



THE CHILDREN ACT, 2022

The long winding journey towards the legal recognition and registration of intersex children in Kenya by John Chigiti SC.

Being born neither a male nor a female child, Baby A had a lot of legal hurdles to overcome in a legislative regime that had little or nothing to offer from day one, not even a Birth certificate.

The child decided to bite the bullet for the sake of the future intersex children when she moved to court in Petition No.266 of 2013, wherein she raised a host of concerns around her right to get a birth certificate amongst other rights. The David in the legal battle that little Goliath had to face was a colonial era law in Section 7(1) of the Births and deaths Registration Act which provided, “It shall be the duty of every registrar to keep a register of births and a register of deaths and to enter therein, respectively, the prescribed particulars of every birth notified to him.”

According to Section 2 (a) of this law, “prescribed particulars” means as to any birth, the name, sex, date and place of birth, and the names, residence, occupations and nationality of the parents.

This colonial law had historically indirectly discriminated against intersex children since it did not have any specific reference to intersex children making it impossible to register or issue them with birth certificates.

Baby A filed the Constitutional Petition in The High Court so as to enable her to secure a birth certificate-www.kenyalaw.org.



Realizing the gap in the law, Justice Lenaola directed the Registrar of births to issue the child with a Birth Certificate in the year 2014.

Towards promoting social justice and the national values and principles of governance and in the drive towards ensuring that intersex children enjoy equality and inclusion within Article 10 of The Constitution, in July 2022, The Children Act 2022 came into force bringing the foregoing historical indirect discrimination to an end by legally recognizing intersex children. The Act has opened the door for the registration of these children.

The book known as the intersex Persons and The Law in Kenya by John Chigiti SC brought out a host of the issues around the social economic rights that have been cured in the Children Act 2022.

According to The Children Act 2022, ***“intersex child” means a child with a congenital condition in which the biological sex characteristics cannot be exclusively categorized in the common binary of female or male due to inherent and mixed anatomical, hormonal, gonadal or chromosomal patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood”***.

This definition has offered a safe space to ensure that the status of being intersex does not deprive an intersex person of their constitutionally guaranteed rights under the bill of rights.

Section 7(2) of the Children Act provides that, ***“Every child has the right to be registered in the Register of Births immediately after birth in accordance with the Births and Deaths Registration Act.”***



Section 7 (3) of the Act goes ahead to provide for the how in that, ***“The Principal Registrar shall take measures to ensure correct documentation and registration of intersex children at birth.”***

These provisions allow for the long-awaited registration framework for intersex children within the Birth and Deaths Registration Act alongside boys and girls. This simply means that the law accords them recognition and they are now able to enjoy Constitutionally guaranteed rights as any other child and citizen of the republic of Kenya.

What a milestone towards the realization of social justice. It is a first in Africa.

That is not enough. The law makers went all out for these children. Section 21 of the Act provides that, ***“An intersex child shall have the right to be treated with dignity, and to be accorded appropriate medical treatment, special care, education, training and consideration as a special need category in social protection services.”***

This Section generates a very huge strides towards the realization, fulfilment, protection and promotion of the standards of living of these vulnerable children. They hitherto suffered from discrimination and denial of access to education and health offending their right to dignity. They can now glow and smile given that their status and dignity has been elevated to that of humanity.

These children have in the past been subjected to unnecessary surgeries in the name of “correcting their genitalia” so that they look like boys or girls.

In Baby A petition to the High Court, we asked the court to address its mind to the issues around the right to bodily autonomy and integrity. We wanted the court to totally ban the surgeries and generate guidelines to inform and guide the doctors in the event the



surgeries were to be conducted as result of medical emergencies given that the Law was silent on this issue.

We have all reasons to celebrate since, Section 23 (1) (f) of The Children Act 2022 now provides that no person shall subject a child to *except with the advice of a medical geneticist, organ change or removal in case of an intersex child;*

Section 23(2) further provides that, *“A person who contravenes the provisions of subsection (1) commits an offence and shall, on conviction, be liable to imprisonment for a term of not less than three years or to a fine of not less than five hundred thousand shillings, or to both.”*

We can now comfortably say that this has ended the unnecessary intersex child cosmetic corrective surgeries. These children will now grow freely into intersex who will live fully fledged lives without hiding their identities.

Children in conflict with the law

For children in conflict with the law, Section 26(3) of the Act provides that *male, female and intersex children deprived of liberty shall be accommodated in separate facilities.*

Section 64. (1) of the Act provides that *The Inspector-General shall establish child protection units in every police station for the purposes of providing, on a temporary basis, a safe and non-threatening environment for children in conflict with the law.*

The Secretary may inspect children protection units established under subsection: -

(1) to ascertain their compliance with the general standards prescribed for children’s institutions under this Act or any other written law.



(3) The child protection units established under subsection (1) shall be desegregated by gender with clear sections for boys, girls and intersex children.

This is a great move for the intersex children in conflict with the law given that a majority of holding facilities lack infrastructure for intersex children. This schedule will allow the intersex children to be treated with dignity and held in facilities that are alive to their dignity. This will also create jurisprudence in the Kenyan courts for intersex children in conflict with the law.

Section 95 of the Act provides that the court shall inter alia consider the needs of intersex children and even summon expert witnesses before issuing any orders with respect to a child.

Section 144(z) of the Act describes an intersex child as a child in need of care and protection as one who is intersex and is subjected to or likely to be subjected to discriminatory treatment or abuse.

Adoption

In an affirmative gesture that resonates with the right to family under Article 45 of our Constitution, Section 174 (2) of the new law provides that ***(2) A single man shall not qualify to foster a female child under this Part unless he is a father to a female child, and a single woman shall not qualify to foster a male child under this Part unless she is a mother to a male child.***

This restriction shall not apply to a person who applies to be a foster parent to an intersex child.



This is a major step towards the promotion of social justice and the national values and principles of governance which offers a drive towards ensuring that intersex children enjoy equality and inclusion within Article 10 of The Constitution.

This provision will go a long way towards the eradication of the abandonment and neglect of intersex children.

At the end, Section 250 of the Children Act provides that, Section 7 of the Births and Deaths Registration Act is amended by inserting the following new subsection immediately after subsection (1)— “(2) The Register under subsection (1) shall include details of an intersex child and intersex person.”

2. Section 29 of the Births and Deaths Registration Act is amended in paragraph (d) by inserting the following words immediately after the word “documents”— “that shall include details of an intersex child or an intersex person as.

Under Section 29 **Births and Deaths Registration Act Rules**, The Minister may make rules with regard to all or any of the following matters—

the forms of all registers, returns and other documents required for the purposes of this Act;

The new Children Act, 2022 has provided expansive protections and guarantees for intersex children allowing them to live fully fledged lives enjoying with dignity just like any other child born within the Republic of Kenya.