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## Baby 'A' and Another v Attorney General and Others [2014] eKLR

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***Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR***

Samiselo Kayombo<sup>1</sup>

**The Facts**

On or about 3<sup>rd</sup> May 2009, Baby A (1<sup>st</sup> Petitioner) was born as an intersex child.<sup>2</sup> On 10<sup>th</sup> May 2009, Kenyatta National Hospital (2<sup>nd</sup> Respondent) conducted various medical tests on the 1<sup>st</sup> Petitioner and on one of the documents that captured the 1<sup>st</sup> Petitioner's details, inserted a question mark '?' in the column that indicated the child's sex. The Petitioners claimed that the entry of a question mark to indicate the sex of Baby A violated the rights of the child to legal recognition, dignity and freedom from inhuman and degrading treatment. These rights were guaranteed in Section 4 of the Children Act<sup>3</sup> and Articles 27, 28 and 29 of the Constitution of Kenya.<sup>4</sup>

The petitioners pointed out that the Registration of Births and Deaths Act<sup>5</sup> only provided for the registration of male and female persons. Additionally, Baby A had not been issued a birth certificate by the time the petition had gone to Court on 24<sup>th</sup> May 2013. Consequently, the petitioners claimed that Baby A was denied the right to legal recognition which violates Article 7 of the Convention on the Rights of the Child which provides that the child has a right to be registered immediately after birth. The petitioners also argued *inter alia*, that the Respondents failed to discharge their positive obligation and duty owed to Baby A under Article 20 of the Constitution which provides that the Bill of Rights shall be enjoyed by every person to the greatest extent consistent with the nature of the right or fundamental freedom.

Consequently, the Petitioners sought a declaration that intersex children are entitled to and guaranteed the same rights as all other persons within the Kenyan jurisdiction pursuant to the Constitution, the Children Act and various international instruments to which Kenya is a signatory such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People's Rights. The Petitioners also sought a declaration that all surgery on intersex infants that is merely cosmetic and not therapeutic be approved by a Court by way of judicial review order under Article 23 of the Constitution under the principles of *parens patriae* and the best interest of the intersex child. Lastly, the Petitioners sought an order directing the 1<sup>st</sup> Respondent to investigate, monitor and collect statistics on all intersex children in Kenya.

**Holding**

The High Court Held that the Respondents did not violate any of the 1<sup>st</sup> Petitioner's rights due to the apparent lack of tangible evidence. It was indisputable that the 1<sup>st</sup> Petitioner was in fact an intersex child and the Court relied upon the lab report that had a question mark inserted to denote Baby A's sex as a show that the medical practitioners on hand could not categorise the 1<sup>st</sup> Petitioner as either male or female. Therefore, the only logical conclusion was that Baby A was an intersex child.<sup>6</sup> The point of contention was whether or not the 1<sup>st</sup> Petitioner had

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<sup>2</sup> This means that Baby A was born with both male and female genitalia.

<sup>3</sup> Children Act, 2001 [Kenya], No. 8 of 2001, 31 December 2001.

<sup>4</sup> Constitution of Kenya, 2010.

<sup>5</sup> Chapter 149 Laws of Kenya.

<sup>6</sup> *Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR*. para 52.

suffered a lack of legal recognition due to this intersex status *vis-à-vis* the lack of a third category of sex capturing intersex persons within the Kenyan legal framework.

The Court stated that it could not find that the Respondents infringed the rights of the 1<sup>st</sup> Petitioner as the Petitioners apparently failed to bring any evidence in that regard and went on further to state that discrimination is not an academic matter and it should be based on real facts and tangible evidence.<sup>7</sup> Furthermore, despite the Court's acknowledgment that the 1<sup>st</sup> Petitioner and all other intersex persons were entitled to all rights under the Bill of Rights, the Court stated that to create a third category of sex would be overstretching the mandate of the Court. In what appeared to be a bid to honour the doctrine of Separation of Powers, the Court stated that adding a third category of sex to capture intersex persons was a matter that ought to be addressed by the legislature and not the Court.

