Center for Health, Human Rights and Development,
Prof. Ben Twinomugisha, Rhoda Kukiriza, Inziku Valente

Versus

Attorney General

(Petition 16 of 2011, Constitutional Court of Uganda)

CASE DIGEST AND STRATEGY PAPER

May 2021

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social justice in health

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1. INTRODUCTION

On 19th August 2020, the Constitutional Court of Uganda handed down a landmark decision in the case of *Center for Health, Human Rights and Development & Others vs Attorney General*(*Petition 16*).[1]

This case tackles one of the biggest challenges which the health sector in Uganda faces: failure by the State to fully realise the sexual and reproductive health and rights of thousands of expectant mothers. More specific in this regard are maternal health rights.

Uganda's health indicators show that the neonatal mortality rate stands at 20 per 1,000 live births while the maternal mortality rate is at 375 per 100,000 live births.[2] To simplify this indicator, activists have translated it into 16 women dying every day in the process of giving birth.[3] Other health indicators are also worrying. Some of these are illustrated below:

Under-Five Mortality Rate per 1,000 live births	45.8
Births attended by skilled health worker (%)	74
Physicians density per 1,000 population	0.093
Nursing and Midwifery Personnel Density per 1,000 population	0.648
Total Expenditure on health as % of GDP	7.22

Source: WHO, Key Country Indicators: Uganda https://apps.who.int/gho/data/node.cco.ki-UGA?lang=en Refer also to Uganda Bureau of Statistics (UBOS)

1 Constitutional Petition No. 16 of 2011

2 UBOS Demographic and Health Survey Report, 2016 (cite relevant page).

3 See Center for Health, Human Rights and DevelopmentPress Release: Landmark Hearing on Maternal Deaths Proceeds in Uganda's Constitutional Court, available at <https://www.cehurd.org/press-release-landmark-hearing-on-maternal-deaths-proceeds-in-ugandas-constitutional-court/> (accessed on 5th November 2020)

Petition 16 has been "a long walk" to justice, spanning nine years of court proceedings. The case challenged the actions and omissions of the Government arising from its failure to provide the minimum maternal health care services to expectant mothers.

These were listed and elaborated to include the following:

- Non-provision of basic indispensable maternal health facilities;
- Inadequate number of midwives and doctors to provide maternal health services;
- Inadequate budget allocation to the Maternal Health Sector;
- Frequent stockouts of essential drugs;
- Lack of emergency obstetric services at health facilities;
- Non-supervision of public health facilities; and
- Unethical behaviour of health workers towards expectant mothers.

In aggregation, it was argued that the failure in the above respects violated the right to health and contravened Articles 8A, 39 and 45 of the Constitution of Uganda, read together with Objectives XIV and XX of the National Objectives and Directive Principles of State Policy (NODPSP). It was also argued that the omissions violated the right to life as protected by Article 22 of the Constitution, and the the rights of women as far as they relate to maternal functions as protected by Article 33(1), (2) and (3). This is in addition to the failure to provide emergency obstetric care, which results in injury, inhuman and degrading treatment to women contrary to Articles 24 and 44 of the Constitution.

The decision of the Constitutional Court has several implications for the enforcement of economic, social and cultural rights (economic and social rights) in general, the right to health and the right to sexual and reproductive health and rights in particular. Relying on both Article 8A and the NODPSP, in addition to international law, the Court affirms obligations of the Government to provide health and medical services in Uganda.

The Orders of the Court also have far reaching implications, including the award of damages and the directive that the Attorney General submits a report at the end of the 2020/2021 financial year on progress with implementation of the orders.

It is against the above background that this piece is written as a digest and strategy paper, exploring the best strategies to maximise the effects of the decision and secure implementation of the orders made. The strategies proposed here are twofold. First, are those intended to ensure realisation of the declarations of court and implementation of the orders made by the court. In the second sense, the paper gives strategies on how best to take advantage of the case to ground the enforcement of economic and social rights, including other aspects of the right to health in general and sexual and reproductive rights in particular.

