

R.M. v. Attorney General & 4 Others
[2010] eKLR, Petition No. 705 of 2007
Kenya, High Court

COURT HOLDING

The petitioner did not present any data or facts to show that there was a definite number of intersex persons in Kenya as to form a class or body of persons in respect of whose interest the petitioner could bring a representative suit. Consequently, the petitioner had no *locus standi* to bring a representative suit on behalf of other intersex persons.

The petitioner as an intersex person was adequately covered by the law and, consequently, his constitutionally guaranteed rights and other rights were not infringed upon and he suffered no discrimination under the law on that basis.

The petitioner's right to protection against inhuman and degrading treatment as provided under Section 74 of the Constitution was violated by prison officials, and he was entitled to general damages of Kshs. 500,000 and 20% of his costs against the Attorney General and Commissioner of Prisons.

Summary of Facts

The petitioner was born with both male and female genitalia, a condition known as intersex. His parents had raised him as male. He claimed that due to his condition, he could not obtain a birth certificate, a prerequisite to obtaining a national identity card. As a result of not having a birth certificate or national identity card, he could not enjoy citizenship rights, including the ability to register as a voter, obtain travel documents, acquire property and get employment. He dropped out of school at Class 3, and when he attempted to marry, the law did not recognise his marriage. He became secluded and later was charged with an offence of robbery with violence in 2005. While the petitioner was in prison remand, awaiting the determination of his case, the statutory prison search revealed that he had both male and female genital organs. The petitioner was taken to the hospital for verification of his gender, and the doctor's report confirmed that he had ambiguous genitalia. As a result, a court order was made to remand the petitioner to the police station during the pendency of his trial. The petitioner was tried, convicted and sentenced to death for robbery with violence. He was committed to a prison for male death row convicts, where he shared cells and facilities with male inmates. He claimed that he was exposed to abuse, mockery, ridicule, and inhuman treatment, as well as sexual molestation by other male inmates.

The petitioner claimed that due to the failure of the legal framework to recognise intersex persons, his fundamental rights were infringed, including dignity, freedom from inhuman treatment, freedom from discrimination on the basis of sex, freedom of movement, freedom of association, the right to a fair hearing and the right to protection under the law. He therefore relied on the Constitution of Kenya, 2010 (Constitution), and also the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

Issues

The Court in its judgment enumerated a rather long list of issues for determination. However, the issues could be condensed into the following:

1. Whether the petition was a representative suit, and if so, whether the Court had jurisdiction under Section 84 of the Constitution to consider generally the rights and violations of rights of intersex persons;
2. Whether the petitioner was an intersex person, and if so, whether the petitioner, as an intersex person, suffered from a lack of legal recognition and protection under the Constitution and other applicable laws, resulting in violations of the petitioner's human rights, including, among others, the right of everyone to be recognised as a person before the law, the right to equality and non-discrimination as guaranteed under Section 82 of the Constitution, and the constitutionally guaranteed rights to life, liberty and security of the person; and
3. Whether the petitioner suffered violation of his fundamental right to be free from torture, cruel, inhuman, or degrading treatment provided under Section 74 of the Constitution.

Court's Analysis

The Court addressed the issue of whether the petitioner could sue on behalf of the body of intersex persons in Kenya. The Court discussed the definition of "intersex" and concluded that it describes "an abnormal condition of varying degrees with regard to the sex constitution of a person."⁸⁵ Based on that definition, the Court determined from the facts provided that the petitioner was an intersex person. On inquiring into whether there was a body of intersex persons who had an interest in the outcome of the petition because it would have an impact on their welfare, the Court held that the petitioner, along with the interested parties and *amici curiae* who were joined in the matter to support the arguments of the petitioner with respect to other intersex persons, had failed to provide any evidence that there was a definite number of intersex people in Kenya to form a body of people whose interests he represented. The petitioner's *locus standi* with respect to a representative suit was therefore denied and all reference to other intersex persons was struck out of the petition.

