric complications.[108] The paper highlighted that the obstacles experienced by these women were mainly defined by illness-related factors.[109] Fast forward to 2019, the three-model approach to maternity health care is still considered an integrated outlook towards addressing the issue.[110]

3.1.5. International Conference on Population and Development 1994.

The conference on population and development marked a major turning point in health reproductive care rights.[111] The Conference adopted the program on population matters and introduced the concepts of sexual and reproductive health rights.[112] A new definition of population policy was advanced, giving prominence to reproductive health

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[103] The World Bank, *Progress and Prospects the Safe Motherhood Initiative*, March 1992, 3-4.
[104] The World Bank, *Progress and Prospects the Safe Motherhood Initiative*, March 1992,3.
[105] Sereen Thaddeus and Deborah Maine, 'Too Far to Walk: Maternal Mortality in context', 1994, 1-2 - https://www.researchgate.net/publication/11134243_Too_Far_to_Walk_Maternal_Mortality_in_Context on 10 October 2019.
[106] Sereen Thaddeus and Deborah Maine, 'Too Far to Walk: Maternal Mortality in context', 12-15.
[107] Sereen Thaddeus and Deborah Maine, 'Too Far to Walk: Maternal Mortality in context', 12-15.
[108] Tim Thomas, 'Maternal Health from 1985-2013, Hopeful Progress and Enduring Challenges', Population and Reproductive Health program of the John D. and Catherine T. MacArthur Foundation', December 2013,2- https://www.macfound.org/media/files/MHRetrospective_FINAL.pdf on 10 October 2019 .
[109] Tim Thomas, 'Maternal Health from 1985-2013, Hopeful Progress and Enduring Challenges',2.
[110] https://www.maternityworldwide.org/what-we-do/three-delays-model/ on 7 October 2019.
[111] UNFPA, *Report of the International Conference on Population on Development Policy Action,* 13 September 1994, 6-11.
[112] UNFPA, *Report of the International Conference on Population on Development Policy Action,* 13 September 1994, 6-11.

and the empowerment of women.[113] The policy action advocated for the access to appropriate health-care services that enables women to go safely through pregnancy and childbirth.[114] To construe the concept of Sexual Reproductive Health Care, the ICPD programme of action established a consensus that governmental population policies must be built on the cornerstones of human rights.[115] Observing that, the right to attain the highest standard sexual and reproductive health rests as a basic right.[116]

3.1.6. General Comment 14 on the Committee on Economic Social and Cultural Rights.

From 2000 to today, several seminal global policy agreements and initiatives have cemented maternal health as a foundational element of, improving health and livelihoods throughout developing countries. Among them was the adoption of General Comment 14, during the twenty second session of the Committee on Economic, Social and Cultural Rights (CESCR).[117] The committee gave a deeper analysis of what the Right to the Highest Attainable Standard of Health consists of, as enshrined in article 12 of the International Committee on Economic, Social and Cultural rights (ICESCR).[118] The committee identified the right to reproductive, maternal, and childcare as one of the core obligation of the ICESCR. General comment 14, calls on states to adopt legislation to take other measures ensuring equal access to health care.[119] In line with International Human Rights Law, states are called upon to fulfil, respect and protect the right to health care which is inclusive of the right to reproductive health care.[120]

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[113] UNFPA, *Report of the International Conference on Population on Development Policy Action,* 13 September 1994, 11-15.
[114] UNFPA, *Report of the International Conference on Population on Development Policy Action,* 13 September 1994, 22-30.
[115] UNFPA, *Report of the International Conference on Population on Development Policy Action,* 13 September 1994, 30-33
[116] UNFPA, *Report of the International Conference on Population on Development Policy Action,* 13 September 1994, 30-33.
[117] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights,* 11 August 2000.1.
[118] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health,* 1-21.
[119] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 7.
[120] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 11-14.

The obligation to respect calls on states to abstain from imposing discriminatory practices relating to women's health status and needs.[121] Violation of the obligation to respect occurs in situations whereby there is ; denial of access to health facilities, goods and services to particular individuals or groups as a result of de jure or de facto discrimination; deliberate withholding or misrepresentation of information vital to health protection or treatment, or adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health.[122]

The obligation to protect, calls on states to legislate or take other measures in ensuring equal access to health care and health-related services provided by third parties.[123] In this way, ensuring that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability, and quality of health facilities.[124] Failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties, follows as a violation of the obligation.[125]

Lastly, the obligation to fulfil requires state parties who have ratified the ICESCR, to give sufficient recognition to the Right to health in their national, political, and legal systems preferably by way legislative implementation.[126] Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to health.[127] Examples of such instances could include; the failure to adopt or implement a national health policy designed to ensure the right to health for everyone, insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized;[128]

Furthermore, the committee recognizes that State parties need to take necessary steps to comply with the aforementioned covenant state obligations.[129] A State which is unwilling to use the maximum of its available resources for the realization of the right

[121] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 12.
[122] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 16.
[123] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 12.
[124] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 12.
[125] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 18
[126] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 12-13
[127] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 18.
[128] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 18.
[129] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 17.

to health is in violation of its obligations under article 12 of the ICESCR.[130] An Important aspect captured in General Comment 14 in relation to developing countries, is progressive realization which is founded on the idea states have different resource capacity.[131] With this consideration, a state's compliance with the aforementioned obligations is assessed in light of its resources, and financial capabilities.[132] However, this must be approached expeditiously and effectively.[133] Towards the goal of achieving proper health care, the committee calls on countries to ensure that health care is available, accessible acceptable and of great quality.[134] The Four elements form an important fragment in the progressive realization of quality health care, marked as a baseline for assessment.[135]

