

LEGAL RECOGNITION OF INTERSEXUALITY

Baby “A” (suing through her mother, E.A.) and The Cradle the Children Foundation v. Attorney General, Kenyatta National Hospital, and the Registrar of Births and Deaths [2014] eKLR, Petition No. 266 of 2013
Kenya, High Court (Constitutional and Human Rights Division)

COURT HOLDING

The petitioners in the case before the Court and in the *RM* case are different, and the facts also differ, so that matter is not *res judicata*.

Baby A has an intersex condition, but there is no evidence that the rights of Baby A or other people with intersex conditions were violated in any way because of Sections 2(a) and 7 of the Registration of Births and Deaths Act.

It is an anomaly that the current legal framework does not recognise people with intersex conditions. It is the duty of the government to protect the rights of babies and people with intersex conditions by providing a legal framework to address issues relating to them, including registration under the RBDA, medical examination and tests, and corrective surgeries.

Summary of Facts

The petitioner, Baby A, was born with both female and male genitalia. Kenyatta National Hospital, the second respondent in the case, conducted medical tests on the petitioner. In one of the documents which captured the personal details of the petitioner, a question mark “?” was inserted in the column for indicating the sex of the person. Baby A had never been issued a birth certificate. The petitioner claimed that the entry of a question mark indicating the sex of the petitioner was a violation of 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, 2001 (Children Act), and Articles 27, 28, and 29 of the Constitution of Kenya, 2010 (Constitution).

The petitioner also claimed that the failure of legislation such as the Registration of Births and Deaths Act (RBDA), Cap 149 of the Laws of Kenya, to recognise children with intersex conditions infringed on various rights of children guaranteed under the Constitution, and also under various international human rights treaties, including the Convention of the Rights of the Child (CRC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and People’s Rights (ACHPR), and the International Covenant on Economic and Social and Cultural Rights (ICESCR).

Issues

The Court identified the following issues for its determination:

1. Whether the matter raises facts already raised and determined (*res judicata*) in the earlier case of *RM v. Attorney General and Another*, Petition 705 of 2007 (*RM* case);

2. Whether Baby A is an intersex person and if so, whether the baby suffers lack of legal recognition because of Sections 2(a) and 7 of the Births and Deaths Registration Act and whether therefore these provisions are inconsistent with Article 27 of the Constitution;
3. Whether there is need for guidelines, rules and regulations for surgery on persons with intersex conditions; and
4. Whether there is a need to collect data on persons with intersex conditions in Kenya and if so, who is mandated to do so.

Court's Analysis

The Court considered the *RM case* and the matter at hand to determine whether the issues raised had indeed been raised before and already settled by the Court in terms of Section 7 of the Civil Procedure Act. After reviewing precedent and instructive case law from other jurisdictions, the Court concluded that for *res judicata* to apply, “the issues in the matter before the Court must be directly and substantially in issue in the two suits and the parties must be the same or the parties under whom any of them claim or is litigating under, are the same.”⁸¹ First, the Court found that the parties in the two suits were not the same. Second, it determined that the facts in the two suits were different. The Court therefore held that the matter was not barred by *res judicata*.

The Court then dealt with the central claim of the petition, that Baby A suffered from lack of legal recognition due to having an intersex condition. First, the Court sought to determine whether Baby A was an intersex person. Using the definition of intersex from the *RM case*, the Court determined that Baby A was an intersex person based on the fact that a laboratory report/form indicated a question mark in the category of the sex of the child, showing that there was ambiguity about the sex of the child. Although the Notification of Birth form indicated that Baby A was male, the Court determined that that outcome was due to the societal expectation that babies be categorised as male or female.

After determining that Baby A was an intersex person, the Court evaluated the petitioner’s argument with respect to lack of legal recognition as an intersex person. The petitioner claimed that failure of the RBDA to recognise persons with intersex conditions constituted an infringement of constitutional rights guaranteed under Article 27(4) of the Constitution, which prohibited discrimination against the person on any ground including sex. The Court followed the reasoning in the *RM case* where the Court had said that sex is fixed at the time of birth.

The Court went on to address the petitioner’s argument that the term “sex” in various legislation, including the Constitution, be interpreted to include intersex. The Court relied upon the *RM case*, which was of the view that it was not the mandate of the Court to expand the meaning of sex in the Constitution to include intersex, and that this was for the Legislature.

Further, the Court found that no one, neither the petitioner nor anyone on her behalf, had in fact tried to register the birth on behalf of the underage petitioner. In addition, there were no facts alleged or evidence produced of violations of the petitioner’s rights. It was on this basis that the Court refused to find infringement of rights.

