REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO.705 OF 2007

IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER SECTIONS 74(1), 77(1), 82(1), (3) AND (8) OF THE CONSTITUTION OF KENYA AND BREACHES OF SECTIONS 28, 30, 31 AND 38 OF THE PRISONS ACT CAP 90, RULES 25(1), 103 AND 104 OF THE PRISONS RULES, SECTION 2B AND 7 OF THE BIRTHS AND DEATHS REGISTRATION

ACT CAP 149

BETWEEN

RICHARD MUASYA.....PETITIONER/APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT
(Being sued on his own behalf)
THE COMMISSIONER OF PRISONS.....2ND RESPONDENT
THE COMMISSIONER OF POLICE.....3RD RESPONDENT
THE REGISTRAR OF BIRTHS AND DEATHS...4TH RESPONDENT
HON. EVANS K. MAKORI MAGISTRATE.....5TH RESPONDENT

AND

THE KENYA HUMAN RIGHTS COMMISSION.....1ST AMICUS CURIAE
THE KENYA GAY AND LESBIAN TRUST.....2ND AMICUS CURIAE
KENYA NATIONAL COMMISSION FOR HUMAN RIGHTS.....3RD AMICUS CURIAE
THE LEGAL RESOURCES FOUNDATION (LRF).....1ST INTERESTED PARTY
THE CHILDREN'S RIGHTS ADVISORY DOCUMENTATION LEGAL EDUCATION FOUNDATION (CRADLE).2ND INTERESTED PARTY
KITUO CHA SHERIA LEGAL ADVICE CENTRE.....3RD INTERESTED PARTY
CENTRE FOR RIGHTS, EDUCATION AND AWARENENSS FOR WOMEN (CREAW).....4TH INTERESTED PARTY
KENYA CHRISTIAN LAWYERS FELLOWSHIP.....5TH INTERESTED PARTY

J U D G M E N T

INTRODUCTION

1. The petitioner Richard Muasya commenced these proceedings by way of a petition filed pursuant to Rules 11 and 12 of The Constitution of Kenya (Supervisory Jurisdiction and Protection of the Fundamental Rights & Freedoms of the Individual) High Court Practice and Procedure Rules L.N. No.6 of 2006. The petition was filed under the former Constitution of Kenya, which was repealed by the promulgation of a new Constitution on 27th August, 2010. Therefore, it is important to note that reference herein to the Constitution unless otherwise indicated refers to the repealed Constitution.

2. The respondents to the original petition were named as the Hon. Attorney General (1st respondent), The Commissioner of Prisons (2nd respondent), The Commissioner of Police (3rd respondent), and The Registrar of Births and Deaths (4th respondent). As a result of subsequent applications, leave was granted and several other parties joined in the suit. The parties added were as follows: Hon. Evans K. Makori Magistrate (5th respondent), The Kenya Human Rights Commission (1st amicus curiae), The Kenya Gay and Lesbian Trust (2nd amicus curiae), Kenya National Commission on Human Rights (3rd amicus curiae), The Legal Resources Foundation (1st interested party), The Children Rights Advisory Documentation Legal Education Foundation (Cradle) (2nd interested party), Kituo Cha Sheria Legal Advice Centre (3rd interested party), Centre for Rights, Education and Awareness for Women (Creaw) (4th interested party) and Kenya Christian Lawyers Fellowship (5th interested party).

THE PRAYERS SOUGHT IN THE PETITION

3. By an amended petition filed on 16th October, 2009, with leave of the court the petitioner sought several declarations, and orders. For purposes of clarity, we reproduce the prayers herein verbatim:

(a) A declaration that the petitioner was not afforded a fair hearing as provided for under section 77 (1) of the Constitution since your humble petitioner's detention at Kitui Police Station, Kitui Prison and Kamiti Main prison were and are illegal in so far as The Prisons Act Cap.90 does not provide for where hermaphrodites intersexuals should be remanded or handled and,

(b) A declaration that upon being convicted with the offence of robbery with violence then the petitioner should be acquitted on the ground of intersexuality.

(c) A declaration that detaining your humble petitioner at Kitui police station all through the trial was illegal and unconstitutional since the petitioner was facing a capital offence.

(d) A declaration that the petitioner has been discriminated upon on the ground of sex which is inconsistent with section 82(1) (3) & (8) of the Constitution of Kenya and or on the basis of status.

(e) A declaration that section 2b and 7 of the Births and Deaths Registration Act (Cap. 149) is inconsistent with section 82 of the Constitution in so far as the same offends the principal of equality and non-discrimination.

(f) An unconditional acquittal and;

(g) A declaration that as an intersexual, your humble petitioner and intersexuals in Kenya have suffered, are suffering and continue to suffer lack of legal recognition and protection, under the Kenyan statutes;

(h) A declaration that the petitioner and intersexuals have been left out on issues of marriage and adoption and in the process of deciding the gender or sex they belong to upon attaining the age of majority.

(i) A declaration that the Government through the 1st Respondent has failed to introduce legislation setting out procedure, rules and regulations for dealing with intersexuals, to regulate and or monitor the intersexuals so as to ensure that they get a statutory

guarantee against discrimination, arbitrary and or unnecessary corrective surgeries.

(j) A declaration that the state through the 1st Respondent has failed and or neglected to provide for human rights based treatment of the petitioner and intersexuals and informed consents before operating, and in particular the so called corrective surgeries which have resulted in permanent injuries and or scars on the intersexuals.

(k) A declaration that the Government of Kenya through the Respondents has neglected the petitioner and other intersexuals in that the Government has not set up any institutions, facilities for intersexuals like toilets, cells, schools, no trained any personnel to deal with the intersexuals, thereby depriving the petitioner of the Constitutional right of freedom of association as provided for under section 80 of the Constitution.

(l) A declaration that the petitioner and other intersexuals have been deprived of their Constitutional right of freedom of movement as enshrined in section 81 of the Constitution of Kenya since intersexuals are not provided for in statutory forms like PP2 which one is required to fill as a passport application form nor given the facilities that are required for the purposes of obtaining a Kenyan passport or for enjoyment of the right of free movement in and out of Kenya.

(m) A declaration that the petitioner and other intersexuals have been deprived of the democratic right to vote given that intersexuals cannot legitimately obtain national identity and voters cards since the concerned statutory forms do not create room or provide for intersexuals.

(n) A declaration that the petitioner has suffered and will continue to suffer from discrimination and or will stand disadvantaged when seeking or maintaining employment given that intersexuals cannot enjoy the government supported free education facilities free from stigmatization unlike other citizens of Kenya.

(o) A declaration that as an intersexual, your humble petitioner is deprived of and cannot enjoy the equal

protection of the law nor avail of the statutory privilege of protection and or immunity from being arbitrarily deported to other countries like other Kenyan citizens.

(p) A declaration that the petitioner as an intersexed person is a member of sex minority group which should enjoy the protection of the law and that as an intersexual the petitioner has a human right to define his or her own sexual identity.

(q) A declaration that the respondents have violated the petitioner's right to privacy and subjected him to inhuman and degrading treatment.

(r) All such orders leads and or directions as are just, appropriate to safeguard the Constitutional and fundamental rights of the petitioner under the Constitution of the Republic of Kenya and,

(s) A declaration that the respondents are liable to pay the damages, and

(t) General damages.

(u) Costs of this petition, and

(v) An order that the petitioner be granted legal recognition.

(w) Any orders that this court shall deem fit to grant.

FACTS AVERRED IN SUPPORT OF THE PETITION

4. From the amended petition, an affidavit sworn by the petitioner on 28th June, 2007, supplementary affidavits sworn by the petitioner on 7th July, 2009, and 18th November 2009 respectively, and an affidavit sworn by the petitioner's advocate John M. Chigiti on 26th August, 2008, the following facts emerge:

5. The petitioner was born with both male and female genitalia. The option of corrective surgery was not pursued as the petitioner's parents could not afford the costs. The petitioner was given a male name by his parents. For

the purposes of this judgment we shall also refer to the petitioner as "him". Due to his ambiguous gender the petitioner was unable to secure a birth certificate, identity card, or any travel documents. The petitioner dropped out of school at Class 3. He later attempted to marry but could not live with the wife, nor could his attempted marriage be given legal recognition. The petitioner became secluded and ended up in conflict with the law, being charged with an offence of robbery with violence in Kitui Chief Magistrate Court Criminal Case No.144 of 2005.

6. While the petitioner was in prison remand, awaiting the determination of his case, he was subjected to the usual statutory search at the prisons. It was realized during the search that he had both male and female genital organs. Prison officers being in a dilemma as to whether to remand the petitioner in a female cell or male cell, referred the matter to the Kitui Magistrate's Court. A magistrate, Evans Makori ordered that the petitioner be taken to Kitui District Hospital for verification of his gender. The doctor's report confirmed that the petitioner had ambiguous genitalia. An order was therefore made for the petitioner to be remanded at Kitui Police Station during the pendency of his trial.

7. The petitioner was subsequently tried, convicted and sentenced to death for robbery with violence. The petitioner was committed to Kamiti Maximum Prison for male death row convicts. He was again examined by Prison Medical Officers who confirmed that he was a hermaphrodite. Contrary to The Prisons Act, the petitioner was made to share cells, beddings and sanitary facilities with male inmates, and was exposed to constant abuse, mockery, ridicule and inhuman treatment. He was also sexually molested by curious male inmates. The petitioner claimed that his dignity as a human being and his fundamental rights against inhuman treatment, discrimination on grounds of sex, and rights to freedom of association, freedom of movement, right to fair hearing and protection under the law were violated. He therefore filed this petition seeking appropriate redress.

RESPONSES TO THE PETITION

8. It is only the 1st to 5th respondents, 3rd amicus curiae, 1st interested party, and the 5th interested party, who filed responses to the petition. We shall start with the responses filed by 3rd amicus curiae which were actually in support of the petition.