3.2. Development Goals.

Following an atrociously high mortality rate in 2007, world leaders stepped up to rally around the issue and commit to action.[136] This birthed the 'Women Deliver Conference in London.[137] The initiative was led by maternal, reproductive and sexual health rights activist Jill Sheffield.[138] While pushing for both agendas , she recounts facing a lot of backlash from governments and elected policy makers.[139] It was only until she started addressing the economic perspective of the agenda that she started to gain traction. In 2010, Women Deliver led the change to include improved maternal health care as Millennium Development Goal Number 5.[140] Later reflected as sustainable development goal number 3 in 2015 .[141] The major challenge for achieving the

[130] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health* ,17.
[131] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 11.
[132] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 11.
[133] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 11.
[134] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 3-5.
[135] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 4.
[136] https://womendeliver.org/about/our-history/ on 7 October 2019.
[137] https://womendeliver.org/about/our-history/ on 7 October 2019.
[138] Jill Sheffield as aforementioned was the prime mover of the motherhood initiative.
[139] Pamela Das, 'Jill Sheffield, Nurturing safe motherhood' Volume 370 *The Lancet* Issue No. 9595, 2007, 1308.
[140] Pamela Das, 'Jill Sheffield, Nurturing safe motherhood', 1308.
[141] In 2015, the Millennium Development Goals were changed to Sustainable Development Goals in September 2015, SDG's are to be achieved in a span of 15 years and universally applied to all countries.

Development Goal, according to Sheffield, is deciding to have the will to invest in it and committing to maternal health.[142]

Since the inclusion of these development plans , governments have adopted different strategies to achieve the goal.[143] Although strategies have been put in place, little to no action has been directed towards them. In addition, most countries, scholars, and trained personnel have mainly combatted efforts in addressing maternal mortality neglecting the care aspect of the conundrum.

3.3. Conclusion

Women make a great contribution to the welfare of the family and to the development of society, which is still not recognized or considered in its full importance. [144] Notably, the right to maternal health care has developed significantly over the years. However, international law needs to do more to address the right cohesively. The law needs to properly define what maternal health care is and what it means to respect, protect, and fulfil the right. As it stands, the right to maternal health care will always be a subset of other health related rights. Failing to give the right, the urgency it deserves. In relation to the already established framework, General comment 14 provides a great insight to the right to healthcare. In as much as General comment 14 has been incorporated into various legislative instruments, it is important to question whether the right to quality health care is being progressively realized in some of these countries. In Kenya, the right to quality maternal health care, has been out rightly ignored despite Kenya being one of the member states party to the ICESCR. As my research will highlight, underprivileged women have been forced to endure substandard public maternal health care which is a violation of the right to fulfil as per General Comment 14. In addition, the four elements essential to the progressive realization of health care remain an untouched agenda in the Kenyan public health care system all at the detriment of the Kenyan citizens. Who is to blame?

[142] Pamela Das, 'Jill Sheffield, Nurturing safe motherhood', 1308.
[143] UNDP, Millennium Development Goals Report, 1 July 2015.
[144] UN General Assembly, B*eijing Declaration and Platform for Action, the world conference on Women*, 15 September 1995, 12.

4.0. CHAPTER IV

The history of maternal healthcare from a domestic perspective

This chapter will probe the right to maternal healthcare in Kenya. With the aim of understanding how national laws have safeguarded the right to quality maternal health care, vis a vis a comparative analysis of maternal health care post-independence and in the 2010 constitution. Thus, allowing one to understand how progressive Kenya has been towards achieving the right. While accessing the current state of maternal healthcare in Kenya they key focus will be directed towards; accessibility, availability, quality and acceptability. Furthermore, this chapter will also provide a synopsis of the steps taken by the government to ensure that women have the needed healthcare services. In conclusion understanding how successful these steps have been in addressing the maternal healthcare dilemma.

4.1. Maternal health care post-independence in Kenya

Kenya, like most African countries in the 1950's through to the 1970's, made substantial progress in health care delivery.[145] Post-independence, Kenya's health policy was founded on the country's landmark post-colonial nation-building and socio-economic development blueprint.[146] The blue print was mainly informed by Sessional Paper No. 10 of 1965.[147] The paper mainly founded on African socialism, emphasized on the elimination of disease, poverty, and illiteracy.[148]

On the basis that universal health care was a major policy goal worldwide, the government took the responsibility of financing all public health services

[145] Dr. Richard Muga, Dr. Paul Kizito, Michael Mbayah, Dr. Terry Gakuruh, 'Overview of the healthsystem',*Demographicandhealthsurveys*,2005,13-https://dhsprogram.com/pubs/pdf/spa8/02chapter2.pdf on 16 November 2019.
[146] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018, 4-5.
[147] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018, 4-5.
[148] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018, 4-5.

countrywide.[149] Abolishing user fees implemented by the colonial government.[150] At the time, general health care services were efficient and of a decent standard seeing that, facilities had the needed equipment and staff to attend to women in labour.[151] However, a big shift was occasioned in 1988 when the world economy plummeted.[152] Kenya, along with the rest of the world was forced to acclimatize with structural adjustment policies.[153] In this regard, governments had to cut back on their spending so as to sustain their economies.[154] In Kenya, a negative impact was experienced when the government reduced funding on health services.[155] This negative effect was mainly endured by the low-income population who were left suffering disproportionately.[156] This stemmed from the fact that they were largely dependent on subsidized health care services.[157]

One of the health services that was significantly impinged on was maternal health care. Following the governments reduced spending, the growth of maternal health facilities was curtailed.[158] As a result, women were forced to trek six to seven kilometres to receive health care services in hospitals that often lacked basic amenities.[159] This was