It is in the first place proposed that a multi-disciplinary analysis of the Court Decision is undertaken to determine its full implications including the nature of the obligations it gives rise to. Another strategy is to identify areas requiring further litigation for economic and social rights in general and the right to health specifically. Special focus could be had on sexual and reproductive health and rights. Also proposed as a strategy is to identify the actors and partners for purposes of ensuring implementation of the orders of the Court. It is also proposed that a Plan of Action be drawn to guide in pursuing the orders and maximising benefits of the Decision.

2. THE CASE

The case arises from unfortunate events that affected two families, but which were representative of widespread maternal deaths.

> A one Sylvia Nalubowa showed up at Mityana Referral Hospital seeking emergency attention due to obstructed labor. Medical personnel did not attend to her as required, instead they demanded for a bribe. By the time they decided to attend to her, it was too late. Nalubowa and one of her unborn twin babies died at the hospital (fortunately the other twin survived). Nalubowa bled to death. Nalubowa's story is not different from that of Jennifer Anguko, who died at Arua Regional Referral Hospital under similar circumstances.

When the case first came up for hearing in the Constitutional Court, it was dismissed on a preliminary point of law. The Court agreed with the state and ruled that the case was barred by the "political questions doctrine" since it inquired into the health policy of the Government, a political consideration that is a preserve of the other organs of Government (the legislature and executive) and not courts. The Ruling of the Constitutional Court was appealed to the Supreme Court in 2013.[4] The Supreme Court reversed the Ruling, holding that the case challenged the constitutionality of state conduct and must be entertained as such. It is based on this that the Court ordered the Constitutional Court to hear the case on its merits.

Between the ruling of the Constitutional Court and the decision of the Supreme Court, CEHURD strategically filed some cases seeking enforcement of the rights under Article 50 rather than interpretation under Article 137 which had been rejected by the Court.

The cases which were successfully argued in the High Court included *Center for*

4 Center For Health ,Human Rights & Development (CEHURD) & Ors v The Attorney General (CONSTITUTIONAL APPEAL NO.01 OF 2013) [2019] UGSC 69 (30 October 2015).

Health, Human Rights and Development vs Nakaseke District local Administration (*Nakaseke* case),[5]and *Center for Health, Human Rights and Development & Ors vs Executive Director of Mulago National referral Hospital & Ors* (*Mulago* case).[6] What these cases did was to maintain the momentum for legal activism to enforce economic, social and cultural rights, in general, and the right to health in particular, as justiciable rights. This is in addition to ensuring that victims of violations of these rights get remedies.

The *Nakaseke* case combines evidence of negligence and Article 33 and 34, respectively to find violation of the rights of women and children. The rights of women in Article 33 are with respect to those related to their maternal functions. Those of children in Article 34 are in relation to the right to know and be cared for by their parents. In the case, the mother requiring emergency obstetric care had been neglected, leading to her death. In the *Mulago* case, the Judge cited *General Comment No. 14 of the UN Committee on Economic, Social and Cultural Rights* to establish the right to health. This is in addition to invoking the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol).

It was ruled that the right to health contains both freedoms and entitlements and that the freedoms include the right to control one's health and body, including sexual and reproductive health, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. The Judge then elaborated on the obligations that go with the right, using the typology of the duties to respect, protect, promote and fulfil.

This is in addition to invoking the notion of progressive realisation and the effect of resources on the realisation of the rights. The case resulted in far reaching orders, including an order of compensation, and orders directing the hospital to put in place an effective system to monitor the movement of babies, both alive and dead. This is in addition to ordering both Police and Mulago hospital to report back to her on measures taken to comply with the orders of court. In the case, a new-born baby had disappeared and appears to have been swapped with a dead baby.

5 High Court Civil Suit No. 111 of 2012.

6 High Court Civil Suit 212 of 2013. The case arose from the loss of a twin baby at Mulago hospital, with evidence showing a high probability that the live baby was exchanged with a dead baby. There was noeffective system to monitor the movement of babies after birth, both dead and alive.

While the Nakaseke and Mulago cases are important in as much they maintained the momentum, they were not enough to give an authoritative constitutional interpretation affirming the existence of the right to health as well as economic and social rights in general. It therefore remained necessary to pursue Petition 16 in the Constitutional Court.