9. The 3rd amicus curiae filed 4 affidavits in support of the petition. These were affidavits sworn by the petitioner's mother Juliana Kaviviu, petitioner's brother John Mutinda Muasya, the petitioner's grandfather Boniface Kiilu Katilu, and the petitioner's grandmother Damarice Syongo. The gist of the affidavits is that the petitioner was born with both male and female genitalia. This was a closely guarded secret kept by the mother and the grandmother who was the midwife during the petitioner's birth. The petitioner was given a male name because of his physical appearance. The petitioner dropped out of school at Class 3. The petitioner's peers laughed at him because he developed breasts and this caused the petitioner to lead a solitary life. Later the petitioner married one Rael, but the marriage only lasted for about a month or so.

10. The 1st interested party filed an affidavit sworn by Jedidah Wakonyo Waruhiu its Executive Director. The gist of the affidavit was that the current male only facilities at the Kamiti Maximum Prison, are not appropriate to cater for intersex persons. Despite the order issued by the High Court that the petitioner be accorded exclusive accommodation, the prison has failed to comply with the said orders. Consequently, the petitioner has continued to suffer sexual harassment. In particular the petitioner had reported to prison paralegal staff of sexual harassment meted out to him on the 9th April, 2009, in respect of which no action was taken. The prison paralegals had also reported of two occasions when the petitioner was asked to strip and spread his legs causing inmates to mock and laugh at the petitioner.

11. The 1st to 5th respondents who were all represented by the Attorney General objected to the petition through two replying affidavits. The 1st

affidavit was sworn by a State Counsel Victor Mule on the 15th October, 2009. The 2nd affidavit was sworn by a prison warder one Julius Kaliakamur on 19th May, 2010. Briefly the allegations that the petitioner has been subjected to psychological suffering and physical abuse, inhuman or degrading treatment at Kamiti Maximum Prison was denied. It was admitted that The Prisons Act (Cap 90) was silent on the provision of separate prison facilities for hermaphrodites. However, it was maintained that no violation of the petitioner's rights was caused by this, as administrative arrangements could be made for special accommodation. It was denied that the petitioner was exposed to any discrimination on the grounds of sex, or that the petitioner suffers lack of legal recognition. Finally, it was stated that the petitioner having been charged with an offence known in law, tried and convicted after due process, with the necessary constitutional safeguards, he could not now be acquitted merely because he is an intersexual.

12. The 5th interested party who also opposed the petition responded to the petition through a lengthy replying affidavit sworn by its Executive Officer one Joyce Kabaki. The replying affidavit is substantially argumentative and raises issues of law which would be best dealt with as submissions. The only clear fact that comes out from the replying affidavit is that the deponent visited the petitioner at Kamiti Maximum Prison. During the visit the petitioner explained to the deponent that a day after he was remanded at Kitui Prison to await his criminal trial, an order was made by the magistrate for the petitioner to be remanded at Kitui Police Station, where arrangements were made for the petitioner to be held in his own cell, without being mixed with the male or female remandees or suspects.

13. Joyce Kabaki also swore that the petitioner indicated during the interaction that although he was currently held at Kamiti Maximum Prison, he was comfortable as he was being held in an isolation area, where he has his own bed and room. The petitioner also indicated to the deponent that he did not face any mistreatment at Kitui Police Station where he was remanded. The

petitioner denied having been sexually molested by other inmates at Kamiti Prison or facing any threat of sexual harassment due to his condition. Finally, as a result of the interaction, the deponent formed the impression that the petitioner came to terms with his physiological condition early in life. This was not consistent with the petitioner's claim that his social development demented on account of his condition.

THE HEARING OF THE PETITION

14. On 9th July, 2010, The Chief Justice nominated us to hear this petition. Hearing of the petition proceeded from 12th July, 2010 to 15th July, 2010. All the parties filed written submissions which were duly highlighted before us during the hearing of the petition. Authorities relied upon were also availed to us. For purposes of convenience, we shall briefly set out these submissions in two categories: Firstly, we shall set out the submissions which were in favour of the petition. These were submissions made by the petitioner, the 1st to 4th interested parties and 1st to 3rd amicus curiae. Secondly, will be the submissions opposing the petition. These were made by the 1st to 5th respondents, and the 5th interested party.

A. ARGUMENTS IN FAVOUR OF THE PETITION:

Petitioner's Submissions

15. Mr. Chigiti who argued the petition on behalf of the petitioner, submitted that the petitioner being a person who because of a genetic condition was born with reproductive organs or chromosomes that were not exclusively male or female is an intersexual. Noting that there was no legal definition of an intersex in Kenyan Law, he referred the court to the definition in "*The Judicial Matters Amendment Bill, 2005 of South Africa*," which proposed to amend the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (PEPUDA), by introducing a definition of intersex as follows: ***Intersex means congenital physical sexual differentiation which is atypical to whatever degree***. This definition is already included in Section 1of the South African "Alteration of Sex Description and Sex Status Act No.49 of 2003." Reference

was also made to "The Legislation Act 2001" of Australia, which defines an intersex as "***a person who because of a genetic condition was born with reproductive organs or sex chromosomes that are not exclusively male or female***".

16. Our attention was drawn to the medical report prepared by Dr. Nyakeri a Medical Officer at Kamiti Prison. This report showed that the petitioner had undeveloped male and female sexual organs, and had male hermaphroditism. It was submitted that in terms of the above referred to definitions, the petitioner was an intersex, the term hermaphrodite being no longer in use. It was argued that as an intersex person, the petitioner has no legal recognition before the law. This is evident in the Births and Deaths Registration Act, Cap 149 Laws of Kenya which makes no mention or reference to intersex. As a result of such omission, the petitioner (and others like him), are not treated equally before the law.

17. An issue was taken with Section 7 of the Births and Deaths Registration Act, which requires every birth to be registered and "prescribed particulars" to be maintained, and Section 2 of the same Act which defines "prescribed particulars" to mean:

> ***"(a) as to any birth, the name, sex, date and place of birth, and the names, residence, occupation and nationality of the parents;***
>
> ***(b) as to any death, the name, age, sex, residence, occupation, and nationality of the deceased, and the date, place and cause of death ---"***

18. It was pointed out that in line with the above definition, the forms provided in the schedule in the Births and Deaths Registration Act, made provision for only two checkboxes for "male" or "female". Since the particulars in the forms are the ones that facilitate the issuance of a Birth Certificate, an Applicant must fill either box. Leaving both boxes blank, would result in an Applicant not being issued with the Birth Certificate, a document which is viewed by the petitioner as a very crucial document for his identity. It was

argued that because Form B1 makes no provision for intersex persons, the petitioner and others like him lack legal recognition and statutory protection. It was submitted that there is therefore no equality before the law for intersex persons who are neither male nor female, men or women, boys or girls, him or her.

19. Taking the argument on lack of legal recognition, further it was contended that the issuance of a Birth Certificate to any person under the Births and Deaths Registration Act, means that such a person is recognized and acknowledged as being in existence Such a person then, becomes entitled to a number of human rights. Such rights include the following:-

- Access to healthcare
- Access to immunization (this is part of healthcare)
- Enrolment in school at the right age
- Enforcement of laws relating to minimum age for employment, assisting efforts to prevent child labour
- Effectively countering forced marriage of young girls before they are legally eligible, without proof of marriage
- Protection against under-age military service or conscription
- Protection from child harassment by police and other law enforcement officers
- Securing a child's right to nationality either at birth or at a later date
- Protection against trafficking in children including repatriation and family reunion
- Getting a passport, opening a bank account, obtaining credit, voting or finding employment

20. It was submitted that the petitioner and other intersex persons are denied the above rights simply because the Births and Deaths Registration Act failed to make provision for their sex status. This statutory omission is contrary to the provisions of Article 6 of the Universal Declaration of Human Rights 1948, which reads:-

> ***"Every one has the right to recognition everywhere as a person before the law."***

It is also contrary to Article 7 of the same Declaration which provides as follows:

> ***"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."***

21. It was argued that the lacuna in the Births and Deaths Registration Act means that the petitioner cannot enjoy the fundamental rights and freedoms enshrined under the Constitution with regard to life, liberty and security of the person. For instance, the petitioner's freedom of association, and freedom of movement, under Sections 80 and 81 of the Constitution respectively have been infringed because he can neither associate nor move freely without proper identification documents. It was also argued that the petitioner was denied his right of freedom of movement contrary to section 81 of the Constitution because the right to movement was facilitated by documents such as identity card and passport which could only be obtained after getting a birth certificate. In the case of the petitioner, he could not get the necessary travel documents unless he lied about his sex that he was either male or female. It was maintained that this was also contrary to Article 20 of the Universal Declaration of Human Rights, which provides for freedom of peaceful assembly and association.

22. It was further submitted that contrary to Section 82 of the Constitution which provides protection to individuals against discrimination, the petitioner was suffering discrimination due to his intersex status. This was because of lack of legal recognition of his status. It was submitted that statutes like the Births and Deaths Registration Act, and The Prisons Act (amongst others) form the basis of discrimination against the petitioner and other intersexuals by failing to give the intersexuals legal recognition. Sections 2b and 7 of the Births and Deaths Registration Act were identified as being inconsistent with Section 3 of the Constitution which provides as follows:–

> ***"This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and,***

subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

23. The court was urged to apply a liberal interpretation of the term "sex" used in Sections 70 and 82 of the Constitution so as to include intersex as a criterion upon which no different treatment can be accorded to an individual. Referring to Article 1 of the Universal Declaration of Human Rights it was submitted that the petitioner like all other persons is born free and equal in dignity and rights, and that under Article 2 of the Declaration he is entitled to all the rights and freedoms set out therein without discrimination on grounds of birth or other status. It was argued that contrary to these Articles, the petitioner was denied his right to marry because Kenyan law only recognized marriage as a union between a male and a female person, and did not cover intersexuals.