[149] Dr. Richard Muga, Dr. Paul Kizito, Michael Mbayah, Dr. Terry Gakuruh, 'Overview of the healthsystem',*Demographicandhealthsurveys*,2005,13-
https://dhsprogram.com/pubs/pdf/spa8/02chapter2.pdf on 16 November 2019.
[150] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018, 4-5.
[151] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018, 4-5.
[152] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018, 4-5.
[153] Sumit Roy, 'Structural Adjustment and African Development', 29, *Economic and Political weekly* 47, 1994. 1-2.
Structural adjustment policies refer to a range of macro-economic and structural measures that were promoted by the World Bank and the IMF to restore internal balances and increase the role of the market force in the economy.
[154] Dr. Richard Muga, Dr. Paul Kizito, Michael Mbayah, Dr. Terry Gakuruh, 'Overview of the health System*Demographicanhealth surveys* ,2005,13- https://dhsprogram.com/pubs/pdf/spa8/02chapter2.pdf on 16 November 2019.
[155] Dr. Richard Muga, Dr. Paul Kizito, Michael Mbayah, Dr. Terry Gakuruh, '*Overview of the health system*',*Demographicandhealthsurveys*,2005,13- https://dhsprogram.com/pubs/pdf/spa8/02chapter2.pdf on 16 November 2019.
[156] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018, 4-5.
[157] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018, 4-5.
[158] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,4-5.
[159] Damaris Parsitau, '*The Impact of Structural Adjustment Programs on Women's Health in Kenya', Governing Health Systems in Africa*, 1ed, African books collective, Dakar, 2008, 193-194.

very prevalent in rural Kenya.[160] In hospitals like Nakuru District Hospital, expectant mothers were required to buy gloves, surgical blades, disinfectants and syringes in preparation for childbirth.[161] Many government hospitals lacked essential amenities[162] Women were forced to bribe hospital personnel in order to be attended to.[163] Considering their vulnerable situations, it was impossible for most women to meet these unexpected costs. Such limitations priced many out of the healthcare system.

4.1.1. The National Reproductive Health strategy 1997-2004.

Following the Safe Motherhood Initiative conference in 1987, and the ICPD conference of 1994, the government embarked on addressing the dire need to improve maternal health care.[164] One of the strategies that came about was the National Reproductive Health Strategy of 1997, which was to run until 2010.[165]

The strategy came at a time when the quality of maternal health care had deteriorated extensively countrywide.[166] The principal objectives for the strategy was to; reduce maternal mortality, increase professionally attended deliveries, create effective referral systems, enable clean and safe deliveries, and provision of emergency care.[167] However, the strategy did not translate to better health care services.[168] Hospitals like Pumwani Maternity Hospital had a high number of reported deaths, mainly attributed to lack of resources and poor health care services.[169] Although providing women with access to a skilled attendant at birth was a key element in the National Reproductive Health Strategy, there were major problems with the availability and distribution of

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[160] Damaris Parsitau, 'The Impact of Structural Adjustment Programs on Women's Health in Kenya', 193-194.
[161] Damaris Parsitau, 'The Impact of Structural Adjustment Programs on Women's Health in Kenya', 193-196.
[162] Damaris Parsitau, 'The Impact of Structural Adjustment Programs on Women's Heath in Kenya', 195-196.
[163] Damaris Parsitau, 'The Impact of Structural Adjustment Programs on Women's Heath in Kenya', 195-196.
[164] Kenya Legal and Ethical Issues Network, Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya, December 2018,8.
[165] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,4-5.
[166] Audrey R. Chapman, 'The social determinants of health, health equity and human rights', *Health and Human Rights Journal, 2010* - https://www.hhrjournal.org/2013/08/the-social-determinants-of-health-health-equity-and-human-rights/ on 12 November 2019.
[167]Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,8.
[168] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,8.
[169] Damaris Parsitau, 'The Impact of Structural Adjustment Programs on Women's Heath in Kenya', 196.

health professionals.[170]The time period between 1997 and 2010 has been highlighted as the time when maternal health care was at its worst in Kenya.[171]

Although the repealed 1969 constitution was silent on the right to health care, there were several legislative enactments that governed health services in Kenya.[172] The main act in this respect was the Public Health Act enacted in 1921.[173] The main challenge with the act was that it failed to highlight the measures through which the health obligation was to be realized.[174]

4.2. Maternal health care post-2010 constitution.

4.2.1. Constitution of Kenya.

In 2010, Kenya promulgated a new constitution repealing the old constitutional dispensation. In comparison to the 1964 independence constitution, the new constitution appraised a very progressive modern approach to human rights.[175] Specifically, this was done through the bill of rights which was drafted to include a wide array of socio-economic rights.[176] One of the socio economic rights captured was the right to health care which was a drastic breakaway from the 1969 constitution.[177] Article 43 stipulates that;

Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.[178]

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[170] Damaris Parsitau, 'The Impact of Structural Adjustment Programs on Women's Heath in Kenya', 197.
[171] United Agency for International Development, *Exploring Evidence for Disrespect and Abuse in Facility-Based Childbirth*, 2010, 1-18,
[172] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,6
[173] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,7.
[174] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,6-7.
[175] Cornelia Glinz, 'Kenya's New Constitution, a transforming Document or Less than Meets the Eye'44 Law *in Africa, Asia and Latin America* 1, 2011, 60-65.
[176]Cornelia Glinz, 'Kenya's New Constitution, a transforming Document or Less than Meets the Eye'44 Law *in Africa, Asia and Latin America* 1, 2011, 60-65.
[177] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,7
[178]Article 43, *Constitution of Kenya* (2010).