2.1. The Strategy in Petition 16

The Petitioners employed a blended strategy, combining use of legal standards drawn from a variety of legal sources, including international law, the Constitution of Uganda and comparative case-law. Extensive reference is also made to the national policy framework on sexual and reproductive health. The case combines a legal, public health and medical strategy and presents the facts succinctly.

2.1.1. International law and Comparative case law

There was strategic reliance on international human rights standards that establish the right to health. International law comprises the body of law which traditionally defines the relationship between states. It is defined by rules of custom as well as provisions of international agreements negotiated and signed by states as binding covenants. States have an obligation to translate the standards in the international treaties into domestic standards which they should implement. It is these and more that CEHURD relied on in building its case. The entry point was Article 287 of the Constitution which preserves all agreements, treaties and conventions which were in force before the coming into force of the Constitution in 1995. Specifically, reliance was made on Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The ICESCR guarantees the right to the best attainable standard of physical and mental health. This provision has been elaborated by the UN Committee on Economic, Social and Cultural Rights in its General Comment No. 14,[7] as relied on by CEHURD. Also relied on was Article 16 of the African Charter on Human

7 General Comment No. 14: The right to the highest attainable standard of health (article 12) (2000) *(Adopted by the Committee on Economic, Social and Cultural Rights at the Twenty-second Session, E/C.12/2005/4, 11 August 2000).*

and Peoples Rights which guarantees the right to health. The Charter has been interpreted by the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human Peoples' Rights. These too were relied on.

Reliance on the above instruments was intended to bolster and complement the domestic provisions that guarantee the right to health. This was important because the provisions in the Constitution are not elaborate enough with respect to the normative content of the right. The international instruments were key in establishing the justiciability of the right as protected by the Constitution and in defining the obligations of the state.

In addition to the international instruments mentioned above, CEHURD relied on comparative case law, especially that which affirms the right to health in general, and the right to reproductive health specifically. Reliance on comparative cases, which includes decisions of some treaty bodies, was a step in the right direction. This is because international human rights law has built a web which includes jurisprudence drawn from both international bodies and national courts.

National courts have built a practice of "trans-national judicial dialogues", under which judges are using jurisprudence to hold cross-border conversations and to emulate each other's approaches.[8] This has happened across legal systems. CEHURD relied on case law from Kenya, India, and South Africa. Also relied on was jurisprudence of such international tribunals as the Committee on the Elimination of Discrimination Against Women (CEDAW) and the Inter-American Court of Human Rights.

2.1.2. Building on the decisions of the High Court and Supreme Court Appeal

As mentioned above, the ruling of the Constitutional Court dismissing the Petition under the political question doctrine did not deter CEHURD from pursuing enforcement of the right to reproductive health. These cases were useful in

8 See Christopher Mbazira "The role of transboundary dialogue: A response to Stephen Ellmann" (2009) 2 Constitutional Court Review 145.

keeping the momentum for enforcement of the right. Moreover, the cases were particular to the right to reproductive health. In its submissions, CEHURD relied on the *Nakaseke* case and the Ruling in the Supreme Court Appeal No.1 of 2013, which, as seen above, was challenging the decision of the Constitutional Court on the political question doctrine.

In responding to the decision of the Constitutional Court, while not going into the merits of the case, the Supreme Court indirectly affirmed the constitutionality of the right to health. In his Judgment in the Appeal, Hon Chief Justice Bart Katureebe, while referring to Objective XX, emphasised the fact that the Constitution makes provision for the right to medical services. The Chief Justice also referred to Article 8A and gave guidance on some of the questions the court would have to address: "Where does the right to medical services fall? Is it a fundamental human right that is inherent and not granted by the state?".[9]

The effect of these cases CEHURD pursued in the High Court was to show the Constitutional Court that making determination on the existence of the right to health in general and the right to reproductive health in particular would not be irregular. This could be one of the factors which gave the Constitutional Court the confidence to confirm the rights. Indeed, on its own, the Constitutional Court referred to the Mulago case to confirm the rights and to also discuss its relationship with resources.