24. It was also submitted that according to the existing Kenya laws, the petitioner had suffered inhuman and degrading treatment contrary to section 74 of the Constitution and Article 5 of the Universal Declaration of Human Rights, as well as Article 10 of the International Convention on Civil and Political Rights. In this regard it was pointed out that Section 30 of The Prisons Act ***(Cap. 90)*** only recognizes prisoners of male and female gender. It was argued that the petitioner was exposed to inhuman and degrading treatment as he was severally bodily searched by people who were not intersexuals. The petitioner was also put in the same accommodation with people who were not the same gender as himself. Further, although the petitioner was put in secluded accommodation pursuant to a court order, there were no trained personnel in the prisons of the same sexual orientation as the petitioner, to deal with petitioner.

25. It was noted that The Prisons Act Cap 90 of the Laws of Kenya does not make provision for intersexuals. The petitioner was therefore unable to enjoy the benefit of the separation order made by the court on 6th November, 2007, since the petitioner has at all times during his incarceration been

detained in male cells. Further that the trial court's order to detain the petitioner in a police station for two years during the pendency of his criminal trial exposed the petitioner to inhuman and degrading treatment. It was contended that the detention in prison has exposed the petitioner to mockery, ridicule and verbal abuse by the male inmates, officers and prison warders, including strip searches on the person of the petitioner by the prison warders, including caressing the petitioner's breasts at the warders' pleasure. It was also submitted that at one time in March 2009 during the petitioners' detention, blood samples were taken from him by the prison doctors without the petitioner's consent. The petitioner no longer has privacy and/or bodily integrity. The detention has had such a negative psychological impact on the petitioner that the Petitioner feels he does not matter to anyone anymore and has been contemplating suicide.

26. On the issues of locus standi, reliance was placed on the cases of ***Priscilla Nyokabi Kanyua –vs- Attorney-General & another Constitutional Petition No.7 of 2010*** wherein the Interim Independent Constitutional Court held inter alia with regard to voting rights for prisoners as follows:-

> ***That section 43 of the Constitution of Kenya does not in any way exclude inmates who are over 18 of sound mind and who have not committed an electoral offence from voting in the referendum.***

27. Reliance was also placed on the case of ***Busaidy -Vs- Commissioner Of Lands & 2 Others [2002] KLR*** wherein Onyancha J. held, inter alia, that-

> "***The legal position in England on*** locus standi ***has always been the position in Kenya.***
>
> ***For a party to have locus standi in a suit, he ought to show that his own interest particularly has been prejudiced or is about to be prejudiced. He must show that the matter has injured him over and above the injury, loss or prejudice suffered by the rest of the***

> ***public. Otherwise public interests are litigated upon by the Attorney-General."***

28. It was submitted that the matter before the court is public interest litigation. Thus the court, in exercise of its constitutional jurisdiction should give the issue of locus standi a broad interpretation. Reliance was placed on the case of ***Lemeiguran & 3 Others –Vs- Attorney General & 2 Others (2008) 3 KLR (EP) 325*** wherein Nyamu J. (as he then was) and Emukule J. held inter alia that-

> " ***A generous and purposive interpretation is to be given to constitutional provisions protecting human rights while carefully considering the language used in the Constitution. The court had a responsibility to interpret the Constitution in a manner that protected and enhanced the right of minorities and other disadvantaged group***

29. It was submitted that this court should not be bogged down unnecessarily on issues of *locus standi* in Constitutional matters, such as the one before the court. The court was urged to be proactive in embracing the rights of intersexuals by giving them legal recognition. Since there were no Kenyan precedents on the subject, the court was urged to apply international standards and grant the orders sought.

30. It was also contended that due to lack of legal recognition the petitioner's right to vote as enshrined under Section 34 of the Constitution was violated. It was argued that without a Birth Certificate, the petitioner cannot obtain a national identity card which is a requisite document before one is registered as a voter. That in the circumstances, the petitioner cannot be registered in any constituency as a voter, or vie for any political seat, or vote for anyone else. Thus the petitioner is disenfranchised on account of his intersex status. It was pointed out that lack of legal recognition contravenes Article 21(1) of the Universal Declaration of Human Rights which reads:-

> ***"Everyone has the right to take part in the government of his country, directly or through freely chosen representatives."***

31. It was argued that because of this lack of legal recognition the petitioner and others like him cannot enjoy the right to housing, or the right to acquire property contrary to Article 17 of the Universal Declaration of Human Rights. That the petitioner and others like him, cannot acquire a Personal Identification Number (PIN), resulting in economic incapacity. In essence, it was argued that intersex persons as a minority group lack legal recognition, and that lack of recognition in all its forms runs counter to the provisions and spirit of the Universal Declaration of Human Rights.

32. It was also argued that due to lack of legal recognition of intersex persons, the petitioner cannot get employment. This is because he cannot be employed without a national identity card, which he can only get if he has a birth certificate. Yet an intersex child cannot get a birth certificate because he is neither male nor female. The petitioner and other intersex persons cannot also attain academic qualifications due to the social stigma they face in school and the fact that they cannot access examination registration forms. Thus contrary to Article 23(1) of the Unilateral Declaration of Human Rights which guarantees every person the right to work, the freedom to choose employment and the right to equal pay for equal work intersex persons are disadvantaged in the job market. It was submitted that because of lack of legal recognition, the attendant social stigma and economic incapacity caused by unemployment, intersex persons are more prone to crime than those who are either male or female. It was contended that because there is no legal recognition for intersex persons in this country, such persons are hidden away by their families or resort to hiding for fear of either being stigmatized or molested.

33. With regard to corrective surgery, it was submitted that though many intersex children are today being subjected to corrective surgery, the petitioner's family was too poor to afford the surgery. A question was posed as to whose responsibility it is to assign gender to an intersex child, whether it was the child, the parent, the doctor or the court, and whether such surgery would be in the best interest of the child, or would infringe upon the

intersexual child's privacy. In trying to find answers to these questions, reliance was placed on the case of **Gillick –vs- West Norfolk and Wisbech Area Health Authority & Another [1985]3 ALL ER 402** in which it was held that in certain specified circumstances, a minor can give consent for corrective surgery or other medical treatment without obtaining parental consent.

34. Counsel for the petitioner concluded the submissions by a quotation from the Constitutional Court of Colombia, in two decisions namely ***Sentensia No.54-337/99*** (***The Ramos Case***) and ***Sentensia T551/99*** (***The Cruz Case***) in which the Colombian court concluded both decisions with the same emphatic exhortation:-

> ***"Intersexed people question our capacity for tolerance and constitute a challenge to the acceptance of difference. Public authorities, the medical community and the citizenry at large have the duty to open up a space for these people who have until now been silenced. [...] We all have to listen to them, and not only to learn how to live with them, but also to learn from them."***

The Court was urged to find that the petitioner has made out a case for the declarations sought and to proceed to make the declarations.

Submissions 1st Interested Party:

35. During the hearing of the petition, the 1st interested party, who supported the petition, was represented by Ms. Wakonyo. The arguments made were along the same lines as those made by the petitioner. For the sake of brevity, we shall not repeat what has already been covered in the petitioner's submissions. Adopting the definition of an intersex, contained in the eDictionary Wikipedia, Ms Wakonyo submitted that the term intersex is applied to human beings whose biological sex cannot be classified as either male or female. The petitioner being a person with both male and female characteristics fell within that definition.

36. It was noted that The Prisons Act (Cap. 90) was silent on how intersex inmates should be treated. This omission has resulted in inhuman

and discriminatory treatment for intersex persons in the prisons. It was also contended that there was contravention of section 82(1), (3) and (8) of the Constitution which prohibits the existence of any law whose provisions are discriminatory. It was contended that The Prisons Act not having made provision for intersex persons was discriminatory. Reliance was placed on the case of ***Nakusa –vs- Tororei & 2 Others – Election Petition No. 4 of 2004***, where the court held that-

> ***" .....in interpreting the Constitution the court must uphold and give effect to the letter and spirit of the Constitution always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trends ..... The society is not static."***

37. Reliance was also placed on the case of ***Njoya & 6 Others –vs- Attorney-General & 3*** **Others HC Misc Application No. 82 of 2004** wherein Ringera J. (as he then was) adopted the view that the constitution was a living instrument with a soul and a consciousness, and embodied certain values and principles, and must be construed broadly, liberally and purposely to give effect to those values and principles. We were urged to find that the responsibility of ensuring that the rights of intersex persons were protected fell squarely upon the State.

38. The court was urged to take the bold step taken by the Constitutional Court in Columbia in the ***Ramos Case*** (supra) in which the court held that it was necessary for the Constitutional judge to take necessary measures to protect the fundamental rights of intersex persons, where there were no laws protecting them. It was emphasized that it was important to give intersex persons recognition to ensure that they enjoy equal rights in the eyes of the law, as failure to do so would expose them to untold discriminatory suffering contrary to section 74 of the Constitution.

39. It was maintained that due to the petitioner's ambiguous gender and overpopulation of inmates in the Prison, the petitioner was exposed to deplorable and inhuman conditions contrary to section 74 of the Constitution.

Reference was made to a research document titled "***Who Is Responsible for my Pain? A Research on the Prevalence of Torture in Kenya Prisons 2006".*** The research carried out by the 1st interested party indicated that there were acts of torture and sexual harassment in prisons by warders as well as inmates.

40. It was contended that the petitioner was vulnerable to abuse due to his unique biological make up. This was because although Rule 36 of The Prisons Rules provides that an inmate in a prison should be subject to searches conducted by a person of the same sex, The Prisons Act was silent on searches on persons with unique biological characteristics like the petitioner. This meant that the petitioner's right to privacy was violated by the routine searches, and strip searches being done on him by persons not of his gender. It was contended that at times the searches upon the petitioner were not conducted for security purposes but purely to satisfy the curiosity of the prison officers.