The Court then delved into the issue of lack of legal recognition of and discrimination against the petitioner as an intersex person. The petitioner had submitted that the Birth and Deaths Registration Act only recognised male or female sexes but not intersex. He argued that the law therefore did not provide legal recognition of him as an intersex person and did not afford him the rights protected by the Constitution. To address the issue, the Court first of all inquired into the meaning of the term "sex". The Court sought a definition of the term in the 11th Edition of the *Concise Oxford English Dictionary* and also the *Black's Law Dictionary* (8th Edition), and found that "sex simply refers to the categorization of persons into male and female on the basis of their biological differences as evidenced by their reproductive organs."⁸⁶ It was also persuaded by the English decision in *Corbett v. Corbett* ([1970]2 WLR 1306), as well as decisions from other jurisdictions, that a person's sex is fixed at birth. The Court therefore concluded that the Births and Deaths Registration Act did not in fact exclude the petitioner as an intersex person, since he was either male or female at birth, despite the

difficulty posed by the ambiguous genitalia, and thus his birth could have been registered under the Births and Deaths Registration Act if an application had been made. The Court rejected the argument that the term sex in Sections 70 and 82 of the Constitution should be interpreted to include intersex as a third category of gender because the Court read the term sex in those sections to encompass the two categories of male and female only, and also because the legislature in Kenya had not taken action to expand the meaning of the term sex. Similarly, the Court disagreed with the argument that intersex persons should be brought within the category of “other status” included in Article 2 of the UDHR and Article 26 of the ICCPR. It concluded that intersex persons “are adequately provided for within the Kenyan Constitution as per the ordinary and natural meaning of the term sex,”⁸⁷ it would be contrary to the intention of the legislature, and society might not have been ready for a third category of gender at that time.

The Court also considered the argument that the petitioner had been discriminated against and disadvantaged socially as a consequence of the alleged failure of his legal recognition as an intersex person. The Court indicated that the petitioner’s failure to obtain legal documents including a birth certificate, identity card and voter’s registration card was his own fault, as neither the petitioner nor his mother had made any efforts to obtain such documentation. The Court also determined that the petitioner had abandoned school because he could not see anything written on the blackboard, not because he was disadvantaged due to his intersex status, and that the petitioner’s later inability to obtain employment was due to not having an educational background that would make him a stronger candidate for employment. Further, the social problems which he claimed were a result of lack of legal recognition, including inability to marry, were not due to the effect of discriminatory laws. Rather, based on the Court’s determination that each person falls into one of the two categories of gender at birth, the Court determined that the petitioner was not prevented from marrying due to his intersex status, and instead, his biological make-up is what prevented him from being able to marry, as his physiology would not permit him to consummate the marriage as a male.

On whether the law should be reformed to allow the petitioner as an intersex person to determine his gender or define his sexual identity, the Court was of the opinion that the petitioner as an adult could do so, including through corrective surgery, but that the government was not at fault for failing to provide the necessary facilities, as there was no justification for giving corrective surgery economic priority over other government-funded initiatives. The Court also determined that the issues raised with respect to the ability of intersex persons to adopt children or parental responsibility for assigning gender to children were not properly brought in the case, as the petitioner had not sought to adopt a child and was beyond the age of maturity. Further, the Court determined that the issue that the petitioner raised regarding social stigma was not a legal issue, but rather a social issue to be addressed through openness and dissemination of appropriate information. Due to the traditional nature of Kenyan society, the Court believed that Kenyan society had not reached a stage where matters of sexuality could be rationalised through science, and that in any case, it was the Legislature’s mandate to take up such issues.

The Court also rejected the petitioner’s claims that his rights were violated during his criminal trial or that the provisions of The Prisons Act or The Prisons Rules were discriminatory against the petitioner. With respect to the petitioner’s criminal trial, the petitioner’s detention in the police station was legal because the Court validly ordered his detention in that location taking into account his intersex status

and that there was no other appropriate location to remand him during his trial, and there were no other defects in the trial identified by the petitioner. In addition, the Court determined that holding the petitioner in a male prison was not a violation of his rights because The Prisons Act allows people of separate genders to be housed in different parts of the same prison, and it was not practical for the petitioner to expect a prison facility for himself alone with prison officers who are intersex or have training in that area, given that no such prison officers were known to exist.

Further, the Court found that the petitioner had not been denied the freedom of movement and association because his freedom of movement was lawfully limited after his arrest due to his alleged criminal activity and was limited prior to his arrest due to his own failure to obtain the necessary documentation. Similarly, the Court stated that the petitioner's right to privacy had not been violated because the limitations on petitioner's privacy were legally imposed due to the petitioner's conviction for a criminal offence.