2.1.3. Blending the principles with the facts

Many public interest cases fail because they lack a factual basis. At times, those preparing the cases concentrate on the principles and forget that facts too are important and must be proved. In Petition 16, CEHURD did well in blending the principles and the facts.

In the first place, the relatives of the victims who witnessed the deaths at the hospitals were included as petitioners and their evidence presented by way of affidavit. The affidavits of these petitioners properly brought out the events as they unfolded at the hospital.

9 Decision of Chief Justice Bart Katureebe, pp 17 - 18.

This gave a vivid picture to which to apply the principles. Indeed, the Court keeps referring to the affidavits as it draws conclusions. In addition to these, the case blended with evidence adduced by experts, including legal experts and a medical professional.

The evidence of the medical professional, Prof Peter Waiswa, paints a picture of the nature of health care services in Uganda, including the state of infrastructure and the nature of services. The affidavit is also used to bring to the case various reports and statistics relevant to the state of sexual and reproductive health and rights in Uganda. The medical professional's evidence is blended with that of the legal experts on sexual and reproductive health and rights, Prof. Ben Twinomugisha and Mr Moses Mulumba, who elaborated on the nature of the right to health in general and reproductive health, while also drawing on the reproductive health policy framework.

2.1.4. Applying the integrated approach

CEHURD employed the integrated approach to establish the right to health. The integrated approach has allowed the use of other rights, especially civil and political, to enforce elements of economic and social rights. This has been the case, especially in countries where economic and social rights are not comprehensively protected in the legal framework.[10]

One of the jurisdictions which is notorious for this, using especially the right to life, is India.[11] The right to life is inextricably bound with the right to health. The argument in the Petition around the right to life was to the effect that there is a relationship between life and health. That availing access to health care and ensuring availability of effective emergency health services maintains life.

10 See Sandra Liebenberg "The Protection of Economic and Social Rights in Domestic Legal Systems" in Asborn Eide et al (eds) Economic, Social and Cultural Rights: A Textbook (2001) Kluwer Law International pp 55 - 84.

11 See Muralidhar in Yash Ghai & Jill Cottrell supra note 59, at 24 - 25, referring to the decision in Kesavananda Bharati v State of Kerala (1951) SCR 525.

That also, campaigns to ensure access to medical examinations and treatment and establishing functional health systems have the same effect. This is in addition to eliminating discriminatory laws which impact on the individual's ability to seek health care. Failing to do so, therefore, impeded both on the right to life as well as facilitating women's realisation of their full potential as per Article 33(2). It is this interaction of rights that CEHURD rode on, while infusing the principles in the NODPSP as bolstered by Article 8A, which makes them enforceable.

3. DISSECTING THE DECISION

The decision in the case turned on six issues. In summary, these are as stated below"

(i) Whether Government violated articles 8A, 39 and 45 as read with objectives XIV and XX;

(ii) Whether Government violated the right to life as provided for under Article 22;

(iii) Whether Government violated the rights of women as provided for under Article 33;

(iv) Whether failure to provide emergency obstetric care violated articles 8A, 22, 33, 45 and 287;

(v) Whether Government's omissions subjected women to inhuman and degrading treatment contrary to articles 24 and 44; and

(vi) What remedies are available.

The Court answers all these issues in the affirmative, in favour of the petitioners. In the first place, the Court draws on international law and the provisions of the Constitution to find the existence of the right to health. It is on the basis of this right that the court delves into the right to maternal health. The court acknowledges that the provision of maternal healthcare services depends largely on the availability of resources in the country. which, they state, should not be used as a blanket excuse and defence for failure to provide basic services to save life.

Court observes that indeed, the evidence showed that some deaths recorded were a result of negligence and corruption, where the victims failed to raise money to bribe the already paid-for workers to attend to them. It is on this basis that the Court finds that progressive realisation should not be a shield to greater scrutiny of state action.

That this is because the law requires that the state must demonstrate in clear and concrete terms that it has taken all practical measures to ensure that basic medical services are available to its people. That what is required of the state is to implement a reasonable and measurable plan with set achievable benchmarks and time frameworks for the enjoyment of the right over time, which should be within the resources available to the state. This was not done in the case. Although the Court finds that there are many policies relevant to maternal health, these have not fully been implemented.