The constitution further provides that every person has the right to inherent dignity which must be respected and protected.[179] In addition, several international frameworks exist to guide the implementation of the right to health generally, and specifically, the right to reproductive health.[180] This is empowered by Article 2 of the constitution which states that any treaty or convention ratified by Kenya shall form part of the laws of Kenya.[181] While most of these treaties were ratified prior to 2010 and imposed state obligation, their significance become apparent with the promulgation of the 2010 constitution.[182]

In line with article 21(2) of the 2010 constitution which states that:

The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.[183]

Other subsequent acts have been enacted to fortify the right to reproductive health. One of these acts is the Health Act enacted in 2017.[184] It mainly outlines what exactly the right to health entails and the role of the state in actualizing the right.[185] The Act situates dignity, respect and privacy as core to the realization of the right to health,[186] and additionally recognizes that maternal and child health are part of the right to health.[187] Another act is the Public Health Act re-enacted in 2012.[188] Similar to its previous mandate, the Public Health Act seeks to provide means of securing and protecting public health.[189] The act calls for the regulation of all maternal health facilities in the country through the Permanent Secretary.[190] In addition, there is the National Patients Charter 2013,implemented by the ministry of health.[191] The Charter is mainly informed

[179] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,7.
[180] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,12-13.
[181] Article 2, *Constitution of Kenya* (2010).
[182] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,12-13.
[183] Article 21(2), *Constitution of Kenya* (2010).
[184] Section 1, *The Health Act* (2017).
[185] Preliminaries, *The Health Act* (2017).
[186] Section 5, *The Health Act* (2017)
[187] Section 68, *The Health Act* (2017)
[188] Preamble, *Public Health Act* (2012).
[189] Preliminary, *Public Health Act* (2012).
[190] Section 153, *Public Health Act* (2012)
[191] Introduction, *The Kenya National Patients' Rights Charter* (2013).

by the need for all patients to acquaint themselves with the rights due to them as they receive medical attention, as well as dispute resolution mechanisms [192]

4.2.2. An analysis of the current state of maternal healthcare.

The state has an obligation to ensure that healthcare is being provided in accordance to the four elements highlighted in general comment 14.[193] The first of these elements is availability which is founded on the fact that there should be sufficient functioning public healthcare facilities.[194]The other element is accessibility which focuses on health facilities being reachable to everyone without discrimination especially to the marginalized and vulnerable.[195] The committee goes on to outline that accessibility extends to physical accessibility, economic accessibility and information accessibility. [196] Another element is acceptability which pin points that all health facilities, goods and services must be respectful of medical ethics and culturally appropriate.[197] Lastly, quality speaks to health facilities, goods and services being; scientifically and medically appropriate and of good quality.[198] The four aspects must be progressively realized for a state to fulfil the right to quality healthcare. [199]

Despite the law becoming more encompassing of the right to health, maternal health care still remains derelict. Vulnerable and marginalized women are still forced to endure deplorable health treatment in public health institutions.[200] In 2012, two women reported being detained, disrespected and abused at the Pumwani Hospital for failure to pay the hospital fees.[201]. In 2013, a lady delivering her baby in Bungoma County Hospital was physically and verbally abused by hospital staff and deliberately left to deliver on the floor.[202]. In 2018, 12 infants were found dead at the Pumwani hospital

[192] Foreword, *The Kenya National Patients' Rights Charter* (2013).
[193] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*,4-5.
[194] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*,4-5.
[195] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*,4-5.
[196] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*,4-5.
[197] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*,4-5
[198] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*,4-5.
[199] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*,4-5.
[200] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,12.
[201]*Millicent Awour Omuya alias Maimuna Awour & another* v *The Attorney General & 4 others* (2015) eKLR.
[202] *J.M* v *the Honourable Attorney General &5 others* (2014) eKLR.

after the power supply in the nursery was interrupted overnight.[203]. In 2019, a documentary highlighted the plight of women delivering in Mama Lucy Kibaki Hospital.[204] The expose showed women being beaten, abused and having no form of privacy while giving birth.[205] Women are stacked together on beds, due to the hospital's incapacity.[206] In addition, women are forced to give birth on the floor in unsanitary conditions, owing to the fact that the designated rooms are too small to accommodate each and every woman in labour.[207] Furthermore, the hospital is understaffed despite the overwhelming number of patients they receive.[208] . These misdeeds continue to persist in spite of the existence of a legal and policy framework that aims to improve maternal health. This sad case studies depict how disrespect and abuse of women seeking maternal healthcare are still recurring problems. Notwithstanding the fact that the sacrosanct principle of dignity is a secured right in the law. [209]The importance of dignity as a founding value of the new Constitution cannot be over emphasized. [210] Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern.[211] The right is a foundation of many other rights that are specifically entrenched in our Constitution.[212]

These atrocities demonstrate insufficient expenditure and misallocation of public resources which are highlighted in general comment 14 as prongs of violating the