The Court however found that the petitioner was treated in an inhuman and degrading manner by prison authorities who conducted strip searches of the petitioner in front of other inmates with the intention of humiliating him for his intersex condition. The Court therefore found that such actions were a violation of Section 74 of the Constitution. The Court awarded damages of Kshs. 500,000 (about 5,000 USD) to the petitioner as redress for violation of his right to dignity and 20% of his costs against the Attorney General and the Commissioner of Prisons.

Conclusion

The petitioner failed on the main claim that the legal framework did not recognise and discriminated against intersex persons.

The petitioner also failed on the claim that he could bring the petition on behalf of other intersex persons.

The petitioner succeeded in the claim that prison officials treated him in a manner that was cruel and degrading, and he was awarded damages for violation of the right to dignity.

Significance

This case presented novel issues for the Kenyan Court. While intersexuality is lumped together with gay, lesbian, transgender/transsexual and bisexual identities in the collective term LGBTI, intersexuality presents unique legal and human rights challenges quite distinct from the other identities.

The Court defined intersex in a negative manner by characterising it as an abnormality. This was unfortunate because such language fuels stigma and shame about individuals' body. Rather, it should be recognised that some people are born with physical traits that do not fit neatly into the biological categories of male or female. Article 3 (d) of the Convention on the Rights of Persons with Disabilities (CRPD), on the general principle of respect for differences and acceptance of persons with disabilities, is instructive in this regard. Intersex conditions should be taken as part of human diversity and humanity, and differences should not be justification for discrimination.

Many people with intersex conditions have been subjected to “corrective surgery” or genital mutilation. The rationale behind these surgeries and related therapies is to manipulate the person’s physical traits in order to make them fit into the male/female binary. This type of intervention is usually done at birth, when the person is not capable of consenting. In this petition, the Court did not address the question in depth because it was not in issue. Indeed, surgery may not be a huge concern in Africa because of the cost and unavailability of the technology and skilled personnel on the African continent. The discourse on intersex conditions and corrective surgeries has gained ground in the developed world, however. For instance, in its concluding observations on Germany, the United Nations Committee on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Committee against Torture) expressed concerns about “cases where gonads have been removed and cosmetic surgeries on reproductive organs have been performed that entail lifelong hormonal medication, without effective, informed consent of the concerned individuals or their legal guardians.”⁸⁸

In his report of 2013, Juan E. Méndez, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, called upon states to “repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, ‘reparative therapies’ or ‘conversion therapies’, when enforced or administered without the free and informed consent of the person concerned.”⁸⁹

While corrective surgery was not the gist of the petition, it is noteworthy that the reasoning of the Court was akin to the ideology behind corrective surgery which is to “normalise” the person and make them fit into the male/female binary. The Court suggested that every person is either male or female and therefore every person should be made to fit into either the male or female category. Because of this ideological construct, the Court did not find it a problem that laws did not recognise persons with intersex conditions. Everyone would be made to fit, even if uncomfortably, into a male or female category. Failure to recognise intersex persons is to erase, ignore, and make them invisible. The consequences however are not only physical; they are social and psychological, and include stigmatisation. By denying difference, society signals rejection of persons who do not conform to socially acceptable traits. One is either male, female, or nothing.

Making persons with intersex conditions disappear through ideological construction opens up space for violations of various human rights. For instance, if in sexuality education, students are not made aware of the existence of peers with intersex conditions, and socialised to accept differences, those peers become marked as “other” and objects of ridicule. To curb the risk of exposing persons with intersex conditions to human rights violations, it is necessary for public policy to recognise and accept them. By making them visible, it makes it necessary to protect their rights.

The Court expressed the opinion that “The Kenyan society is predominantly a traditional African society in terms of social, moral and religious values. We have not reached the stage where such values involving matters of sexuality can be rationalised or compromised through science.”⁹⁰ This text of the judgment feels rather misplaced given that persons with intersex conditions are born with the condition. One explanation might be that the Court’s sentiments were directed toward transgender persons rather than persons with intersex conditions. However, it raises suspicion that this had set the tone of the whole judgment, in which the Court did not accept them as worthy of recognition under the law.

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