

The Court grappled with the issue of intersexual conditions and human rights, but by denying recognition of intersex as a category distinct from male or female, the Court failed to protect the rights of intersex persons. The Court could have shed human rights light into the spaces where intersex persons continue to search for affirmation of their humanity and of their rights. That could be a stepping stone for better jurisprudence regarding intersexuality and human rights on the African continent.

GENDER IDENTITY

Republic v. Kenya National Examinations Council & Another
[2014] eKLR, JR Case No. 147 of 2013
Kenya, High Court

COURT HOLDING

According to Rule 9(3) of the Kenya National Examinations Council Rules 2009 (Kenya Certificate of Secondary Education Examinations), the Kenya National Examinations Council (KNEC) may withdraw a certificate for amendment or for any other reason where it considers it necessary. If on being requested to perform its duty, the KNEC fails to do so, the High Court has the jurisdiction to issue orders compelling it to perform its duty.

The KNEC is not required by law to indicate a gender demarcation on all Certificates of Secondary Education, noting that although it is traditional to indicate such demarcation to assist in proper identification of a candidate, such tradition is not backed by law.

Summary of Facts

This was an application before the High Court of Kenya for review of a decision of the Kenya National Examinations Council (KNEC) denying the applicant change of particulars of name on the applicant's Kenya Certificate of Secondary Education (KCSE), and removal of a gender mark on the same document.

The applicant was born with the physical characteristics of a male child, but has always inclined toward female gender. The applicant completed secondary school as a male, but following such time was diagnosed with Gender Identity Disorder (GID) and commenced treatment for gender reassignment to female.

The applicant applied to the KNEC to have his/her secondary school certificate re-issued to remove the gender demarcation and change the name. This request was denied, so the applicant sought a court order compelling the KNEC to re-issue the certificate.

Issues

The issues put before the Court were the following:

1. Whether the change in name on a KCSE is allowed by law; and

2. Whether the law requires the KNEC to indicate a gender mark on the KCSE.

Court's Analysis

The Court's determination hinged on the proper interpretation and application of the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules 2009 (Rules), especially Rule 9 which addresses the mandate of the KNEC with regard to what appears on the certificate. In the Court's opinion, the Rules do not require a gender mark to be indicated on the certificate. Further, the Rules allowed KNEC the discretion to withdraw the certificate for amendment or for any other reasons that it considered necessary.

The Court addressed the reason for which the applicant wanted the certificate to be re-issued with a change in the particulars of name, which included Gender Identity Disorder (GID). The Court found that the applicant demonstrated why the applicant should be treated differently to remove the gender demarcation. In so finding, the Court reviewed, in *obiter dicta*, several decisions from the UK, Kenya, India, and Nepal that consider the legal status of transgender and intersex gender categories (*Belinger v. Bellinger* [2003], UKHL 21, *Richard Muasya v. the Attorney General & Others*, Nairobi High Court, Petition No. 705 of 2007, *National Legal Services Authority v. Union of India and Others*, Civil Original Jurisdiction Writ Petition (Civil) No. 400 of 2012; Writ Petition (Civil) No. 604 of 2012 and *Sunil Babu Pant & Others v. Nepal Government*, Writ Petition No. 917 of 2007). The Court recognised the pain, trauma, and agony that persons with GID undergo, and quoted the opinion of the Supreme Court of India (*National Legal Services Authority* case) that "the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change."

The Court also recognised that this was an issue about human dignity, and that it ought to apply Article 28 of the Constitution of the Republic of Kenya, 2010, which recognises this right, to the applicant's circumstances. It was its view that "Human dignity can be violated through humiliation, degradation or dehumanization," as was the case with the applicant.

Taking into account the Rules and the reasons for the applicant's requests, the Court held that by refusing the name-change and removal of the gender mark, KNEC had failed to discharge its obligations in accordance with the law. The Court therefore compelled KNEC to comply by re-issuing the applicant a certificate with the name-change and without a gender mark.

Conclusion

The applicant was successful and the Court ordered KNEC to replace the applicant's certificate.

Significance

The Court's review of the legal interpretation of the term "sex," although *obiter dicta*, is instructive. The Court referred to Article 10 of the Constitution of Kenya in identifying human dignity as a guiding principle to be applied in interpreting any law, and to Article 28 of the Constitution of Kenya which provides that such human dignity should be protected. The Court's emphasis on the value of human dignity was ultimately the reason that it used to overcome the respondents'

arguments, based on grounds of bureaucratic complexity, for not recognizing the applicant's special circumstances.

SEXUAL ORIENTATION

Oloka-Onyango and 9 Others v. Attorney General
[2014] UGCC 14, Constitutional Petition No. 8 of 2014
Uganda, Constitutional Court

COURT HOLDING

The Court held that the Anti-Homosexuality Act 2014 (hereinafter “the Act”) was invalid because the Parliament lacked a quorum as required by the Uganda Constitution when it voted to pass the Act.

Summary of Facts

When the Act was put to a vote by the Parliament in December 2013, members of Parliament, most notably the Prime Minister, twice asserted that there was not a quorum present, as required under the Uganda Constitution. The Speaker of Parliament, who is responsible for determining whether a quorum exists, did not follow the required procedures for determining whether a quorum was present and put the Act to a vote, whereby the Act was passed by the members of Parliament present.

The Petitioners sued the government, claiming that a quorum did not exist at the time the Act was voted on, and that the enactment of the Act without quorum was in contravention of Articles 2(1) and (2), 88 and 94(1) of the Constitution of the Republic of Uganda and Rule 23 of the Parliamentary Rules of Procedure. Further, the substantive provisions of the Act were impugned for violating legal principles and constitutionally guaranteed rights, including as follows:

- By criminalising consensual same-sex/gender sexual activity among adults in private, it contravened the right to equality before the law, freedom from discrimination and the right to privacy;
- By criminalising consensual touching by persons of the same-sex, it created an offence that was overly broad;
- By imposing a maximum life imprisonment sentence, it created disproportionate punishment in contravention of the right to equality, and freedom from cruel, inhuman and degrading punishment;
- By criminalising consensual same-sex/gender activity among adults in which one is living with HIV or has a disability, it contravened the right to freedom from discrimination and the right to dignity; and,