[203] Stella Cherono, 'DCI probes death of 12 infants at Pumwani Hospital', Daily Nation, September 18 2018https://www.nation.co.ke/news/DCI-probes-death-of-12-newborns-in-Pumwani-hospital/1056-4764604-w273uvz/index.html on 12 November 2019 .
[204] Graham Kajilwa, ' Misery of poor women exposed at city hospital 'Standard Newspaper, 6 August 2019https://www.standardmedia.co.ke/article/2001336933/misery-of-poor-women-exposed-at-city-hospital on 12 November 2019.
[205] Graham Kajilwa, ' Misery of poor women exposed at city hospital 'Standard Newspaper, 6 August 2019https://www.standardmedia.co.ke/article/2001336933/misery-of-poor-women-exposed-at-city-hospital on 12 November 2019
[206] Graham Kajilwa, ' Misery of poor women exposed at city hospital 'Standard Newspaper, 6 August 2019https://www.standardmedia.co.ke/article/2001336933/misery-of-poor-women-exposed-at-city-hospital on 12 November 2019
[207] Graham Kajilwa, ' Misery of poor women exposed at city hospital 'Standard Newspaper, 6 August 2019https://www.standardmedia.co.ke/article/2001336933/misery-of-poor-women-exposed-at-city-hospital on 12 November 2019
[208] Graham Kajilwa, ' Misery of poor women exposed at city hospital 'Standard Newspaper, 6 August 2019https://www.standardmedia.co.ke/article/2001336933/misery-of-poor-women-exposed-at-city-hospital on 12 November 2019
[209] Article 29, *Constitution of Kenya* (2010).
[210] *R* v *Makwanyane* (1995), The Constitutional Court of South Africa.
[211] *R* v *Makwanyane* (1995), The Constitutional Court of South Africa.
[212] *R* v *Makwanyane* (1995), The Constitutional Court of South Africa.

obligation to fulfil the right to healthcare.[213] The state is therefore failing to give sufficient recognition to the right to quality maternal healthcare.

4.2.3. Steps taken by the government to fulfil the right to maternal health care post the 2010 constitution

Ratifying international conventions and legislated domestic laws safeguarding the right to quality healthcare are a step towards fulfilling the right to quality health care.[214] To address the other facets of the obligation as well as move towards progressive realization of the right, the government has adapted various steps over the years. The most important steps are devolution and a policy initiated to promote free maternal healthcare.

4.2.4. Devolution

Prior to 2010, the health function in Kenya was centralized but after the 2010 Constitution, there was a clear division of roles made possible through devolution.[215] Devolution is a system of government, that transfers decision-making and implementation powers, functions, responsibilities and resources to elected local governance structures.[216] Devolution was a major turning point with the new constitution reform, transforming the ways in which the Kenyan government manages and allocates its resources.[217] Within the health care sector, the National Government is now in charge of National Referral Hospitals and Health Facilities, while the County Governments are responsible for all county health services including county health facilities and promotion of health care among others.[218] Through devolution, health care services, amongst others, have been decentralized,[219] thus a contribution towards achieving accessibility and availability elements.[220] Devolution has brought to the

[213] *R* v *Makwanyane* (1995), The Constitutional Court of South Africa.
[214] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 13.
[215] Shandana Khan Mohmand and Miguel Loureiro, 'Interrogating Decentralization in Africa' 48 *IDS Bulletin* 2, 2017, 1-7.
[216] Shandana Khan Mohmand and Miguel Loureiro, 'Interrogating Decentralization in Africa' 48 *IDS Bulletin* 2, 2017, 1-7.
[217] Susan Kilonzo, Eunice Kamara and Kitche Magak, 'Interrogating Decentralization in Africa' 48 *IDS Bulletin* 2,2017, 91.
[218] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,12-13.
[219] Susan Kilonzo, Eunice Kamara and Kitche Magak, 'Interrogating Decentralization in Africa' 48 *Institute of Development Studies Bulletin* 2,2017, 95.
[220] ICESCR, *General Comment 14, The right to the Highest Attainable Standard of Health*, 4-5.

forefront issues of equitable distribution of resources, wider public participation, reduction of socio-economic disparities, national unity and integration.[221]

However, challenges to devolution include significant capacity gaps within county political and management structures.[222] When resources were devolved, few countries possessed the administrative capability to absorb the available funding or plan for its use.[223] In 2019, a study[224] of the top 14 county hospitals revealed that they lacked basic amenities like adequate toilets, piped water and safe drinking water.[225] This puts the lives of patients at risk. Undoubtedly, corruption has contributed to the reduction of available resources, quality, equity and efficiency of health care services.[226]

4.2.5. Policy

On June 1st 2013, the Government of Kenya took action to address the maternal health care conundrum.[227] His Excellency President Uhuru Kenyatta initiated a policy of free maternity services in all public facilities, effective immediately.[228] In addition, the government committed Kshs 60 billion to fund the maternal healthcare program.[229] In as much as the policy was a positive step in line with economic accessibility, the hurried implementation of the policy has presented a number of challenges.[230] Through squandering and misappropriation of funds, the amount allocated was not as well utilized as it should have been.[231] In this regard, providing the needed maternity services in public health facilities resulted in the quality aspect of healthcare being

[221] Institute of Economic Affairs, *A Political Economy Analysis of Devolution in Kenya*, 2018, 5-7.
[222] Institute of Economic Affairs, *A Political Economy Analysis of Devolution in Kenya*, 2018,9-13.
[223] Institute of Economic Affairs, *A Political Economy Analysis of Devolution in Kenya* ,2018, 9-10.
[224] A study conducted in Kenya Medical Research Institute, (Kemri) and University of Amsterdam.
[225] Gatonye Gathura, 'Shame of hospitals with no toilets, water', Standard Newspaper, 15 October 2019 https://www.standardmedia.co.ke/article/2001345546/shame-of-hospitals-with-no-toilets-wate on 14 November 2019.
[226] Gatonye Gathura, 'Shame of hospitals with no toilets, water', Standard Newspaper, 15 October 2019 https://www.standardmedia.co.ke/article/2001345546/shame-of-hospitals-with-no-toilets-wate on 14 November 2019.
[227] Kenya National Commission of Human Rights, '*Implementing Free Maternal Health Care in Kenya*, 6 November 2013, 3-4.
[228] Kenya National Commission of Human Rights, '*Implementing Free Maternal Health Care in Kenya*, 6 November 2013, 3-4.
[229] Kenya National Commission of Human Rights, '*Implementing Free Maternal Health Care in Kenya*, 6 November 2013, 3.
[230]Kenya National Commission of Human Rights, '*Implementing Free Maternal Health Care in Kenya*, 6 November 2013, 3-10.
[231] Kenya National Commission of Human Rights, '*Implementing Free Maternal Health Care in Kenya*, 6 November 2013, 5-6.

