

The Human Rights Situation, Case Law, and Research on Protections on Grounds of Sexual Orientation, Gender Identity, and Expression in the Republic of Kenya

Submitted to the Office of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

Submitted by:

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&

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Introduction

In response to the Call for Inputs issued by the Office of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, this submission outlines the human rights situation of members of the transgender and intersex community in the Republic of Kenya (Kenya). In particular, this submission discusses the following underpinnings: legal recognition of gender identity, and iv) destigmatization linked with depathologisation. This submission includes information on the current human rights situation in Kenya and key laws and policies as well as best practice recommendations in relation to the abovementioned underpinnings.

Legal recognition of gender identity

Persons whose gender identity does not conform to the sex they were assigned at birth, or who's sex characteristics do not conform to society's understanding of sex characteristics face significant challenges when it comes to the legal recognition of their gender identity. In Kenya, policy gaps exist in the areas of equality and non-discrimination, documentation and legal status, as well as appropriate and affirming health care for transgender, intersex, and gender non-conforming individuals.

The Births and Deaths Registration Act, the Registration of Persons Act, and the Citizenship and Immigration Act, key legislation that provide for the issuance of birth certificates, national identification cards and passports, fail to adequately provide for intersex persons as well as persons who wish to change their gender marker in government issued documentation.

In *RM v the Hon. Attorney General* [2010], Petition 705 of 2007 (RM Case), the Court addressed the legal recognition of intersex persons for the first time. In this case, the Court rejected the claim by the Petitioner that he had suffered lack of legal recognition on account of having not been registered under the Births and Deaths Registration Act. The Court argued that intersex persons could be categorised as either male or female by relying on their dominant sex characteristics. Further, the Court rejected the petitioners claim that the meaning of 'sex' under the Constitution of Kenya included 'intersex', restricting itself to a strict gender/sex binary.

In *Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others* [2014] eKLR (Baby 'A' Case), the High Court ruled that the petitioner, an infant who had been found to have both male and female genitalia, had suffered from the lack of legal recognition and that differential treatment was not on account of discrimination. However, the Court made rulings which have a positive bearing on the rights of intersex persons. First, the Court determined that the petitioner was an intersex person, thus recognising that such a category of individuals existed, contrary to the finding in the RM case. Second, the Court went on to order 'appropriate relief' for the petitioner by compelling the Attorney General to file a report identifying the status of a statute addressing intersex persons as well as guidelines and regulations on 'corrective surgery' for this group. On May 26, 2017, the Government of Kenya gazetted a taskforce on policy, legal, institutional and administrative reforms regarding intersex persons in Kenya in an effort to implement the decision in the Baby 'A' Case.¹

In *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu* [2014] eKLR (Audrey Mbugua Case), the High Court held that a transgender person had the right to government issued documentation that bore their desired name (in the case where a person had legally changed their name) and with the gender marker removed. Although Article 27 (4) of the Constitution of Kenya (2010) does not explicitly mention gender identity as a protected category, the precedent set in the Audrey Mbugua Case may be construed to mean that transgender, intersex, and gender non-conforming individuals are entitled to human rights protections that are specific to their lived experience. However, lack of clear policies relating to non-discrimination on grounds of gender identity, expression and sex characteristics open transgender, intersex, gender non-conforming persons to differential treatment.

Identity documentation in Kenyan society forms an important element of public life and key determinant of access: persons without valid identification may face arbitrary arrest and detention by law enforcement; withholding of services such as healthcare, banking, education, employment, and travel.

¹ The Kenya Gazette, Vol. CXIX—No. 67, May 26 2017

Transgender persons wishing to have their gender marker amended in identity documents or other documents conferring legal status face hardship arising from lack of policies to govern this process. Although the Audrey Mbugua Case set a major precedent in allowing for the alteration of gender markers in government issued documents, the legal grounding was limited to instances where the law did not explicitly provide for the requirement that a gender marker be included in the document (in this case, Ms Audrey Mbugua's academic certificate). In cases where the law requires a gender marker in a document (such as a birth certificate², passport³, or national identity card⁴), persons wishing to have their gender marker amended have few, if any, options.