The Court next considered the argument that it should issue guidelines on corrective surgeries for babies with intersex conditions. The Court was of the view that it was not within its mandate. However, the Court went on to say that it would nevertheless grant appropriate relief in accordance with Article 23(3) of the Constitution because the matter raised issues of a constitutional nature. The Court proposed that people with intersex conditions be recognised as such under the law, and that the failure of the RBDA or the Constitution to recognise them should not be interpreted to mean that their rights could be infringed. It made reference to two decisions of the Colombian Constitutional Court, Sentencia No.54-337/99 (the *Ramos* case) and Sentencia T 551/99 (the *Cruz* case), and concluded that the state had a duty to protect the rights of babies and persons with intersex conditions by putting in place a legal framework which would govern issues such as their registration, medical examinations, and corrective surgeries. The Court urged Parliament to enact the necessary legislative framework. In addition, the Court determined that data collection on intersex persons should be undertaken and that the Court would make an appropriate order to determine whose function it was to collect such data.

Conclusion

The petitioner's rights were not violated, so the petition failed in that regard.

The Court ordered the Attorney General to bring before it, within 90 days of the judgment, the information related to the organ, agency, or institution responsible for collecting and keeping data related to persons with intersex conditions.

The Court also ordered the Attorney General to file a report before it within 90 days of the judgment, identifying the status of a statute regulating intersex as a sex category, and guidelines and regulations for any corrective surgery for persons with intersex conditions.

Finally, the Court ordered that the Petitioner move to make an application for registration of Baby A by the Registrar of Births and Deaths, and that a report of this be filed with the Court within 90 days of the judgment.

Significance

This is the second case to be decided in the Kenyan courts concerning the rights of persons with intersex conditions. The first case was *RM v. The Hon. Attorney General and Four Others (RM case)*, Petition no 705 of 2007. The *Baby A case* further develops the jurisprudence in the *RM case*, and its significance is better appreciated when it is analysed in contrast to the *RM case*.

In the *RM case*, Justice Sitati, who authored the main judgment, had written 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."⁸² In contrast, Justice Lenaola in the present decision uses language such as: "... time is now ripe for the development of rules and guidelines on corrective surgeries for intersex children especially minors such as Baby A."⁸³ Elsewhere in the judgment, Justice Lenaola states that "The fact that the Births and Deaths Registration Act and the Constitution do not define

the term ‘sex’ does not mean that we should hide behind the traditional definition as we know it.” These statements show progressive thinking about intersex conditions, as compared to the reasoning in the *RM Case*.

The most important way in which this Court differed in perspective from the *RM case* is that while the reasoning in the *RM case* was tantamount to erasing persons with intersex conditions by rigidly affirming the male/female binary, the Court in the *Baby A case* departed from this traditional understanding of the meaning of sex as only encompassing the male/female binary. It was therefore not surprising that the Court went on to recognise the existence of children and people with intersex conditions as a class. Although the issue of *locus standi* was not raised in this case, the Court on its own motion allowed Baby A to represent other persons with intersex conditions when it said 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.”⁸⁴ In fact, this case turned upon the Court’s recognition of persons with intersex conditions as a class whose rights needed protection. Therefore, though the conclusion of the case did appear to be unfavourable for Baby A as an individual, the petition was successful in raising awareness about the rights of persons with intersex conditions generally. Despite its apparent reliance on the reasoning in the *RM case*, which it quoted substantially, the Court arrived at a bolder and more just conclusion because the decision was in the end premised on Baby A’s capacity to bring a representative suit on behalf of the interests of persons with intersex conditions. Further, while it agreed with the court in the *RM case* that it is the role of the Legislature to come up with laws that would recognise persons with intersex conditions, the Court assumed the duty to ask the Legislature to come up with a legal framework for them, and it proceeded to issue orders that would, if respected, facilitate realisation of their constitutional rights.

This case is therefore important because it broke fetters with cultural norms about sex and sexuality in relation to intersexuality. It forged new ground toward ensuring recognition and respect of the rights of persons with intersex conditions.

It would have been more enriching for Africa’s jurisprudence if the Kenyan courts had addressed the issue of discrimination and lack of legal recognition of persons with intersex conditions, apart from addressing the issue of corrective surgery. In both cases, the Courts found that the petitioners had not brought evidence of discrimination, as neither petitioner had applied for a birth certificate or other identity documentation, and therefore they could not conclude that the petitioners had been discriminated against. This however does leave room for further public interest litigation if a petitioner could bring concrete evidence of how lack of legal recognition violates rights including the right to non-discrimination. Further, the Court in the *Baby A case* did issue orders relating to gathering data about persons with intersex conditions and the status of the law in relation to them, which, if respected by the Attorney General, would contribute towards development of a positive discourse on their rights, not only in Kenya but in the African region.