compromised.[232] In addition, lack of proper funding has contributed significantly to understaffing of health workers due to reduced or no compensation.[233]

Ever since the Kenyan government instituted the policy, the system has suffered from improper implementation.[234] Studies have shown that this was mainly because there was lack of cohesion between policy makers and policy implementers of free maternal health care.[235] In 2015, the Center for Reproductive Rights, brought a petition on behalf of two women who had been detained unlawfully at the Pumwani Hospital for their inability to pay hospital fees.[236] This was despite the free maternal health care policy instituted by government.[237] The grim reality is that Pumwani Hospital is just one of many hospitals in Kenya that are ill-equipped to provide women with free maternal services. If the government fails to revisit the policy, free maternal health care will continue as a systemic widespread problem that denies women quality reproductive health care[238] Thus, going against human rights and the four elements of health aforementioned.

4.3. Conclusion

The Kenyan government has undeniably made constructive efforts to advance reproductive health rights. However, more needs to be done. As demonstrated, women seeking reproductive health services in Kenya have been made to suffer serious human rights violations. The public sector continues to be plagued by shortages of funding, medical staff and equipment. This has interfered with the ability of health care facilities to provide standard quality care. These systemic problems have continued to persist due to lack of accountability within the health care system stemming from lack of basic

[232] Kenya Legal and Ethical Issues Network, *Mapping the constitutional provisions on the right to health and the mechanisms for implementation in Kenya*, December 2018,12-13.
[233] Kenya National Commission of Human Rights, '*Implementing Free Maternal Health Care in Kenya*, 6 November 2013, 5-6.
[234] Emmanuel Wekesa Wamalwa, 'Implementation challenges of free maternity services policy in Kenya, the health worker's perspective'375 *Pan African Medical Journal* 22, 2015, 10-15.
[235] *Millicent Awour Omuya alias Maimuna Awour & another* v *The Attorney General & 4 others* (2015) eKLR
[236] *Millicent Awour Omuya alias Maimuna Awour & another* v *The Attorney General & 4 others* (2015) eKLR
[237] *Millicent Awour Omuya alias Maimuna Awour & another* v *The Attorney General & 4 others* (2015) eKLR
[238] Emmanuel Wekesa Wamalwa, 'Implementation challenges of free maternity services policy in Kenya: the health worker's perspective'375 *Pan African Medical Journal* 22, 2015, 10-15.

awareness about patients' rights and the absence of transparent and effective oversight mechanisms.[239]

The situation in Pumwani Maternity hospital, heavily highlighted in this chapter, illustrates the Kenyan government failing to take responsibility for severe human rights violations in health facilities. This is when taking into consideration that the hospital is the largest public maternity hospital and its patients are among the poorest and the youngest women in Kenya; a fact that makes them severally vulnerable.[240] Despite the fact that the hospital's atrocities have been public knowledge for decades, little to no measures have been taken to address them.[241] Women deserve to receive quality care that respects their dignity when they seek maternity services. In line with international standards, the current state of maternal health care depicts that the Kenyan government is failing to fulfil the right to maternal health care in line with the ICESR obligations More needs to do done in order to achieve safe motherhood in Kenya.

[239] Emmanuel Wekesa Wamalwa, 'Implementation challenges of free maternity services policy in Kenya, the health worker's perspective'375 *Pan African Medical Journal* 22, 2015, 15-21.
[240] Center for Reproductive Rights, Failure to deliver, 2007, 7-9.
[241] Center for Reproductive Rights, Failure to deliver, 2007, 7-9.

5.0. CHAPTER V

Access to justice

This chapter will focus on access to justice for the women who are victims of poor quality maternal healthcare. Sifting through the two cases that have been litigated in Kenya, and understanding how the women approached the court and how the courts have interpreted the right to quality healthcare. In conclusion, the chapter will also access some of the factors that have prevented these women from realizing their right to access justice. This part of research will mainly be informed by case law.

5.1. The concept of Access to justice.

Access to justice was first defined in 1978 to encompass, a system that is equally accessible to all, and leads to results that are individually and socially just.[242] As an inviolable right, access to justice mainly encompasses; the enrichment of rights in the law, awareness of and understanding of the law, access to information, equality in the protection of the right, access to justice systems particularly the formal adjudicatory processes, availability of physical legal structures, affordability of legal services, provision of a conducive environment within the judicial system, expeditious disposal of cases and enforcement of judicial decisions without delay.[243]

5.1.1. Access to justice for women in Kenya.

In my previous chapters, I have highlighted the various atrocities that indigent women undergo when seeking maternal health care in Kenya, that go against their constitutional rights. [244] Despite the fact that these plights are prevalent in public health institutions, only two cases have been tried before the courts countrywide.