Transgender persons in Kenya also face challenges when seeking to legally change their name, even though this process is governed by law. Section 9 of the Registration of Persons Rules (subsidiary legislation to the Registration of Persons Act), sets out the process by which a person can change their names. There are no restrictions for changing a person's name to one that does not conform to the sex the person was assigned at birth. However, in February 2017, the High Court of Kenya ordered the Principal Registrar of Persons to effect the name changes of 5 transgender persons in their identity documents after the office's repeated failure to do so.⁵ In late 2017, the High Court awarded the five transgender persons 30 million Kenya shillings in damages after the Principal Registrar's Office repeat failure to effect name-changes in their identity documents and for failure to implement previous court rulings.⁶

Destigmatization linked with depathologization

In Kenya, transgender and intersex persons face violence and discrimination when accessing health care services, violations that sometimes arise from the pathologization of sex characteristics, gender identities, and forms of gender expression that do not conform to sex/gender binaries prevalent in society. In the case of transgender, historical conceptions of gender non-conformity to the sex one is assigned at birth, continue to affect the way in which the medical community, and in extension the

² Under Section 2 of the Births and Deaths Registration Act, the prescribed particulars of a birth certificate mean – “as to any birth, the name, sex, date and place of birth, and the names, residence, occupations and nationality of the parents.”

³ Under Rule 13 (d) of the Kenya Citizenship and Immigration Regulations, 2012, all passports issued under the authority of the Government of Kenya must bear the sex of the passport holder.

⁴ Under Section 5 (1) of the Registration of Persons Act, the Principal Registrar is mandated to maintain a register of all registered persons and to record the particulars in respect of such persons which include the sex of the person.

⁵ 'Court orders state to alter names in IDs for five transgender Kenyans,' Justice Now (Vincent Agoya), February 15 2017, <http://justicenow.co.ke/2017/02/15/court-orders-state-to-alter-names-in-ids-for-five-transgender-kenyans/> (Accessed June 24, 2018)

⁶ 'State ordered to pay transgender woman Sh 30 million over names' Standard Media Group (Luke Anami), undated, <https://www.sde.co.ke/article/2001260360/state-ordered-to-pay-transgender-women-sh30-million-over-names> (Accessed June 24, 2018)

state, view them.⁷ Intersex persons, especially minors and infants, are considered to be “patients” in need of “treatment” for their “condition.”⁸

The pathologisation of transgender persons is a key impediment to their enjoyment of rights under Kenya’s 2010 Constitution. Kenya does not have any laws or policies providing for medical procedures aimed at conforming a transgender person’s physical appearance with their gender identity. The lack of these laws and policies is both a cause and effect of the violence and discrimination that transgender persons experience. For instance, court records in the Audrey Mbugua Case reveal that the applicant had been required to produce documentation showing that they had been diagnosed with “gender identity disorder” before the gender marker in the academic certificate could be changed. However, without clear guidelines on the diagnosis of gender identity disorder, such a diagnosis was impossible to make and, if it had been, such a diagnosis would have had questionable legal merit.

In *Republic v Cabinet Secretary Ministry of Health & 2 others Ex-Parte Transgender Education and Advocacy (Suing Through Its Officials) Audrey Mbugua Ithibu (Chairperson) & 2 others* [2015] eKLR, the High Court ruled that the Government of Kenya could not be compelled to develop and implement National Guidelines for the Management of Gender Identity Disorders. This case is a testament to the urgent need for guidelines on the legal (and medical) status of transgender persons that is key to the clarification of the rights under both local and international law.

Although no laws or policies exist in Kenya on the legal and medical rationale for surgical procedures aimed at conforming a person’s sex with a particular gender identity, many intersex persons, particularly infants and young children, undergo such surgeries aimed at “correcting” ambiguous genitalia. The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has underscored the illegality of these procedures under international human rights law.⁹

From birth, intersex persons in Kenya are medicalised and pathologized by parents and legal guardians, the medical community, and the state with a bid to “correct” or “normalise” their sex to fit cisnormative (a belief that one’s sex assigned at birth should correspond to one’s gender identity) norms. In its landmark 2018 report titled *Equality In Dignity and Rights: Promoting the Rights of Intersex Persons in Kenya*, the Kenya National Commission on Human Rights (Kenya’s national human rights institution), highlighted the effects of pathologization of intersex persons to include genital mutilation;

⁷ These views continue to be prevalent even though medical professionals in Kenya are trained and use the most current versions of texts, training manuals, and diagnostic manuals that apply a less pathologized view of transgender persons.

⁸ KNCHR report

⁹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment, Juan E. Méndez, 1 February 2013, A/HRC/22/53

medical neglect (often through diagnosis) leading to mortality and morbidity; lack of mental health provision (through the privileging of mental health over physical health; and deprivation of past medical information (even during adulthood)).¹⁰ In this report¹¹, the Kenya National Commission on Human Rights issued the following recommendations to the Government of Kenya aimed at centring the human rights during interactions between intersex persons and the healthcare system:

1. The Cabinet Secretary for Health to convene an *Intersex Health Working Group*. This Intersex Health Working Group should be comprised of medical professionals from various fields (midwifery, paediatric surgery, endocrinology, psychology) and it should involve the relevant medical associations: the Medical Practitioners and Dentists Board (MPDB), the Kenya Paediatric Association (KPA), and the Kenya Association of Paediatric Surgeons. The Intersex Health Working Group should also include the meaningful participation of intersex representatives and parents of intersex children.
2. Train nurses and doctors to identify intersex conditions and, when necessary, refer patients to a hospital that has specialists with expertise in treating intersex conditions. Also, train hospital staff to respect the human rights of intersex people, including the right to personal autonomy, right to privacy, and the right to information.
3. Include intersex people in all training workshops and review of health care guidelines.
4. Identify a select number of hospitals – such as Kenyatta National Hospital, Kijabe Hospital, and Moi Teaching and Referral Hospital – that have expertise in providing for the health needs of intersex people. Designate these hospitals *Intersex Care Centres* and ensure that medical interventions that require special expertise are only conducted at one these *Intersex Care Centres*.
5. Establish national guidelines for treating intersex patients based on the patient's right to personal autonomy and the best interests of the child and on medical best practices. In creating new guidelines, the Intersex Health Working Group will have to carefully scrutinize the medical treatments currently performed on intersex patients, many of which have been identified as harmful and unnecessary by international human rights bodies, such as the African Commission on Human and People's Rights.¹²

¹⁰ Equality in Dignity and Rights: Promoting the Rights of Intersex Persons in Kenya (2018), Kenya National Commission on Human Rights, Nairobi.

¹¹ Ibid., pp 35-37

¹² End violence and harmful medical practices on intersex children and adults, UN and regional experts urge (Office of the High Commissioner for Human Rights), 26 October 2017, <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739> (accessed June 25, 2017)

6. Create a national registry to record the frequency and geographic distribution of intersex variations. The registry will help the government better allocate health care services. The registry must be kept strictly confidential and intersex people must be allowed to access their personal records at all times. This recommendation is in line with the order of the High Court in the *Baby 'A' Case* which called on the Attorney General to: *Submit to this Court within 90 days of this judgment information related to the organ, agency or institution responsible for collecting and keeping data related to intersex children and persons. (Para 71, Order iii)*
7. Direct the National Hospital Insurance Fund to cover the full costs of health care of intersex persons to ensure that intersex receive the “highest attainable standard of health.” For many intersex people require medical treatment for their intersex condition, but for those who do, the costs can be prohibitive.
8. Create multi-disciplinary teams to assess and care for intersex patients including surgeons, endocrinologists, and psychologists. Supportive counselling services for intersex persons and their family is just as important as caring for their physical health of intersex persons.
9. Facilitate the formation of peer support groups. Connect intersex patients and family members with other intersex patients and family members with shared experiences. “Peer support” is increasingly being recognised as a crucial step to removing stigma and improving health. The *2016 Global Disorders of Sex Development Update* says that peer support “relieves patients from isolation and provides a unique source of identity, support, anticipatory guidance and medical information accessible to individuals of all levels” (p.2).

In terms of sex “normalising” surgery (i.e. surgical procedures that have no therapeutic value aimed at conforming an intersex person’s assigned sex with their gender identity, usually at infancy or early childhood), the Kenya National Commission on Human Rights made the following recommendations¹³:

1. Direct doctors at designated Intersex Care Centres to advise all parents to withhold “normalising” surgery until children are at an age when they can make a decision for themselves. And facilitate the creation of peer support groups, so that new parents of intersex children can talk with other parents and with intersex children can talk with other parents and with intersex adults in order to understand that intersex variations are not uncommon and they should not be feared.
2. [...]

¹³ Equality in Dignity and Human Rights, *supra* note 10, pp. 49-50

3. Further research on the impact of sex “normalizing” treatment on intersex Kenyans. The study should include intersex people of various age groups and include both people who have and have not received “normalizing” surgery as children.

KHRC Recommendations to the Government of Kenya

Based on the above findings and analysis, we make the following recommendations to the Government of Kenya:

- a) To immediately implement court decisions affirming the right of transgender and intersex persons to change their names in government-issued identity documents in conformity with existing legislation and to end the practice of denying change-of-name applications by transgender and intersex persons.
- b) To immediately pass and implement legislation and policies that provide for the right of transgender and intersex persons to appropriately amend gender markers in all government-issued documentation. Further, to ensure that such laws are in line with international best practices that aim to depathologize the acquisition and amendment legal status of transgender and intersex persons such as by removing the requirement for a diagnosis of “gender dysphoria” and “gender identity disorder” or the requirement of non-therapeutic “normalising” surgery or the requirement of involuntary sterilisation in order to legally change one’s names and gender marker.
- c) To immediately pass and implement legislation and policies that outlaw non-therapeutic surgeries on intersex minors in line with the 2018 report by the Kenya National Commission on Human Rights outlined above.
- d) To immediately implement the recommendations by the Kenya National Commission on Human Rights outline in the foregoing as they provide international best standards relating to depathologization.