41. Thus the petitioner was exposed to abuse by the warders during the searches. As a result, the petitioner was vulnerable to abuse and ridicule by both the prison officers and inmates. In addition, since there were no special toilets or bathrooms for intersex persons, the petitioner was forced to use toilets and bathrooms used by other inmates. All these resulted in torture, cruel, inhuman or degrading treatment to the petitioner contrary to section 74 of the Constitution and Article 50 of the Universal Declaration of Human Rights.

42. Reference was also made to a study carried out by the Sylvia Rivera Law Project (SRLP) 2007 from New York State Prison called "***Its War In Here***." It was submitted that the report revealed a co-relation between a person being transgender or intersex and crime, which led to the conclusion that discrimination and stigmatization often drive intersex persons into conflict with the law. Ms. Wakonyo also relied on a report called ***"The Transgender, Gender Variant & Intersex Justice Project"*** from San Francisco USA, which

highlighted human rights problems faced by transgender and intersex persons. These included sexual assault and rape, sexual harassment, physical assault, verbal humiliation, medical neglect and discrimination.

43. On the issue of the solitary confinement of the petitioner, the US case of ***Dimarco –vs- Wyoming Department of Corrections 2004 WL 307421*** was cited. In that case a District Judge Clarence A. Brimmer ruled that state officials violated the 14th Amendment due process rights of an intersex Miki Ann Dimarco when she was confined for 14 months in the security wing of the prison, totally segregated from the general population of inmates after it was discovered that she had male organs.

44. It was argued that the petitioner's solitary confinement is a violation of his rights under Article 2(3) of the International Covenant on Civil and Political Rights. The court was urged to use the spirit of the Colombian Constitutional Court in the ***Ramos Case*** (supra), where the court acknowledged that in the near future it would be necessary and unavoidable for certain policy adjustments to regulate, in the best possible way, the challenges posed to our pluralistic society's intersexual status. Counsel submitted that the drafters of the Constitution might not have foreseen cases of intersex persons. However, as the situation was actually with us, the interpretation of sex should include intersex.

Submissions of the 2nd Interested Party:

45. The 2nd Interested Party supported the petition with regard to prayer (h) of the amended petition, which seeks a declaration that the petitioner and other intersexuals have been left out on issues of marriage and adoption and in the process of deciding the gender or sex they belong to upon attaining the age of majority. The 2nd interested party was represented before us by Ms. Lillian Njeru. It was submitted that due to the lacuna in the law, intersexuals are discriminated against while others undergo corrective surgeries against their will. It was argued that the declarations sought by the

petitioner, if granted, shall have far reaching ramifications for other intersex individuals now and in the days to come.

46. We do not find it necessary to repeat the 2nd interested party's submissions which have already been captured by the petitioner and the 1st interested party. However we take the liberty to reproduce the following extract from the 2nd interested party's written submissions which neatly sums up its submissions.

> ***"The term sex as used in the Kenyan laws including the Constitution is not legally defined and therefore, resort would be to standard 'dictionary' definitions, most of which do not take cognizance of atypical situations of intersex who do not comply with the contemporary sex differentiation of being male or female.....It is our submission that the fact that an intersex does not fall within the definite criterion as being distinctly male or female, should not negate his right as a human being in whom rights and freedoms are inherent. The fact that the Births and Deaths Registration Act defines the limits of sex in restricting the same to male/female contravenes the Constitutional rights of an intersex. Further, given that the law in Kenya does not provide for a definition of sex, it is our submission that the Constitution should not be strictly interpreted to mean that discrimination on the ground of sex does not include an intersex because of the lack of a definition; rather, we pray that the Court interprets the term sex liberally as the condition of being an intersex relates to the question of gender identity to which discrimination on the ground of sex relates. It is therefore in the interests of justice that the court upholds the rights of intersexual persons by declaring unconstitutional laws that vindicate discrimination of intersex on the ground of them being intersexed.***

47. On the issues of Children's rights and parental consent, the 2nd interested party argued that there was need for rules and regulations and laws to govern issues of parental responsibility and corrective surgeries on intersexual children. The court was urged to address the issue as to whether parental discretion was absolute. The court was challenged to take the opportunity to develop and entrench the common law doctrine of ***parens patriae*** under which courts have an inherent right to make decisions on

behalf of persons incapable of making such decisions, such as minors and people with disabilities.

48. Reliance was placed on the Australian case of ***Re A (1993), Deakins Law Review, Vol. 9, Issue No. 2*** at page 380, wherein the court in regard to a decision to determine gender and give consent to sex correction surgery, held that the decision to proceed with the proposed treatment did not fall within the ordinary scope of parental power to consent to medical treatment. The court proceeded to give consent to the surgery having given due consideration to expert evidence.

49. It was argued that there was need for appropriate legislation or rules and regulations that govern parental responsibility and corrective surgeries on intersexual children. The court was urged to apply the provisions of the Children's Act 2001 with regard to the principle of the best interests of the child. An example was given of New South Wales where a Tribunal was formed guided by regulations to deal with such matters. The court was urged to grant prayers (h) (i) and (j) of the petition, as the current position of the situation in Kenya contravened Section 82 of the Constitution.

Submissions of the 3rd Interested Party:

50. The 3rd interested party who was represented before us by Ms Angote also supported the petition. The gist of the 3rd interested party's submissions was that the petitioner and other intersexuals, belong to a rare marginalized group who have suffered discrimination and stigmatization due to lack of legal recognition. Submissions similar to the ones made by the petitioner and 2nd interested party on the Constitution and the Birth and Death Registration Act were reiterated. The discrimination suffered by the petitioner and other intersex persons on matters such as housing and employment were of particular concern to the 3rd interested party.

51. It was submitted that the Kenya Government had failed to ensure statutory guarantee against discrimination, and that it must therefore ensure that intersexuals and or people of other status are protected. In this regard, it

was noted that International Legal Instruments such as the Universal Declaration of Human Rights, the International Covenant on Social Cultural and Economic Rights, and the African (Banjul) Charter on Human and People's Rights all included "other status" as a criterion upon which discrimination was outlawed.

52. The Court was urged to find that the State ought to ensure that statutory recognition is given to the rights of intersex persons in the same way the rights of male and female persons are recognized. It was submitted that to achieve this equality of status the law must recognize the "other status" not only in the Constitution but in other statutes as well. It was argued that since Kenya is a signatory to the various international Conventions which are set out above, Kenya should also enact laws that are in tandem with the said international instruments.

53. The court was referred to Articles 2, 7 and 8 of the Universal Declaration of Human Rights for the proposition that the petitioner and other intersex persons have a right to be accorded equal protection of the law. In the absence of such recognition, they should seek redress either in the local courts or internationally. It was maintained that there is no reason why the term "other status" should not be included in the laws of Kenya. Reference was made to the case of ***Edward Young vs Australia – 6th August 2000 Communications No.941/2000, CCPR/C/78/D/941/2000***, for the proposition that the term "other status" was open ended enough to include intersexuals.

54. The court was urged to display the kind of judicial activism displayed by the Constitutional Court of Columbia in the ***Ramos Case*** (supra) and to find that:-

"Intersexed people constitute a minority entitled to protection by the state against discrimination."

Reference was also made to ***Di Marco vs Wyoming Department of Corrections*** (Supra), and the court asked to earnestly urge the Prison Authorities in the country to push for immediate reforms of their facilities to

cater for the likes of the petitioner and other intersex persons. It was contended that such a finding would help intersex persons to fight the stigma, segregation, discrimination and neglect around the status of intersex persons.

Submissions of the 4th Interested Party:

55. The 4th interested party who was represented during the hearing of the petition by Ms Wambua, also supported the amended petition. The submissions of the 4th interested party examined the nature of intersexuality with particular focus on the implications for gender identity, taking into account scientific perspectives, and Christian Theology. It was argued that intersex persons were human beings, who are in the class of people born with disabilities like the blind, deaf, and lame. However, because of existing cultural definition of sex as male or female, they were discriminated against. It was pointed out that intersex persons were born as such because of biological processes, not because of sin.

56. Referring to the Bible, it was contended that there was no strict or rigid definition of gender in the Bible, as male or female mentioned in the book of Genesis, was only meant to facilitate relationships. It was argued that in the Bible eunuchs who were treated as neither male nor female were recognized. It was submitted that because of the legal vacuum in Kenya, many intersex persons do not enjoy a dignified status, ending up as objects of ridicule, fear or pity. This court was therefore called upon to issue protection orders and writs that will heal relations between biological sex, gender identity, and cultural influences in Kenya, so as to safeguard the constitutional rights of intersex persons. The court was challenged to stand up to the task of deconstructing social structures that discriminate and ridicule intersex persons leading to serious human rights violations.

57. It was argued that God created man with the deep need to express his (man's) humanity most fully in relationships. God made the two genders with a view to drawing the two sexes towards human intimacy and for procreation. Christians in society are called upon to welcome the marginalized

and the alien and to "do justice, love, mercy and walk humbly with God". It was submitted that intersex and transgender persons are among the marginalized and that the body of Christ should indeed embrace and nurture them to enable them live a flourishing and full life within the bounds of their situation, like the eunuchs did. Finally, the court was urged to recognize by declaration the intersex gender, and thus eliminate the discrimination that is faced by this minority group of society so as to give them an identity and enable them to enjoy equal rights in society and before the law.

Submissions of the 1st & 2nd Amicus Curiae:

58. The 1st and 2nd amicus curiae who supported the petition were represented before us by Mr. Gatuguta. Submissions were made pointing out that the petition raised issues on the violation of individual rights of the petitioner, under Sections 74, 77 and 82 of the Constitution. Sections 28, 30, 31 and 38 of The Prisons Act, and Sections 2(b) and 7 of the Births and Deaths Registration Act were identified as denying or violating the petitioner's rights. It was argued that the rights of intersex children in Kenya were not safeguarded. Consequently intersex children were subjected to surgery or genital mutilation; left to grow with no medical attention or psychological counseling; ostracized and/or isolated.