### Significance

A careful analysis of the provisions of the Constitution of Kenya pertaining to the Bill of Rights and the corresponding duties of the Court lead to the conclusion that the Court failed to dispose of its duties to protect the 1<sup>st</sup> Petitioner's fundamental rights. Article 22(1) of the Constitution provides that, 'Every person has the right to institute court proceedings claiming that a fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.'<sup>8</sup> The inclusion of the word 'threatened' in Article 22(1) can reasonably be interpreted to mean that no actual suffering has to have occurred for a person to institute proceedings for the enforcement of their fundamental freedoms. It is enough cause that a situation exists that could potentially lead to the infringement of the person's rights for them to institute proceedings. Furthermore, Articles 259(1)(b) and (c) when read in tandem, provide that the Constitution ought to be interpreted in a manner that advances human rights and fundamental freedoms as laid out in the Bill of Rights and in a manner that permits the development of the law.

It can be argued that it was open for the Court in this case to analyse the circumstances of the case and weigh them up against the backdrop of the legal landscape in the country and come to the conclusion that it was in the best interest for the advancement of human rights and the development of the law to hold that the Respondents had indeed violated the 1<sup>st</sup> Petitioner's rights. The importance of this case not only for the 1<sup>st</sup> Petitioner, but for all other intersex persons in the Country was not lost on the Court as it stated that, 'The issues raised in the present Petition must be looked at in the wider context of the place of intersexuals in our society as opposed to the narrower and specific interests of Baby A who is only one such person in our Society.'<sup>9</sup> Therefore, it was open for the Court to decide that the lack of a category of sex that accounted for intersex persons was an infringement of intersex persons' freedom from discrimination as guaranteed in the Constitution and right to legal recognition as guaranteed in the international instruments that Kenya had ratified and form part of Kenya's legal system by virtue of Article 2(5) of the Constitution, thus securing intersex rights.

Alternatively, the Court could have decided that the continued lack of legal recognition for intersex persons, if not a violation in itself, could lead to the violation of the individual's rights to self-determination and is a hindrance to the autonomy of the intersex person which are both protected in international human rights law and attain the force of law by virtue of the Kenyan Constitution recognition of international human rights law as enforceable.

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<sup>7</sup> Ibid para 62.

<sup>8</sup> Constitution of Kenya, 2010.

<sup>9</sup> *Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others* [2014] eKLR para 61.

Both of these approaches would have resulted in the laying down of a sound judgment which was going to promote the development of the law regarding intersex human rights. Had the Court found that the Respondents had infringed the 1<sup>st</sup> Petitioner's rights, the Respondents would have been forced to honour their mandate as prescribed in Article 21(1) of the Constitution that provides that, 'It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.' Additionally, Article 21(4) of the Constitution compels the State to enact and implement legislation that fulfils its obligations in respect of human rights and fundamental freedoms. Therefore, finding that the 1<sup>st</sup> Petitioner's rights were infringed or in threat of infringement would have led to the State being forced to protect the human rights of the 1<sup>st</sup> Petitioner and all other intersex persons by creating a third category of sex.

However, the Court chose to exercise judicial restraint in an issue involving a realm of human rights that the Court itself identified as being in need of reform. Instead of taking an active step to ensure that the rights of the 1<sup>st</sup> Petitioner were guaranteed, as is the Court's mandate according to the Constitution, the Court ordered that the 1<sup>st</sup> Petitioner shall expediently make an application to the 3<sup>rd</sup> Respondent for the registration of Baby A and that a report in that regard shall be forwarded to the Court within 90 days of the judgment. Effectively, the only obligation that the Court placed on the 3<sup>rd</sup> respondent was to forward a report as to the registration of the 1<sup>st</sup> Petitioner. This means that the Court left the 1<sup>st</sup> Petitioner and all other intersex persons exposed to the continued threat of their human right to legal recognition being infringed by the Respondents. This conclusion can be arrived at due to the fact that no obligation has been placed on the Respondents to amend any of the laws relating to the registration of intersex persons which only serves to perpetuate the infringement of intersex persons' rights.

Pertaining to the issue of the State creating guidelines and rules for surgery on intersex persons, the Court stated that, '...time is now ripe for the development of rules and guidelines on corrective surgeries for intersex children especially minors such as Baby A.'<sup>10</sup> The Court went on further to state that the mere fact that the term 'sex' under the legal framework at the time did not include intersex persons was no reason to lean on the traditional meaning that only accounted for male and female. As a result, the Court stated that it is the duty of the State to protect intersex persons by providing a legal framework to govern issues such as their registration under the Births and Deaths Registration Act, examinations and tests by doctors and corrective surgeries.