One of these cases is the landmark case of; *Josephine Majani v Honourable Attorney General*.[245] The legal proceedings were instigated after a video recording of Josephine being physically and verbally abused by hospital staff was leaked to the press.[246] Based

[242] Grath and Cappelleti, 'Access to Justice, The Newest Wave in the Worldwide Movement to Make Rights Effective 'Maurer Faculty, 1978,6.
[243]*Dry Associates Limited* v *Capital Markets Authority & others* (2012) eKLR.
[244] Article 48, *Constitution of Kenya* (2010).
[245]*J.M* v *the Honourable Attorney General &5 others* (2014) eKLR.
[246] *J.M* v *the Honourable Attorney General &5 others* (2014) eKLR.

on the uproar instigated, the matter become a public interest issue, and justice had to be seen to be done.[247]Josephine's petition was premised on the fact that, while receiving maternal healthcare at the Bungoma County hospital she was forced to deliver her baby on the floor with no assistance and endure physical and verbal abuses from the nurses.[248] In addition, Josephine was forced to purchase basic amenities such as cotton wool during her maternity treatment at the hospital. [249] All of which violated her human rights, her right to quality maternal healthcare and respect for human dignity.[250] In the ruling, Justice Aroni found that Bungoma County Hospital, the Bungoma County government and the Cabinet Secretary of health had each contributed to the violation of Josephine's rights under both the Kenyan constitution and International Law. [251] As state representatives they each had a duty to ensure that Josephine was guaranteed her basic rights.[252] The national and county governments of Bungoma had failed to certify that healthcare facilities were providing quality maternal healthcare services.[253]

In addressing the issue of human dignity, the court believed that the nurses as healthcare providers owe a duty of care to their patients at all times. Thus, denying, derogating and demeaning the Petitioner's worth goes against that duty. The hospital was therefore culpable for infringing on her dignity as a woman and as a member of the human race.[254]

Justice Aroni further opined that quality healthcare is the availability of the bare minimum including; proper treatment at hospital, availability of necessary equipment, facilities and medication. [255] In light of the fact that maternal health care is anchored on the Constitution and a Presidential directive specific on the provision of free maternal care, the atrocities were identified to be nothing short of violating basic rights.[256] On this basis, the case was ruled in favour of Josephine Majani who was awarded Kshs 2.5 Million as remedies.[257]

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[247] *J.M* v *the Honourable Attorney General &5 others* (2014) eKLR.
[248] *J.M* v *the Honourable Attorney General &5 others* (2014) eKLR.
[249] *J.M* v *the Honourable Attorney General &5 others* (2014) eKLR.
[250] *J.M* v *the Honourable Attorney General &5 others* (2014) eKLR.
[251] *J.M* v *the Honourable Attorney General &5 others* (2014) eKLR.
[252] *J.M* v *the Honourable Attorney General &5 others* (2014) eKLR
[253] *J.M* v *the Honourable Attorney General &5 others* (2014) eKLR
[254] *J.M* v *the Honourable Attorney General &5 others* (2014) eKLR
[255] *J.M* v *the Honourable Attorney General &5 others* (2014) eKLR.
[256] *J.M* v *the Honourable Attorney General &5 others* (2014) eKLR
[257] *J.M* v *the Honourable Attorney General &5 others* (2014) eKLR.

The other case is that of; *Millicent Awour Maimuna and Margaret Anyoso v Attorney General*.[258] The suit was instigated through the Center for Reproductive Rights who filed a petition for both women at the High court in 2012. [259] Due to the back log of cases and an ineffective court system, a ruling was issued in 2015. The two women had been illegally detained for 24 days and subjected to physical abuse for failure to pay hospital fees at the Pumwani Hospital.[260] During their detainment, the women were forced to sleep on a flooded floor together with their infants with no food or beddings. In addition, both women were unable to access prescribed medication, necessary for that period. [261] Due to the unfavourable conditions Millicent contracted Pneumonia. [262] In her judgement, justice Mumbi Ngugi declared that the detention of the two women was arbitrary and unlawful, going against their constitutional safeguards and Kenya's international obligations.[263] In relation to quality maternal healthcare Justice Mumbi was of the opinion that, all pregnant women, including poor women should have access to affordable skilled care free from abuse during pregnancy, delivery, postpartum and postnatal periods.[264] In addition the waiver of maternity fees in public hospitals and health facilities should be effectively enforced without compromising the quality of service.[265] She further declared that the misconduct of the staff infringed on the women's rights to human dignity, freedom from arbitral detention and the right to quality maternal healthcare. In this regard, the women were awarded Kshs 2million as remedies.[266]

In these two cases, it is important to discern that, the women did not approach the courts on their own volition. Without the intervention of the aforementioned third parties,

[258] *Millicent Awour Omuya alias Maimuna Awour & another* v *The Attorney General & 4 others* (2015) eKLR.
[259] *Millicent Awour Omuya alias Maimuna Awour & another* v *The Attorney General & 4 others* (2015) eKLR.
[260] *Millicent Awour Omuya alias Maimuna Awour & another* v *The Attorney General & 4 others* (2015) eKLR.
[261] *Millicent Awour Omuya alias Maimuna Awour & another* v *The Attorney General & 4 others* (2015) eKLR.
[262] *Millicent Awour Omuya alias Maimuna Awour & another* v *The Attorney General & 4 others* (2015) eKLR.
[263] *Millicent Awour Omuya alias Maimuna Awour & another* v *The Attorney General & 4 others* (2015) eKLR.
[264] *Millicent Awour Omuya alias Maimuna Awour & another* v *The Attorney General & 4 others* (2015) eKLR.
[265] *Millicent Awour Omuya alias Maimuna Awour & another* v *The Attorney General & 4 others* (2015) eKLR.
[266] *Millicent Awour Omuya alias Maimuna Awour & another* v *The Attorney General & 4 others* (2015) eKLR.

these women would have been unable to seek the justice they deserve. This distinctively brings out the fact that access to justice remains a barrier to most women who often find themselves to be victims of poor health care, on the grounds of their poverty. Having established a proper judicial system, the state ought to provide a redress mechanism for these women that is proportionate to the seriousness of the impact they are constantly forced to battle.[267] Studies have shown that the biggest impediments to seeking justice in Kenya include; the costs of filing a suit, the costs of engaging a lawyer, opportunity cost of time spent in court, people failing to know their rights and what is owed to them as well as complexities of the justice systems.[268] These barriers continue to reinforce exclusion and poverty. [269]