The Court finds that it was not enough for the Government to merely state that there are challenges in implementing these, it had to be demonstrated that the policies have been used to attend to what those in urgent need require.

The Court also finds that the state is required to fulfil minimum core obligations which includes those obligations which have to be discharged, resources notwithstanding. It includes the element of rights enjoyment of which all persons are entitled to. According to the Court, this includes measures that enable reduction of maternal mortality rate, still birth, infant mortality and taking measures which ensure healthy development of children. In legal terms, the obligations include non-discrimination, desisting from legislation that takes away health benefits from its people, taking concrete and targeted steps to realise the right.

The Court relied on international law, including general comments from treaty bodies, to find that the non-provision of obstetric care, which usually leads to maternal deaths and morbidity, is a violation of the right to life. According to the Court, expectant mothers need the most basic maternal healthcare services in hospitals during delivery. That this is necessary not only to guarantee safe delivery but to also save their lives and those of the new-born babies.[12]

12 At p 37.

The Court also found that the Government has failed to guarantee the right of women to access facilities and opportunities necessary to enhance their welfare to enable them realise their full potential as enshrined under Article 33(2) of Uganda's constitution. This is in addition to the Article 33(3) right to be protected, taking into consideration their unique maternal functions.[13] The omissions the Government was found to have failed to address here included high out of pocket costs, stock out of mama kits, absence of basic maternal health commodities and lack of staff with expertise. Also impugned was Article 24 which prohibits inhuman or degrading treatment or punishment. In making its findings, the Court referred to the NODPSP in Objectives XIV and XX.

3.1. The remedies

The Court granted the declarations sought by the petitioners. This is to the effect that the Government had failed to adequately provide basic maternal healthcare services in violation of the right to health in Articles 8A, 39 and 45 and Objectives XIV and XX of the Constitution. That this omission violated the right to life under Article 22, the rights of women under Article 33, freedom from torture under Article 24, and the right to health under articles 8A, 45, 287 and Objectives XIV and XX.

In addition to the declarations, the Court made directive orders. These include requiring the state in the next financial year to prioritise maternal health; ensure training of staff involved in maternal health services; and to compile a report on the state of maternal care and submit the same to Parliament with a copy to Court.

The Court also gave damages to the relatives of the deceased, in the sums of UGX 70,000,000 as general damages and UGX 85,000,000 as exemplary damages. In addition, the Court directed the Attorney General to submit a report to the Court at the end of FY 2020/2021 showing progress made in the implementation of the orders in relation to improving maternal healthcare.

13 At p 38.

3.2. Synthesis of the implications of the Decision

The Decision in *Petition 16* has interesting implications for social, economic and cultural rights in Uganda in general and for the right to health, with specific focus on maternal care services. In addition, the decision has implications on reproductive health policy and spending. Each of these is discussed below.

Apart from the right to education,[14] family rights,[15] women's rights,[16] children's rights,[17] disability rights,[18] cultural rights,[19] clean and healthy environment,[20] and a few economic rights,[21] which are explicitly protected in the Bill of Rights (chapter four) of the Constitution, Uganda, unlike such countries as South Africa and Kenya, does not directly and comprehensively protect economic, social, and cultural rights. In this regard, the country has a "hybrid" constitution, one which protects only sprinkles of rights with elements of economic and social rights, with the bulk of these being part of the NODPSP.

> The effect of this has been that there are some doubts in some circles regarding the status of the rights with respect to whether they can legally be enforced.[22] The decision in the Petition ends the debate. The Bill of Rights read together with Article 8A and the NODPSP make the economic and social rights that can be deduced from these enforceable. Indeed, Article 45 guarantees all rights, including those not expressly mentioned in the Constitution.

