

KENYA: Baby A and the question mark

Summary

A question mark on an intersex baby's medical documents in Kenya nearly condemned a child to a life without medical care, schooling or a passport. Challenging the incorrect document, the child's mother took the case to the Kenyan High Court.

Background

Intersex people are those born with physical, hormonal or genetic features that are neither wholly female nor wholly male, a combination of female and male; or neither female nor male.

This variation can be the result of genetic, anatomic or hormonal differences and occurs naturally in all species. Despite this, intersex people continue to be misrepresented and struggle to have their rights recognised across the world.

As many as 20,000 Kenyans alive today are likely to have been born intersex. Drawing from the most recent [Kenyan population data](#), which gave a population of nearly 40 million, and the research of the [Intersex Society of North America](#), this number is a fairly conservative estimate.

Baby A was born in Kenya in May 2009 and had two sets of genitals, one male and one female. As Kenyan medical documents only contain options for male or female children this presented a problem for the child and its mother.

Unsure how to proceed, staff at the hospital marked the baby's sex with a "?" rather than an "M" or "F" on hospital paperwork during checkups.

Because a child's sex must be determined for the Registrar of Births and Deaths to issue a birth certificate the fact that Baby A was simply never assigned a sex meant that the next step was unclear.

Without a birth certificate the infant would have no guarantee of getting medical care, school admission, a passport or, later in life, employment.

Statistics on intersex births in Kenya have not been recorded in any previous census and most parents choose for their children [to have 'corrective' surgery](#) soon after birth due to the stigma attached to intersex people in the region.

Bringing the case to court

Baby A's mother was directed to Kenyan human rights lawyer John Chigiti and also to children's organisation CRADLE to seek advice and support during her case.

CRADLE works with parents and their children when they are involved in court cases, providing counselling and legal aid and other services where necessary.

Prudence Mutiso from CRADLE explained that they offered Baby A's mother all the practical advice and support they could at the time of the case to make sure that she saw it through and did not back out because of embarrassment.

Luckily for Baby A's mother, Chigiti took the case on pro bono and she did not have to worry about the additional financial pressures that accompany High Court cases.

Meanwhile Chigiti investigated the case, gathered evidence and tried to find a way to bring the complaint under the 1969 Constitution.

He explained: "The child was born in the traditional method at home, but one day the baby's mother decided to take it for a checkup."

The hospital paperwork for this checkup included a “?” in the gender tickbox, despite the requirement to label the child as either male or female.

"This child clearly wasn't going to fit in either of those," said Chigiti, "and the child was in the process of undergoing 'corrective' surgery."

Despite having unsuccessfully represented another intersex person in a case involving their treatment in prison, Chigiti was confident that he could win the Baby A case.

He researched the case alone and honed his arguments and evidence for the expected court battle with the help of litigation workshops organised by CRADLE.

CRADLE brought together other legal experts to contribute to Chigiti's arguments and ensured that when the time came there were no delays in proceedings.

Chigiti said: "It took a very long time. I started preparing it in the year 2009 but I kept it quiet because the mood wasn't right - the Constitution wasn't right. In 2010 we got the new Constitution so I got out my folder and I started to polish it."

Mutiso explained that this was what allowed the case to progress so quickly and she praised both sides for their preparedness.

She added that anyone bringing a public interest case should aim to be prepared for every stage of proceedings from the start of the case to avoid any delays in what can be a fairly drawn-out procedure.

Under [the 2010 Constitution](#) cases where human rights are infringed can go straight to the Kenyan High Court, and this is exactly the route Chigiti took in May 2013.

Strategy

A poor understanding of intersex people in Kenya means that discussions about their rights are often thrown in with discussion of the rights of lesbian, gay, bisexual, and transgender (LGBT) groups.

As Kenyans generally consider homosexuality as morally wrong, and sentences of up to 14 years in prison can be given for consensual homosexual sex, the association has been a huge stumbling block for intersex people's rights in the country.

Chigiti's case sought to drag the perception of intersex people away from the LGBT label and was based on the right to legal recognition, to be registered immediately after birth and to have a name under [Article 7](#) of the Convention of the Rights of a Child.

He argued that Baby A would not be able to enjoy rights to medical care, schooling and other basic services as a result of not having a birth certificate.

Chigiti added that forcing the child to undergo surgery to pick one gender would violate the right to physical integrity and the right of self-determination.

As well as this he also asked the Court to require that this kind of surgery should only go ahead when the child was capable of making an informed decision and requested that guidelines for giving consent for surgery be created to prevent future cases of children being left without a birth certificate.

Finally, Chigiti asked that the Attorney General collect data on the number of intersex children born in Kenya and provide the government with evidence about how many intersex people live in the country.

Outcome

[The High Court decided in December 2014](#) that Baby A had not been discriminated against, as the mother had not applied for a birth certificate.

Despite this, it accepted that because of the protections written into the 2010 Constitution, something had to be done to prevent children being discriminated against on the basis of sex in the future.

After ordering an expedited registration for the birth of Baby A, the Court concluded that it did not have the power to force hospitals to add a third gender tickbox to their paperwork.

The responsibility for making new laws and guidelines around registering the births of intersex children was passed to parliament, and the Attorney General was told to spearhead a law adding a third option with appropriate guidelines for when children should be registered as intersex.

The Court also ordered the Attorney General to report back within 90 days identifying the government body which would keep data on intersex births in the country and explaining the progress made on the new law.

Finally Judge Isaac Lenaola added that the new legislation should be drawn up with the organisations and people involved in the Baby A case contributing their ideas to the process.

Commenting on the ruling Chigiti said: “It was difficult. It was tough but, well, it had to happen. And it was very fulfilling when I saw justice unfolding.”

Impact

The government of Kenya has not yet produced a draft of the legislation or guidelines it is obliged to enact, but Chigiti and CRADLE are hopeful that these will be made public soon.

As well as the impact of the anticipated change in the law and reporting of the case [around the world](#) Chigiti explained that he has also been impressed with the changes in attitudes in the nation’s parliament.

He cited the recent [Persons Deprived of Liberty Bill](#), currently under consideration, which explains that intersex people should be separated from other prisoners to prevent harassment and allows for them to choose which sex will be allowed to search them should the need arise.

Speaking on behalf of CRADLE Mutiso said: “This is one of the most progressive decisions we’ve had in Kenya and now we are just waiting on the Attorney General to present his draft legislation.”

Once they are informed of a draft, Mutiso explained that they will work to campaign in favour of the law if it is acceptable and will lobby parliament to pass it as soon as possible.

Mutiso also said that the case achieved a fairly high profile domestically and would likely give people seeking to fight similar cases hope that they could win.

She explained that although CRADLE limits its support to cases involving children, other organisations offering support exist in Kenya, including Kituo Cha Sheria and the Centre for Rights, Education and Awareness.

“The human rights division of the High Court in Nairobi is one of the most open and easily accessible courts and people can bring any case involving a violation of their rights to it,” she said.

“For me this case obviously opens doors for other people and affected parties to build on this judgment.”

Further information

- Read CRIN’s case summary of [Baby ‘A’ \(suing through the mother, EA\) and The CRADLE-the Children Foundation v. The Attorney General, Kenyatta National Hospital and the Registrar of Births and Deaths](#)
- Find out more about [strategic litigation](#)
- See CRIN's country page on [Kenya](#)
- Read CRIN’s report on [access to justice for children in Kenya](#)

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