59. The court was referred to authorities from Colombia's Constitutional Court on the legality of performing gender reconstruction surgery on children, and the responsibility in assigning gender. These were:- ***Sentencia No. T-477/95 (the Gonzalez case),*** where it was held that doctors could not alter the gender of a patient, regardless of the patient's age, without the patient's own informed consent; the ***Ramos case*** (supra), where an application by the mother of an intersex child for the mother to give consent to reconstructive surgery on behalf of the child, was refused both at the trial court and on appeal to the Constitutional Court, the court holding that it would be wrong for anyone to give consent for sex change other than the child herself/himself; and the ***Cruz case*** (supra) where the parents sought authority

from the court for genital reconstructive surgery for an intersex child born with female chromosomes but with external male genitalia. The Constitutional Court holding that intersex children of over the age of 5 years must give their informed consent before undergoing reconstruction surgery, narrowed the parental consent to apply to children under the age of 5 years. The Constitutional Court further set 3 criteria which must be met. Firstly, detailed information must be provided and parents informed of the pros and cons. Secondly, the consent must be in writing and thirdly, the authorization must be given in stages.

60. It was argued that the Colombian Court decision did not adequately protect the marginalized and forgotten minority though it has increased the world's awareness of the problems with genital reconstruction surgery. On the issue of marriage, it was argued that genital reconstruction surgery makes matters worse because of the legalities involved in surgically redefining the gender of a child and the hustle of changing birth documents after such a change. It was argued that where such change occurs at infancy, it could be an infringement on an individual's ability to marry as an adult, as the cost of any desired further change may be prohibitive.

61. It was submitted that given the law as it currently stands, genital reconstruction, surgically defines an intersex person as male or female thereby prohibiting them from marriage to a person of their "same" gender. It was submitted for instance, that a child born with male chromosomes, or mixed chromosomes, if surgically assigned a female gender at birth, would be prohibited from marrying a female later in life, without first undergoing another sex change operation. It was argued that by choosing a gender for a child and performing reconstruction surgery at birth, the doctors or parents may be infringing on an individual's ability to marry as an adult.

62. It was further submitted that no Government should be allowed, through its laws, to infringe upon the right to bodily autonomy, the right to choose whether or not to reproduce, the right to marry and the right to make

decisions about how to raise children without first proving in a court of law that there is a compelling state interest that must be served. It was submitted that the doctrine of ***parens patriae*** articulates the government's interest in protecting the rights of vulnerable individuals from harm. Thus, the doctrine allows the government to interfere with parents' choices about how to raise their children when the children may be harmed because of the parents' actions or inactions. In the case of intersex children, the government may have reason to override the parents' decision to perform surgery if the surgery would harm the child.

63. The court was urged to consider international standards such as the Convention on the Rights of the Child which recognizes the rights of children (independent of their parents) by allowing children to veto the parents' decisions on issues of health education and religious upbringing. Emphasis was laid on the importance of doctors within Kenya making a concerted effort to provide parents and children with all available knowledge regarding intersex conditions before making the recommendation to perform genital reconstruction surgery. It was submitted that this petition provides an opportunity for this court to make declarations over the plight of the petitioner in particular, and intersex persons generally, and the specific violations of the fundamental rights.

Submissions of the 3rd Amicus Curiae:

64. The 3rd ***amicus curiae*** is a statutory body having a mandate to promote and protect human rights in Kenya. It supported this petition with particular reference to prayers (d), (g) and (v). The 3rd ***amicus curiae*** was represented before us by Mr. Lando, who emphasized that in addition to the discrimination prohibited by the Constitution, Kenya was also a signatory to international treaties which prohibit discrimination on grounds of sex. In particular, the submissions addressed the following questions:

(a) Who are intersex persons? Does Kenyan law make provision for them?

(b) Does section 82 of the Constitution cover intersex persons in terms of protection from discrimination on the ground of sex?

65. It was contended that though there is no direct mention of the term intersex persons in any of the provisions of the various International Instrument cited, nonetheless, the Constitution still gives intersex a measure of protection under the non-discrimination clause in section 82. It was argued that though there has been no clear interpretation of the term "sex" since its introduction by an amendment to the Constitution in 1997, it is generally understood to mean male and female with no definition of the term with respect to intersex persons. It was submitted that the exclusion of intersex persons from the definition of "sex" is subjective and discriminatory of the petitioner herein. It was argued that the intersex persons, like any other person, should be accorded equal status under the law. It was contended that to say that sex means either normal "male" or "female" results in arbitrary and irrational exclusion, and discrimination against the intersex persons. The court was urged to adopt a more purposive interpretation of the term sex so as to include intersex within the definition of sex, and to find that any discrimination on the basis of intersexuality will thus qualify as discrimination on the basis of sex as recognized under the Constitution.

66. The court was implored to be alive to the plight of the petitioner herein and other intersex persons and to specifically make findings in the following terms:-

(i) That the non-discrimination clause in section 82 of the Constitution prohibiting discrimination on the basis of sex includes discrimination on the ground of intersexuality.

(ii) That any discrimination on the basis of intersexuality is thus a violation of section 82 of the Constitution

It was argued that such findings would ensure equal enjoyment of fundamental freedoms by intersex persons to guarantee and achieve equality.

ARGUMENTS AGAINST THE PETITION:

Submissions of the 1st, 2nd, 3rd, 4th & 5th Respondents:

67. The petition was opposed by the 1st, 2nd, 3rd, 4th and 5th respondents, who were all represented by Mr. Obiri, State Counsel on behalf of the Attorney General. Counsel submitted that the petitioner's complaint in relation to Section 2(b) of the Birth and Deaths Registration Act, Cap 149 is misplaced for two reasons. Firstly, that Section 7(1) of the Births and Deaths Registration Act requires every Registrar to keep a register of births and a register for deaths and to enter therein the particulars of every birth and of every death notified to him. Secondly, it was argued that the petitioner's complaint that he has been discriminated against on grounds of sex are unfounded, as Section 82 of the Constitution deals with discrimination on grounds of race and not sex.

68. It was submitted that in any event, Section 82 of the Constitution does not even mention the word "sex". Counsel contended that even if the Births and Deaths Registration Act Cap 149 denied the petitioner recognition, the question is, who should confer legal recognition, is it the judiciary, the legislature or the executive? It was argued that if the petitioner's complaint is that the word "intersex" is not included in Section 2(b) of the Births and Deaths Registration Act, then it is clear that the petitioner is looking to the wrong authority for a remedy. It was contended that it is only the legislature who can deal with legislative matters and that in the circumstances of this case, Section 2(b) of the Births and Deaths Registration Act is not inconsistent with Section 82 of the Constitution.

69. It was argued that the court cannot direct the legislature on what laws to make or what should be included in any specific law that may be passed by the legislature. Therefore, this court cannot be called upon to make additional provisions on intersex persons under Cap. 149 as the role of the judiciary is merely to interpret laws, not to legislate. With regard to Section 82 of the Constitution, it was submitted that what the petitioner was asking for was for this court to insert the word intersex in the Constitution, which again

was a function of the Legislature. It was argued that the petitioner had not demonstrated that he was denied a birth certificate or identity card, as he had not provided any evidence that he applied and was denied the same.

70. With regard to the alleged discrimination the petitioner had not demonstrated that he was discriminated under The Prisons Act (Cap.90). Moreover the complaints of the petitioner were adequately addressed under Rule 65 of the Prison Rules in that as an inmate, he could make written submissions to the President through the Commissioner, or make a complaint to a Visiting Justice. In the absence of any complaints made by the petitioner as required, the petition had no basis. The court was urged to disregard the reports of alleged research findings relied upon in support of the petition, as the reports were tailor made and lacked authenticity.

71. On freedom of movement and association, it was contended that currently, the petitioner was confined in prison because he was a convict. The confinement was therefore lawful and constitutional. Further it was not practicable to create a separate prison for a single intersex person, nor is it possible to get trained intersex personnel to attend to the petitioner. As regards the right of the petitioner to vote, it was maintained that this was not curtailed by the petitioner's condition as an intersex, because he had not demonstrated that he had applied for an identity card and his application was refused.

72. It was argued that the petitioner's complaint that he has been subjected to inhuman and degrading treatment contrary to Section 74(1) of the Constitution cannot hold. It was stated that the decision by the Prison authorities to keep the petitioner in separate accommodation was a result of an order issued by this court. This was a lawful order that the Prison authorities had to obey. It was argued that the fact that there were only male or female prisons in the country does not in any way violate the rights of the petitioner as an intersex person, as a case involving an intersex person such as the petitioner, can be dealt with administratively, and was therefore not a matter

for the courts. It was contended that the petitioner's biological architecture is just like any other disability suffered by millions of Kenyans and therefore, there is no good reason why the petitioner should be treated with any exception when it comes to prison facilities.

73. Further, it was submitted that the petitioner's alleged discrimination while in prison on account of his intersex status, was not supported by any evidence. There was no record of any complaint made by the petitioner to the Prison authorities in accordance with the elaborate procedure for recording complaints at the prison. The allegations of discrimination while in prison were therefore baseless and should be ignored.

74. As regards the roles of parents in determining or assigning gender, and consents for corrective surgery, it was contended that in jurisdictions where that role was clearly defined as in South Africa and New South Wales, it was the legislature who made the legal framework, not the courts. It was argued that in any case, the petitioner was now above 18 years and did not need anybody's consent to undergo corrective surgery. What was required was for the affected persons to lobby the Legislature to make necessary laws. Finally, it was submitted that the petitioner has no authority to act on behalf of other intersex persons since this is not a representative suit. The court was urged that any orders that may eventually be issued in this case should apply to the petitioner and no one else.