All this means that persons whose economic, social and cultural rights have been violated can drag the state and other perpetrators to court and demand for accountability. The decision is likely to result into a wave of litigation seeking to enforce these rights. This will help to define the normative standards and

14 Article 30.
15 Article 31.
16 Article 33.
17 Article 34.
18 Article 35.
19 Article 37.
20 Article 39.
21 Article 40.
22 See C Mbazira "Hybrid Protection of ESC Rights in Uganda: Challenges to and Opportunities of Constitutional Enforcement" in DM Chirwa and L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: International, regional and national perspectives* (Cambridge: Cambridge University Press, 2016).

obligations that attach to the rights. These could then be used to assess state's policy frameworks and to provide benchmarks for legislation. Orders arising from these cases could also be used to provide relief to victims of violations as well as address systemic violations and abuses of the rights.

Together with other economic and social rights, the decision confirms the justiciability of the right to health. This is one right which has implications for several rights, including food, water and housing. Confirmation of reproductive and health rights, including maternal healthcare, has implications on the lives of thousands of women, especially mothers. The Constitution can now be used to protect the rights of women as they exercise their maternal functions. This could save the lives of many. The decision should ideally influence the implementation of policies and programmes necessary for improving reproductive health. This is important because the Court found that in effect, the problem is not the absence of policies and programmes but rather, their implementation.

In developing the rights, the Court relies on various international instruments, thereby making the international principles and standards in these relevant to the development of the domestic norms around the rights. This has placed the international principles and standards as benchmarks for determining the normative content of the rights and the obligations they impugn. This has the potential of growing our jurisprudence and the principles that guide policy and legislation, among others with the effect of entrenching the human rights-based approach. Utilisation of the standards would stand out as a form of domestication of international law. Indeed, the approach used by the Court appears to concretise the position that international law is a source of law when interpreting the Constitution.

The Decision also breaks new ground in the litigation of the right to health to the effect that it resulted from collective efforts involving the victims, experts in law and a public health/medical professional. This is important because experience shows that one of the difficulties of litigating the right to health is the lack of evidence from medical professionals. The case sets a new pace for the enforcement of the rights as well as other economic and social rights. In this, the case could be used to encourage public health, medical and other professionals to support litigation.

Also, relevant are the orders given by the Court. Human rights litigation in Uganda is experiencing an evolution in the use by the courts of their remedial powers. The courts have progressed from reluctance not to go beyond declarations to making affirmative orders, in some cases accompanied by structural injunctions. In the case, the Court is bold enough to venture into making orders that have vivid budgetary implications. This arises from directives to have staff trained and to improve the state of maternal healthcare. Moreover, the Court ventures into awarding damages.

This is the first case in which the Constitutional Court has awarded individual damages, thereby changing the practice that damages can only be awarded by a trial court after assessing the evidence. The importance of this is that it will motivate people to litigate at that level and would reduce the time taken in assessing damages for infractions of constitutional rights.

Before this Decision, the approach of the Constitutional Court has been to distinguish between Article 50 and Article 137 cases. The Court has previously concluded that Article 137 cases are about interpretation and not enforcement. This means that all the Court does here is to determine whether action, omission or law complained of is inconsistent with the Constitution. That once such inconsistency is found, all the Court will do is make a declaration. Those seeking compensation should go under Article 50 which mandates the appropriate court to enforce the rights in the Bill of Rights. Appropriate "court" here being the High Court.[23] Indeed, the Court has previously declined to give compensation even when a violation is found, arguing that this should be done by the High Court after hearing and considering the evidence.[24] Petition 16 challenges and changes this position.

23 Attorney General v Major General Tinyefuza, Constitutional Appeal No. 1 of 1997, and Ismail Serugo v Kampala City Council & Anor Constitutional Petition No. 14 of 1997.

24 Omar Awadh & Ors vs Attorney General [Consolidated], Constitutional Petitions No. 55 and 56 of 2011.

4. STRATEGY AND WAY FORWARD

The Decision is a great opportunity to promote the enforcement of economic and social rights in general and sexual and reproductive health and rights in particular. In specific terms, the decision stands out as an important tool to improve the state of maternal healthcare in Uganda. However, to realise all the above, there is a need for CEHURD and partners to move strategically. This section discusses some of the strategies that could be employed to maximise the benefits of the Decision.