Despite noting the need for the introduction of guidelines governing the surgeries carried out on intersex persons, the Court merely ordered that the 1<sup>st</sup> Respondent shall, within 90 days, file a report to the Court on the status of guidelines for corrective surgery for intersex persons. In arriving at its decision, the Court stated that it 'would...strongly urge Parliament to consider enacting legislation...'<sup>11</sup> Once more, the Court elected to exercise judicial restraint. The effect of such judicial restraint is that intersex children shall remain subject to 'corrective surgery' without their consent. This is because the Court did not order that the 1<sup>st</sup> Respondent move to ensure that such guidelines are created but that a report be issued as to the creation of said guidelines, which *prima facie* may seem to be the same thing and a victory for intersex persons. However, such an order only leaves the power to correct a situation that adversely affects intersex persons at the discretion of the party responsible for the creation of such adverse conditions.

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<sup>10</sup> *Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others* [2014] eKLR para 66.

<sup>11</sup> *Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others* [2014] eKLR para 67.

To the present day, there exist no guidelines as to the conducting of surgeries on intersex children in Kenya. This means that intersex children are still exposed to corrective surgery which is only cosmetic and may lead to adverse medical consequences. These consequences may include an inability to function sexually or the lack of sexual sensation, or both.<sup>12</sup> Additionally, this means that intersex children are deprived of their bodily autonomy.

It was open to the Court to decide that the lack of guidelines regarding surgeries on intersex persons amounted to a situation that threatened intersex persons' right to dignity and freedom from inhuman and degrading treatment. Instead, the Court opted to neglect its duties to ensure that the purpose and principles of the Constitution are protected and left it up to the discretion of the 1<sup>st</sup> Respondent to create such guidelines. Articles 27(4) and 27(6) of the Constitution when read together would justify the Court making orders to compel the State to create guidelines accounting for intersex surgeries. When read together (for the purposes of this argument), the input of these two provisions is that there is an obligation on the State to treat every person equally, irrespective of their sex and that the State ought to take legislative and other measures to redress any disadvantages suffered by individuals or groups because of past discrimination.

Therefore, the Court finding that the State ought to create guidelines for intersex surgeries would not have amounted to the Court overstepping its mandate but simply the Court upholding the provisions of the Constitution and ensuring that the State abided by these provisions.

Turning to the issue of the creation of an organ or institute responsible for collecting data related to intersex children, the Court ordered that the 1<sup>st</sup> Respondent submit to the Court within 90 days, information related to the organ or institution responsible for collecting and keeping data related to intersex children. The Court stated that it was vital for the State to collect data on intersex persons in Kenya as this would be crucial in making and designing policies to protect intersex persons as a marginalised group. Despite the fact that the Court was once again leaving it up to the discretion of the organ responsible for the lack of information regarding intersex persons to correct the decision, it must be noted that in 2019, a positive development was noted in this regard. For the first time in the history of Kenya, intersex persons were included in the National census conducted.

## Conclusion

The Court in the case of Baby A acknowledged that there was a need to create laws and guidelines that were inclusive of and protected intersex persons. To this effect, the Court made several obiter remarks relating to the need to implement laws that were inclusive of intersex persons. These remarks may be of great persuasive value in the bid to realise the rights of intersex persons in Kenya. However, the Court did very little to ensure that such laws and guidelines are created as it ultimately made a decision that amounted to a request for 'the powers that be' to change the law to include intersex persons' rights. The Court effectively neglected its duty and authority to ensure that such powers were in a position that would compel them to repeal laws that excluded intersex persons and create laws that were inclusive. Consequently, intersex persons still do not enjoy legal recognition of their sex and are still exposed to corrective surgery at birth which deprives them of their bodily integrity and autonomy.

The Court in this case missed an opportunity to protect and realise the rights of intersex persons in Kenya, which not only would have benefited the Kenyan society, but would have served as

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<sup>12</sup> Sarah Creighton, *Surgery for Intersex*, Journal of the Royal Society of Medicine. 94(5) 2001. pp. 218–220.

a beacon and point of reference for the development of intersex human rights within the African jurisprudence.