Submissions of the 5th Interested Party:

75. The 5th interested party who opposed the petition was represented by Mr. Harrison Kinyanjui. The first major issue raised was the issue of locus. It was submitted that the amended petition had the characteristics of a representative case for a class of people called other intersexuals. Since no order was sought or obtained for the petition to be prosecuted as a representative suit, the petitioner does not have the authority to seek orders on behalf of the class of people called other intersexuals who are not party to this petition. In the absence of such authority it was argued that prayers (g) (h) (i)

(j) (k) (l) and (n) challenging the lack of legal recognition for intersex persons in Kenya must fail. It was submitted that the litigation before the court was personal to the petitioner and he cannot purport to litigate on behalf of any other person or persons.

76. It was submitted that the orders sought by the petitioner, and those parties who supported his case particularly in regard to definition of ***"gender',*** were moral or ethical, and the court was not the proper forum to deal with the same. Relying on the English case of ***Bellinger –Vs- Bellinger (2002) WLR 411***, we were cautioned that as Judges we must be careful when considering social issues so as not to substitute our own views. It was maintained that the proper forum to address the petitioner's concerns was Parliament, and that this court could only address the issues of alleged contravention of the Constitutional fundamental rights of the petitioner and not legislate on the petitioner's issues or invent legal situation that address the petitioner's physiological position.

77. With regard to the petitioner's alleged violation of constitutional rights, it was contended that the petitioner did not invoke the appropriate procedure which is the procedure provided under Legal Notice No.6 of 2006. It was submitted that the hybrid constitutional and judicial review jurisdiction which the petitioner invoked was incompetent.

78. It was pointed out that the issue of people being classified as male or female had a Biblical history as stated in the book of Genesis 1: 26-28. It was maintained that the divine definition of gender had only male and female with no in between gender. It was argued that the petitioner's quest for the orders he seeks has been weakened by the fact that he seems not to know whether he is a hermaphrodite or an intersexual, and whether he speaks for himself alone or for other intersexuals. If the petitioner considers himself a hermaphrodite then, the definition should be as defined in the case of ***W –vs- W (Physical Intersex) [2001] FLR 111***.

79. It was further submitted that though counsel for the petitioner submitted that the petitioner was an "intersex" person, there is no specific prayer in the Amended Petition seeking such a classification to be made, save may be for prayer (g) which seeks a declaration that as an intersexual, the petitioner and intersexuals in Kenya have suffered, are suffering and continue to suffer lack of legal recognition and protection, under the Kenyan statutes. It was argued that the legal assignment of the human sex between male and female is founded in Divinity and the authorship of life by God. As such no human being has the power to determine their sex.

80. It was noted that the only medical evidence produced by the petitioner, being the Medical Report signed by Dr. Nyakeri S.B., suggests that the petitioner's physiological findings reveal that he leans more towards male hermaphroditism. No additional medical evidence was adduced by the petitioner to assist this court in establishing the sex of the petitioner in accordance with the criteria set out in the case of **Corbett –vs- Corbett [1970]2 WLR 1306,** where Ormrod J. stated as follows:-

> ***"In other words, the first three of the doctors' criteria, ie chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention."***

81. It was argued that since the only medical report submitted on the petitioner, shows that the petitioner leans towards male hermaphroditism, and the petitioner has also carried himself around as a male person with a male name "*Richard*", he broadly fits into the chromosomal delineation. It was further submitted that the **Corbett case** (supra) also settled the issue of when a person's sex is determined namely that it is determined at birth and that the same **"*cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means*".** Therefore any subsequent operation cannot affect the sex of a person, unless there is a mistake made at birth as to sex.

82. On the issue of assigning gender, the court's attention was drawn to the following passage from the case of **Bellinger –vs- Bellinger** (supra):

> "***There is no difficulty in assigning male or female gender to the individual. But nature does not draw straight lines. Some people have the misfortune to be born with physiological characteristics which deviate from the normal in one or more respects, and to lesser or greater extent. These people attract the convenient shorthand of intersexual. In such cases classification of the individual as male or female is best done having regard to all the factors I have listed. If everybody has to be classified as either male or female, that is the best that can be done."***

83. Counsel submitted that the **Bellinger case** (supra) expanded on the three (3) criteria set out in the ***Corbett case***, (supra) increasing the parameters to six (6) as follows:-

(i) Chromosomal factors
(ii) Gonadal factors (ie presence or absence of testes or ovaries)
(iii) Genital factors (including internal sex organs);
(iv) Physiological factors;
(v) Hormonal factors; and
(vi) Secondary sexual characteristics (such as distribution of hair, breast development, physique etc)

84. It was submitted that because the petitioner has not placed any evidence before this court on all the sex factors to be considered in determining whether he is male or female, the petitioner's petition ought to be dismissed. The court was urged to dismiss the petition on the following grounds:

(i) That the petitioner's proceedings were brought in bad faith and were a mere afterthought. This is because the petitioner never moved the subordinate court either on the issue of violation of his fundamental rights, or his gender designation, prior to his incarceration or during the pendency of his trial. Nor did the petitioner invoke Legal Notice No.6 of 2006.

(ii) That the petition is an attempt by the petitioner to flee from criminal liability. This is because the petitioner never raised any objection to his being designated as "male", nor has he placed any evidence before this Court to show that he ever protested at any stage of his life at being identified as a male. The petitioner only now appears to do so to escape from his conviction.

(iii) That the petitioner's claims are extraneous claims. There is no proof or record that the petitioner has ever sought any surgical interventions to his "intersexual condition", or that the condition is a thorny and foremost issue in his life. The petitioner simply seeks to appeal to the emotional concerns tied to his condition as opposed to genuine constitutional issues.

(iv) That the petition should be dismissed on grounds of public policy. This is because a finding in favour of the petitioner would open a floodgate of litigation from all manner of claimants with inconsequential deficiencies of whatever nature, in order to flee from criminal liability. Moreover, the motive behind the petitioner's proceedings is clouded by the positions expressed by the 1st to 4th interested parties. The 2nd amicus curie has also introduced oblique activism that lacks sufficient loci in the claim.

(v) That the petition should be dismissed due to lack of conclusive medical proof of intersex. In the absence of an appropriate medical report, giving conclusive proof of the petitioner's internal organs, there is no way this court can tell whether the petitioner possesses ovaries, fallopian tubes or uterus, or whether he has tissues that are commensurate with both the masculine and feminine gender, so as to qualify as a "middle-of-the' road' 3rd gender, or whether his organs are predominantly of the male gender or female gender.

85. On the petitioner's attempt to speak for *"other intersexuals*" as per the amended petition, it was noted that the court was not provided with reliable medical or statistical data or medical overview of the intersexual phenomena in Kenya. In the absence of such vital statistical information from medical experts, the court was placed in a difficult situation. Nor was the court provided with the information concerning the chromosomal structure of the petitioner or whether the petitioner had sought any alternative relief. It was argued that in the circumstances, the position taken by the petitioner as the voice of those other unidentified intersexuals could not succeed.

86. With regard to the petitioner's claims relating to specific statutory provisions, it was submitted that under the Births and Deaths Registration Act,

Cap 149 Laws of Kenya, amendment of a birth certificate is permissible and that in the circumstances, nothing would have stopped the petitioner from seeking a Court Order to rectify a birth certificate. It was maintained that the petitioner had not demonstrated that he had made such efforts. On the Children's Act, it was submitted that whereas Part II of the Children's Act recognizes the rights of children, each case that comes before the court must be treated on its own merit. It was argued that the court cannot by means of these proceedings open lacunae for exploitation by homosexuals who may wish to declassify themselves from one gender to the other, to justify their immorality.

87. As regards the provisions of The Prisons Act Cap 90, which were faulted by the petitioner as denying him legal recognition, it was argued that The Prisons Act, provides adequate remedy to any prisoner who, with adequate and legitimate reasons, perceives that his rights are violated, to lodge a complaint with the prison authorities. In response to the submissions by counsel for the petitioner that blood was extracted from the petitioner allegedly without the petitioner's consent and for unknown reasons, it was submitted that neither the petitioner nor his advocate objected to the extraction. It was further submitted that the petitioner had every opportunity prior to his incarceration to ventilate any complaint that he may have had. It was maintained that this court was not the proper forum to deal with the issues raised by the petitioner in his amended petition filed in court on 16th October, 2009.

88. Further, it was submitted that section 89(5) of the Criminal Procedure Code, Cap 75 Laws of Kenya, avails the petitioner the opportunity to truncate criminal proceedings well before the inception of the Charge Sheet based on a legal misdescription of the suspect or such other grounds as may be raised. The petitioner also had an opportunity after conviction to mitigate by letting the court know of his plight before sentence. It was reiterated that the complaints posed by the petitioner against the various statutes, and the

declarations and the interventions sought, have been placed before the wrong forum. The fact that the criminal process against the petitioner was fair, can be gleaned from the joint replying affidavit sworn by the respondents on 15th October, 2009, confirming that the criminal trial in the Kitui case was meticulously considerate of the petitioner's unique position, and that the decision to keep the petitioner in isolation was for the petitioner's own safety.

89. In this regard, reliance was placed on the appeal from the united States District Court from the District of Wyoming in the matter of the ***Estate of Miki Ann Di Marco*** wherein at page 6 it is stated:

> ***"In rejecting Di Marco's equal protection claim, the court first determined that "individuals born with ambiguous gender" are not members of quasi-suspect or constitutionally protected class, and that Di Marco was not denied a fundamental right. Applying the rational basis review, the court found no equal protection violation, "because Defendant's actions in placing Plaintiff in segregated confinement was rationally related to the legitimate purposes of ensuring safety of the Plaintiff and other inmates and security of the facility."***

90. It was submitted further that before deciding the issues that have been raised by the petitioner in the amended petition this Court must of necessity, interrogate the criminal process that led to the petitioner's incarceration in Kitui Criminal Case No. 1146 of 2005. It was noted that during that trial, the petitioner did not raise any objection to the fact that he was defined as a male, nor did the petitioner produce his Birth Certificate in the criminal proceedings or before this court. In fact it was admitted by counsel for the petitioner that the petitioner has never applied for either a Birth Certificate or a national identity card. It was argued that unfounded fear cannot form the basis of a claim for constitutional redress where no effort has been made to comply with the law. Counsel also took issue with the petitioner's failure to enjoin his parents in these proceedings as this suggested that the petitioner has no objection to the gender assigned to him by his parents. It was maintained that the petitioner totally failed to lay any evidence

before this Court to show that he raised any objection with 4th respondent to his gender classification.