An analysis done by Siri Gloppen is useful in understanding the factors that affect the success of public interest litigation.[25] Gloppen argues that success or failure depends on (a) the ability of groups whose rights are violated to articulate their claims and voice them into the legal system – or have the rights claimed on their behalf; (b) the responsiveness of the courts at various levels towards the social claims that are voiced; (c) the capability of the judges – that is, their ability to find adequate means to give legal effect to social rights; and (d) whether the social rights judgments that are handed down have authority in the sense that they are accepted, complied with and implemented through legislation and policy. One can therefore use Gloppen's analysis to assess the successes of Petition 16. This is done in the matrix below

	FACTOR	EVIDENCE
1	**Ability of Group to Voice Claims**	The evidence shows that while victims may not have been able to voice the claims, CEHURD applied its expertise and resources to have the claims voiced. Even when the case was initially dismissed by the Constitutional Court, CEHURD worked to voice the claims up to the Supreme Court and back to the Constitutional Court.

25 Siri Gloppen Social Rights Litigation as Transformation: South African Perspectives Chr. Michelsen Institute Development Studies and Human Rights Working Paper 2005: 3, at p 3.

	FACTOR	EVIDENCE
2.	**Responsiveness of courts at various levels towards claims**	In the Case, the Constitutional Court was initially not responsive when it dismissed the Petition based on the political question doctrine. However, the Supreme Court brought back the responsiveness. This forced the Constitutional Court to be responsive as well.
3.	**Ability of Judges to give legal effect to social rights**	The ability of the Judges was initially not there. This is the reason the Case was initially dismissed. However, the Appeal, and strategies used by CEHURD by litigating the maternal healthcare cases in the High Court built this ability. This was complemented by the work which the UN Office of the High Commissioner for Human Rights did in building the capacity of judges in the area of economic and social rights.
4.	**Whether judgments have authority in the sense that they are accepted, complied with and implemented through legislation and policy**	This is the most critical stage. Evidence shows tardiness on the part of the state to comply with court decisions. This could be explained by the declining commitment to the rule of law and the rising impunity. It is as a result of this that there is a need for CEHURD and partners to act strategically to secure compliance and implementation of the Decision.

4.1. The Strategies

In line with factor four, there is need for strategic steps to secure compliance and implementation Strategically, the following are proposed: (i) Multi-disciplinary analysis of the decision; (ii) Identify areas requiring additional litigation; (iii) Identify the actors responsible for implementing orders and partners that could support this; and (iv) Draw plan of action.

4.1.1. Multi-disciplinary analysis of the decision

The Decision in the case touches on matters of health care. While the case can be subjected to a legal analysis in terms of the normative nature of the right and the legal obligations it gives rise to, a legal analysis may not expose the full implications of the case in health care terms. To fully understand the Decision requires a "public health/medico-legal" analysis. This can only be undertaken by a combination of legal experts in sexual, reproductive health and public health and healthcare professionals. Moreover, the orders of the Court have policy ramifications with budgetary implications.

This requires the review team to have an expert in economics with a speciality in budgeting. A quantitative economist would be the most ideal. To achieve this, CEHURD should organise a convening(s) of these professionals to analyse the Decision.

The purpose of the convenings should be to establish the following:

- Digest the facts and events giving rise to the case and establishing the scale of their prevalence
- Establish the policies and programmes in the Health Sector implicated by the Decision
- Discuss the implications of the orders of court in practical terms with respect to what needs to be done and the persons/ authorities responsible for their implementation
- Determine the budgetary implications of implementation of the orders of the Court
- Identify areas requiring further litigation.

4.1.2. Identifying areas requiring further litigation

The case tackles pertinent issues around sexual and reproductive health. However, as indicated above, the Decision opens litigation in several areas relevant to economic and social rights in general. Also, although the case was on the right to health, it has implications for other rights that complement and are complemented by the right to health. Indeed, even rights in such a specific area as maternal health rights impact and are impacted by other rights. It is therefore important to identify the elements of other rights which impact the right to health in general and sexual, reproductive health and maternal health specifically. For maternal health, the case revolved mainly around access to emergency obstetric care, access to essential goods and services for expectant mothers and the need for professionalism and diligence on the part of medical/healthcare professionals.