In conclusion, in the absence of access to justice, people are unable to have their voices heard, exercise their rights, challenge discrimination and hold decision makers accountable.[270]

[267] International Development Law Organization, *Justice Sector Reforms to Enhance Access to Justice*,2019, 2-3.
[268] International Development Law Organization, *Justice Sector Reforms to Enhance Access to Justice*,2019, 2-7.
[269] Open Society Initiative for East Africa, Ensuring *justice for the most vulnerable in Kenya*, April 2007, 20-28.
[270] Michael Anderson, Access to justice and legal process: making legal institutions responsive to poor people in LDCs, Institute of Development Studies, Working paper number 178, 2003, 2-https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/3969/Wp178.pdfon20th November 2019.

5.0. CHAPTER VI

Conclusions and recommendations

This research has explored the maternal health care dilemma by bringing to light; the inadequacy of international law in safeguarding the right, the fatal condition of public maternal health care, failed government efforts and lack of access to justice for the aggrieved. Despite the outright problem, it is important to dwell in possibility. Thus, finding the infinite hope in the futile disappointment of what is currently the state of maternal healthcare. In this way, I propose some solutions suited to move towards the prospect of achieving the ultimate goal of safe motherhood.

5.0.1. Instituting a maternal healthcare policy

As highlighted in the third chapter, the right to proper maternal health care has always been considered a subset of the right to general health care. As demonstrated, this has contributed to the laxity of this pivotal right being realized. In light of this, a maternal healthcare policy needs to be institutionalized. The maternal healthcare policy which will be enacted through national government, will serve as a footprint of what the right to quality maternal care entails.

An exposition of the right will provide an adequate framework for the right to quality maternal healthcare in Kenya. The policy will state what quality maternal healthcare necessitates as well as the role of the state in guaranteeing the right to its citizens. Instituting the policy will be a step towards safeguarding the right to quality maternal care. The guidelines in the instituted policy will definitely help change the poor maternal health care narrative in the country. The government will also be more obliged to make access to quality maternal healthcare a reality. In the long run this will also tighten the various initiatives such as the free maternal healthcare directives, which have failed to succeed due to lack of proper systems in place. The biggest achievement of this policy will come when, all hospitals and medical centres are impelled to provide quality maternity healthcare for all women seeking maternal healthcare.

5.0.2. Creating rights awareness among patients

In line with achieving the main agenda spearheading the National Patients' rights charter, it is important for all patients to be acquainted with the rights due to them while receiving medical treatment. In this regard, I propose that maternal health care institutions prepare a list of rights that ought to be respected during the maternity period. This list should be approved by the Ministry of health.

The rights should be broken down in a manner that enables for easy understanding. After comprehending the rights and what they connote, each patient should sign off the document. Signing off the document is a declaration to speak out if any of the enlisted rights is violated. After the whole maternity process has been concluded, another document in form of a questionnaire is to be presented to the patients. This will enable them to rate the quality of services received during the maternity period. The questions enlisted should be as simple as; Did you sleep on a bed throughout your stay at the hospital, did you receive the help you needed at all times, were you abused or beaten at any point. This complaint mechanism will work hand in hand with the Continuing Professional Development (CPD), instituted by the Kenya Medical Practitioners Dentists Union (KMPDU) to help maintain their fitness to practise.[271] Through the CPD, KMPDU is working on reducing cases of professional malpractice in healthcare institutions in turn building confidence in the healthcare system.[272]

5.0.3. Institutionalizing epistolary jurisdiction

Having established that access to justice is a predicament for the aggrieved, it is important to simplify the process. One of the ways this can be achieved is through epistolary jurisdiction. Epistolary jurisdiction is defined as a legal innovation devoid of many procedural technicalities through which the wronged may channel their concerns to the courts. This is by way of informal documentation such as letters, telegrams, and newspaper articles amongst others.[273] Rule 2 of the Mutunga rules posits that the court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.[274]

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[271] Medical Practitioners and Dentists Union, *Continuing Professional Development Guidelines*, 2014, 19.
[272] Medical Practitioners and Dentists Union, *Continuing Professional Development Guidelines* 2014, 19.
[273] *Sunil Batra* v *Delhi Administration* (1978), The Supreme Court of India.
[274] Rule 2, *Practice and Procedure Rules, 'Mutunga Rules*' (2013).

The application of epistolary jurisdiction was echoed in the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* where the formal competency of a petition was raised. The court was of the opinion that; so long as there is sufficiency of information, as to the constitutional right violated with particulars supplied, then a court of competent jurisdiction, in the spirit of the Constitution, ought to take the matter up, investigate and provide redress.[275] Having established that these transgressions are mainly experienced by underprivileged women, it is important to create an avenue that enhances their access to justice. In line with my aforementioned solution of rights awareness, these women should also be able to petition the court through the suggested questionnaires. In as much as epistolary jurisdiction is in force as per the Mutunga Rules, lack of institutionalization makes it meaningless. One of the best ways to push the epistolary agenda is to educate the magistrates, judges and other judicial officers on its applicability and its importance.[276] Being a fairly new concept many may not be conversant with the existence of epistolary jurisdiction thus the need to educate.[277] Judicial education will definitely go along away in institutionalizing epistolary jurisdiction.[278]

[275] *Geoffrey Muthinja& another v Samuel Muguna Henry & 1756 others* (2015) eKLR.
[276] Edward Paranta, 'Access to justice: Epistolary jurisdiction as a means of improving access to justice in Kenya, Strathmore University, Nairobi, 2016, 26.
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