91. Regarding the wider public policy concerns, it was submitted that the petitioner has not placed evidence before this court to show the cultural considerations in his Kamba society concerning cases of intersex persons. This was particularly important in light of the averment by the petitioner's mother in her affidavit dated 30th March, 2010, that she has never seen an intersex child in her life as a midwife. The court was urged to note that each of the 42 tribes in Kenya may have its own specific customary attitudes towards hermaphrodites. Thus, it would not be safe for this court to make any generalizations on how intersex persons are to be treated. Nor should the petitioner be allowed to impose his views on hermaphrodites in Kamba community to which the petitioner belongs, to the rest of Kenyan society.

92. On the issue of marriage, it was submitted that this was an extraneous matter which the court should not entertain. It was further pointed out that the issue was never raised before the subordinate court adjudicating on the petitioner's criminal case. Counsel added that the petitioner is not deserving of the orders sought because he has not shown that he suffered any disability that would entitle him to the orders. In particular, it was submitted that the petitioner has not demonstrated to this court: –

(i) that he was denied liberty and freedom of movement being enjoyed by other prisoners; or

(ii) that he was being treated with any indignity while on death row at Kamiti Maximum Prison; or

(iii) that his freedom of association is in jeopardy; or

(iv) that he is not being accorded educational facilities; or

(v) that he has been deprived of food, clothing or shelter while other prisoners are enjoying these privileges; or

(vi) that he has been denied any aspect of prison life otherwise accessible to other prisoners.

93. Counsel also submitted that the petitioner has not demonstrated any other infringement of his constitutional rights to warrant a grant of the orders sought. For example the petitioner has not shown that the 5th Respondent exceeded its jurisdiction during the petitioner's criminal trial. It was argued that if there was such violation, the same would have been a ground of the appeal lodged by the petitioner in the High Court at Machakos. It was contended that all in all, the petitioner's complaints have no basis. Moreover, the petitioner's case is clearly distinguishable from the **Dimarco Case** (supra) in which there was clear evidence that –

> ***"Dimarco was denied other prison amenities. For instance, she was not allowed day-to-day contact with other inmates. Nor did she have access to some of the educational programs that would have put her in contact with other inmates ---".***

94. It was submitted that contrary to the petitioner's allegation that he could not enjoy the right to education because statutory forms under the Ministry of Education did not provide for intersexual, it was on record that the petitioner dropped out of school for reasons unrelated to his gender. Nor did the petitioner demonstrate that he suffered any ridicule during the process of his criminal litigation prior to the conviction he now complains of.

95. In summary, court was urged to disregard the submissions of the 4th Interested Party, on grounds that the said submissions are unsupported generalizations about broad subjects that are not before this court for determination. In particular the court was urged to disregard the 4th Interested Party's purported representation of the petitioner's mother. It was also submitted that s 51 of the Prison Act, Cap 90 provides for various forms of punishing offending prisoners under Part IX of the Act, and that all the punishments prescribed there under, are within the scope of the law, applicable to all prisoners across the board. In light of the above submissions, this court was urged to find that the petitioner's claims as contained in the

amended petition filed on 16th October, 2009, lack merit and should be dismissed.

ISSUES FOR DETERMINATION

96. We have considered the petition and the submissions made before us. We have also given due consideration to all the authorities to which we were referred. In our view, the following issues emerge for determination:

(i) Whether the petitioner has properly moved the court i.e. whether a petition for enforcement of fundamental rights under Section 84 of the Constitution can be brought together with an application for Judicial Review under Order LIII of the Civil Procedure Rules.

(ii) The issue of locus i.e. whether the petition before the court is a representative suit. If so, whether the court has jurisdiction under Section 84 of the Constitution to consider generally the rights and violations of rights of intersex persons.

(iii) Whether the petitioner is an intersex person, and if so, whether the petitioner suffers from lack of legal recognition and protection under the Constitution.

(iv) Whether petitioner has suffered lack of legal recognition because of Sections 2(b) and 7 of the Births and Deaths Registration Act, and if so, whether these provisions are inconsistent with the principle of equality and non discrimination enshrined in Section 82 of the Constitution.

(v) Whether the petitioner as an intersex person has the right to determine his gender or define his own sexual identity, or who should decide on issues of marriage and adoption?

(vi) Whether the Government has failed to provide the petitioner and other intersex persons, corrective surgery and informed consents before such operations.

(vii) Whether the petitioner's rights under Section 82(1), (3) & (8) of the Constitution have been violated on grounds of sex.

(viii) Whether the petitioner has suffered discrimination or been disadvantaged in education, seeking employment or housing due to his status.

(ix) Whether the petitioner and other intersex persons have been denied their democratic right to vote.

(x) Whether the petitioner's detention at Kitui Police Station and confinement at Kamiti Maximum Prison is illegal or unconstitutional.

(xi) Whether the petitioner's rights under the Constitution were violated during the hearing of his Criminal Case No.1146 of 2005 at Kitui Court.

(xii) Whether the provisions of Sections 28, 30, 31 and 38 of The Prisons Act and Rules 25 (1) 103 & 104 of The Prisons Rules are discriminatory against the petitioner, resulting in violation of his rights.

(xiii) Whether the petitioner has suffered violation of his rights to privacy.

(xiv) Whether the petitioner has suffered violation of his fundamental right against torture, cruel inhuman or degrading treatment provided under Section 74 of the Constitution.

(xv) Whether the petitioner has suffered violation of his fundamental right to freedom of movement enshrined in Section 81 of the Constitution, and whether as a result thereof, the petitioner stands the risk of arbitrary deportation.

(xvi) Whether the petitioner has suffered violation of his fundamental right to freedom of association provided under Section 80 of the Constitution.

(xvii) Whether the Government has failed to ensure statutory guarantee, protection and facilities to cater for the petitioner and other intersex persons.

(xviii) Whether the petitioner's conviction should be quashed on account of his intersex status.

(xix) If the answer to any of the above is yes, whether the petitioner is entitled to an award of general damages.

(xx) Finally, who should be liable to pay costs?

COMPETENCE OF PETITION

97. The petitioner has moved this court under Section 84 of the Constitution as read with Rules 11 and 12 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of the Fundamental Rights and Freedom of the individual) High Court Practice and Procedure Rules. In bringing this application, the petitioner has not come to this court under Order LIII of the Civil Procedure Rules nor has he invoked this court's powers of judicial review. Indeed the petitioner has not sought orders of mandamus, certiorari or prohibition which are the kingpin of the remedy of judicial review.

98. We are alive to the fact that issues have arisen regarding the treatment of the petitioner at the Kitui police station, the Kitui Magistrate's Court, and the Kamiti Prisons. Nevertheless, the petitioner is not questioning the powers of the respective authorities, nor is he alleging breach of natural justice. These are the grounds upon which an application for Judicial Review must be anchored. In the absence of such grounds Order LIII of the Civil Procedure Rules cannot apply. The gravamen of the petition before us is that the petitioner has been denied legal recognition and that his fundamental rights have been breached. Those are issues that can only be dealt with by this court in exercise of its interpretative function as per its original jurisdiction (conferred by Section 60 of the Constitution), and its supervisory and enforcement jurisdiction as conferred by Section 84 of the Constitution. Moreover, the only prayer in the petition before us, which can lie in an application for judicial review, is prayer (f) which seeks the unconditional acquittal of the petitioner. That prayer cannot be divorced from the main petition as it is being pursued as a logical consequence of the alleged breach of fundamental rights.

99. In ***Lemeiguran & 3 others vs Attorney General & 2 others,*** (Il Chamus Case) Nyamu and Emukule JJ considering a similar situation noted

that as the main application in that case was a constitutional application, judicial review issues ought to have been ventilated under the umbrella of the constitutional application. We concur with this position and reject the submission that the petition before us is incompetent for invoking a "hybrid" constitutional and judicial review jurisdiction. We are satisfied that the petition before this court is properly before us for determination of fundamental rights and freedoms, and violation or threatened violation of such rights and freedoms.

ISSUE OF LOCUS STANDI

100. Further, the Constitutional and Judicial Review Jurisdiction is a special jurisdiction. Apart from the procedure provided under Order LIII of the Civil Procedure Rules which applies to application for Judicial Review, the proceedings of the High Court in relation to constitutional application are governed by the rules made by the Chief Justice pursuant to Section 65(3) and Section 84(6) of the Constitution. Therefore, Order I rule 8 of the Civil Procedure Rules requiring leave for representative suits does not apply to Constitutional and judicial review applications.

101. In this case, the petitioner has brought the suit on his own behalf. However, in paragraphs 29,30,31,32,33,34,35,36 and 37 of the amended petition, the petitioner has raised complaints, not just with regard to himself as an intersex person, but also with regard to all other intersexuals. The reliefs sought, specifically prayers (g), (h), (i), (j), (k), (l,) (m), and (p) of the amended petition, are reliefs that will cover all the class of persons known as intersexuals. Primarily, the petitioner is pursuing rights which are personal to him, and secondly, he is pursuing a matter which he considers to be a matter of public interest i.e. the rights and violation of rights of intersexuals in the country. This raises the issue as to whether the issue before us is one of public interest.

102. "Public interest" is defined in Black's Law Dictionary 8th Edition as: ***"1.The general welfare of the public that warrants recognition and protection; 2. something in which the public as a whole has a stake especially an interest that justifies governmental regulations"***. Thus, in

order to determine whether the suit before us is one of public interest, and whether the petitioner has locus standi to bring a representative suit, several questions arise: Who is an intersex person? Is there a body of persons in this country known as intersex persons or intersexuals? Is the petitioner an intersex person? Are issues concerning intersex persons issues concerning the general welfare of the public, or issues in which the public as a whole has a stake?