There are, however, several issues that are part and parcel of maternal health and directly and indirectly impact on maternal mortality. These include access to family planning services, sexuality education and unsafe abortions, among others. Although the contraceptive prevalence rate has been increasing, it is still unsatisfactory. Statistics show that the unmet need for family planning stands at 39.5%.[26] The causes are various, ranging from ignorance, lack of access to services, and cultural beliefs and attitudes. There are several that could be explored for possible litigation.

The rolling out of sexuality education which would help create awareness and reduce unsafe sexual practices that contribute to teenage pregnancies and exposure to sexually transmitted infections for instance. One of the issues that should inform considerations in this regard is the National Sexuality Education Framework, 2018, which was shelved following some morality-based objections. Indeed, unsafe abortions significantly contribute to maternal mortality.[27] Advocacy around all these problems could be done through public interest litigation. Focus on these as well as obstetric care could deepen the impact of the decision.

26 Family 2020 Uganda Commitment Maker Since 2012, available at <www.familyplanning2020.org> (accessed on 9th December 2020).

27 See Guttmacher Abortion and Postabortion in Uganda (2017) available at <Abortion and Postabortion Care in Uganda | Guttmacher Institute> (accessed on 7th December 2020).

4.1.3. Identify the actors and partners for implementation of orders

> The implementation of the orders handled down by the Court require the participation of various stakeholders. This includes those who bear direct legal obligations arising from the judgment, and those who could support the implementation. The Decision requires action from the Ministry of Health; Ministry of Finance and Economic Planning; and from the Legislature. Action could also be required from other state institutions, including local governments and the National Planning Authority, among others. This is in addition to non-state actors such as civil society organisations. CEHURD should consider engaging in an exercise of identifying the obligations of each of these institutions.

This should be done in precise terms which identify the exact sections/departments and/or offices responsible for the obligations. The capacities of each of these and areas requiring support should be identified. This is because sometimes state institutions fail to implement court decisions because of the lack of capacity to do so. This could include either financial or technical capacity, or even both. In some cases, the offices may require external support and collaborations. Indeed, in some cases, non-implementation results from lack of coordination between different departments or levels of government. These could be supported to establish this collaboration.

In the first place, after identifying the actors, these could be helped by having the decision broken down for the actors to understand the decision, its implications and what is required of them. The briefs compiled for this purpose should be written in simple terms and in a style that applies to the actor(s) targeted. For instance, briefs targeting public health and medical experts should be presented using public health and medical terminology and procedures.

4.1.4. Draw Plan of Action

There is need for a plan of action to pursue the orders of the court and maximise the benefits of the case as proposed above. The time-bound plan should specify interventions, identify partners and the resources required.

The chronology could be guided by the following:

- Analysing and breaking down the judgment
- Identifying actors for implementation
- Developing case briefs for specific actors
- Determining and planning for areas requiring further litigation
- Planning for the training and sensitisation of relevant stakeholders including judicial officers, legislators and other technocrats on the implications of Petition 16, as well as other relevant decisions
- Determining the role of communities affected by the cases and from where they arise.

5. Conclusion

Petition 16 is a landmark case in enforcement of economic, social and cultural rights in general and the right to health specifically. The case illustrates that organised litigation strategies can promote the realisation of economic and social rights. This is especially important for addressing the challenges that vulnerable sections of society face.

The case's focus on maternal health is justified by the fact that in Uganda, like many countries, maternal health has been affected by high morbidity and mortality rates. The case shows that organisation, persistence, and strategic progress can promote legal norms that would otherwise be neglected. It is a result of these that CEHURD was able to overcome various obstacles to have the Case heard and decided. The normative content of the Decision is sound and opens room for litigation of various economic and social rights.

Nonetheless, there is a need to properly strategise in order ensure that the decision, with its far-reaching orders, is implemented. Moreover, the impact of the case goes beyond implementing the orders and embraces enforcement of other economic social and cultural rights. It is therefore important to maximise this. For this to be achieved, it is proposed that CEHURD does the following: Undertake a multi-disciplinary analysis of the decision; (ii) Identify areas requiring additional litigation; (iii) Identify the actors responsible for implementing orders and partners that could support this; and (iv) Draw a plan of action.

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