103. An argument has been raised, to the effect that the petitioner does not have *locus standi* to bring the petition in a representative capacity on behalf of other intersex persons, especially when those other intersex persons are not identified by name nor are their numbers known. In this regard, the case of ***Priscilla Nyokabi Kanyua vs The Attorney General*** (supra), is relevant. In that case, the development of judicial precedent on the issue of locus standi was traced, and a conclusion arrived at, that in matters of public interest courts have moved away from the previous restrictive position that a petitioner other than the Attorney General, must show that the matter of public interest complained of, injured him over and above the general public. The approach now preferred is a broader and more purposeful approach giving locus standi to anyone acting in good faith with minimal personal interest in a matter of public interest, to seek judicial intervention to ensure the sanctity of the constitution.

104. This was the position in the ***Il Chamus Case*** (supra) where Nyamu and Emukule JJ moved away from the restrictive approach adopted by Nyamu and Wendo JJ. in ***Alphonse Mwangemi Munga & 10 others vs African Safari Club Ltd [2008] eklr*****,** that Section 84 of the Constitution does not envisage one person bringing a common suit on behalf of others, except where the person whose right is alleged to have been infringed is detained. Nyamu and Emukule JJ expressed the view that there was nothing to prevent an individual or a group of individuals with a common grievance, alleging in one suit that their individual fundamental rights and freedoms under Sections 70 to 83 of the Constitution have been infringed in relation to each one of them, and to them collectively.

105. We are entirely in agreement with the above view as it is consistent with the definition of the word "person" in Section 123 of the Constitution, and Section 3 of The Interpretation and General Provisions Act Cap 2. That definition gives standing to corporate and unincorporated bodies in respect of the enforcement of some fundamental rights and freedoms. The definition is consistent with the broader interpretation of section 84 of the Constitution, giving locus standi in matters of public interest to a person to pursue a suit for breach or threatened breach of fundamental rights and freedoms, of a body of persons to which he belongs or has an interest. This takes us back to the three ancillary questions which we posed earlier: Who is an intersex person? Is there a body of persons in this country known as intersex persons or intersexuals? Is the petitioner an intersex person?

Who is an intersex person?

106. The first question we have to grapple with is, who is an intersex person? There is no definition of intersex in Kenyan Law. Two South African Statutes were referred to us. These are: Alteration of Sex Description and Status Act, and The Promotion of Equality and Prevention of Unfair Discrimination Act. In both statutes, intersex is defined as ***"a congenital physical sexual differentiation which is atypical to whatever degree."*** We were also referred to the Australian Legislation Act 2001, which defines an intersex person as ***"a person who because of a genetic condition was born with reproductive organs or sex chromosomes that are not exclusively male or female".***

107. In the Concise Oxford English Dictionary, intersex is defined **as "*an abnormal condition of being intermediate between male and female, hermaphroditism – a hermaphrodite."*** This is the definition which was applied in ***Corbett vs Corbett*** (supra). In that case, Ormrod J described a hermaphrodite as follows:

> ***"The hermaphrodite has been known since earliest times as an individual who has some of the sexual***

> ***characteristics of both sexes. In more recent times the true hermaphrodite has been distinguished from the pseudo – hermaphrodite. The true hermaphrodite has both a testis and an ovary and some of the other physical characteristics of both sexes. The pseudo-hermaphrodite has either testes or ovaries, and other sexual organs, which do not correspond with the gonads which are present."***

108. We have found a more apt and comprehensive description of the term intersex in an article "*Who will make room for the intersexed*" by Kate Haas, published in the American Society of Law and Ethics Boston University School of Law Journal, "**American Journal of Law and Medicine, Volume 30, Number 1".** In that article the term "Intersex" is described as follows:

> ***"The term "intersex" is used to describe a variety of conditions in which a fetus develops differently than a typical XX female or XY male. Some intersexed children are born with "normal" male or female external genitals that do not correspond to their hormones. Others are born with a noticeable combination of male and female external features, and still others have visually male or female external characteristics that correspond to their chromosomes, but do not correspond to their internal gonads. Individuals who are considered intersexed may also be born with matching male chromosomes, gonads, and genitals but suffer childhood disease or accident that results in full or partial loss of their penis".***

109. It is apparent from the above, that the distinction between a pseudo-hermaphrodite and a true hermaphrodite as described above by Ormrod J. is of little significance in defining the term intersex. In short, intersex is a term describing an abnormal condition of varying degrees with regard to the sex constitution of a person. The term intersex and the term hermaphrodite may therefore be used interchangeably. It appears however, that the current preference is for the term intersex rather than the term hermaphrodite.

110. Having thus defined the term intersex, the next question is whether the petitioner is an intersex person. A medical report was produced

which showed that the petitioner was seen by Dr. Nyakeri S.B. for review on 31st October, 2007. The doctor's opinion which was short and to the point is as follows:

> ***"STATUS LOCALIS:***
> ***Patient has well developed breast. On squeezing the nipples there is a discharge of watery milk.***
> - ***Pubic hair not well developed.***
> - ***Penis undeveloped.***
> - ***Urethra opening absent***
> - ***Testis absent***
> - ***Vagina opening shallow with fusion of labia***
>
> ***Conclusion***
> ***The patient has male Hermaphroditism."***

111. This Doctor did not swear any affidavit, and the details of his examination are not clear. The impression that one gets from a reading of the medical report is that the Doctor only carried out a visual physical examination of the petitioner's external genitalia. That is to say that the doctor's report does not provide adequate insight on the gonadal or chromosomal formation of the petitioner. Be that as it may, the report is sufficient to confirm that the petitioner falls within the description of an intersex person as he has ambiguous genitalia bearing physical characteristics of both male and female sex.

112. Having established that the petitioner is an intersex person, the next question is whether there is an identified class or body of persons known as intersex in this country whose interests the petitioner can represent. In other words, whether there are other persons other than the petitioner falling within the category of intersex persons as described above. It was for the petitioner and other parties who were supporting the petition to establish the presence of this body of persons. That could only be done by way of medical evidence and statistical data. Unfortunately, no such concrete evidence was laid before the court. This case is therefore distinguishable from the ***Il Chamus Case***, (supra) where the four applicants were found to have locus standi after establishing that they were members of the Il Chamus community,

a unique, cohesive, and minority group comprising of about thirty thousand persons.

113. In this case, other than talking generally about intersex persons, the petitioner has not identified even a single other intersex person. Several parties applied and were joined to this suit either as amicus curiae or interested parties. The impression created was that the petitioner's suit raised issues of public interest such that the presence of the additional parties was necessary in providing appropriate information that would enable the court deal with the issues comprehensively.

114. In seeking to be enjoined to the suit, the 2nd amicus Trustee, David Kuria, swore an affidavit on 25th May, 2009, in which he deponed that during the course of his duties, he has encountered intersexual persons whose plight is similar to that of the petitioner. Nevertheless, no further affidavit was sworn on behalf of the 2nd amicus curiae giving any facts in regard to this contention, nor did the 2nd amicus curiae identify any other intersex persons.

115. Likewise, the 3rd amicus curiae, in convincing the court to have it joined to the suit, had an affidavit sworn by its secretary one Mburu Gitu stating that it will bring to the court vital and valuable information regarding persons born as intersexuals and the human rights violation they face. Having been joined in the suit, no further affidavit was sworn on behalf of the 3rd amicus curiae bringing before the court any facts regarding the presence of intersex persons in this country or the alleged violation of their rights.

116. The 1st interested party similarly made general references with regard to the violation of the rights of intersexual persons in Kenya. The affidavits sworn by 1st interested party's executive director Jedidah Wakonyo Waruhiu did not make reference to any intersexual in Kenya other that the petitioner. Gilbert Oduor Onyango, Deputy Director of the 2nd interested party, also swore an affidavit urging the court to have the 2nd interested party joined in the suit, stating that during the course of his duties he had encountered intersexual minors whose plight is similar to that of the petitioner. The deputy

director swore that his organization had received instructions from guardians or parents of minor intersexuals to highlight the plight of the minor intersexuals. Again no affidavit was sworn or information laid before the court by the 2nd interested party regarding the incidence or prevalence of intersex births in the country.

117. Thus, there is no empirical data or indeed any other facts before us upon which we can conclude that there is a body of persons known as intersex persons. Nor, is there any information upon which this court can conclude that the issues raised with regard to intersex persons, is something in which the society as a whole has an interest that warrants recognition. It is true that the intersex birth is an unusual occurrence which attracts public curiosity. However, such public curiosity can only graduate to public interest with empirical data confirming that the prevalence of intersex birth in this country is of such magnitude as to call for government regulation or intervention.

118. Therefore, we are not persuaded that there is a definite number of intersex persons in Kenya as to form a class or body of persons in respect of whose interest the petitioner can bring a representative suit, nor are we persuaded that the suit before us is a public interest litigation such as to justify the petitioner bringing a representative suit. We find that the petitioner's condition is a rare phenomenon in this country. His case must be treated as an isolated case in respect of which we are concerned with the rights of the particular individual before us. Consequently, the reference in the amended petition to other intersexuals and violation of rights of those other intersexuals shall be struck out.

Lack of Legal Recognition and Discrimination

119. The petitioner has complained that he has been denied legal recognition. In support of this contention the petitioner has identified Sections 2(b) and 7 of the Births and Deaths Registration Act Cap 149 as the offending provision. We must first point out that the reference to Section 2B (or 2(b)) of the Births and Deaths Registration Act is a gaffe because Section 2B does not

exist in that Act and Section 2(b) which exist in the Births and Deaths Registration Act, (Cap 149), is not relevant to the petition as it deals with particulars concerning registration of death. We believe that reference to Section 2B or 2(b) was intended as reference to Section 2(a) of the Births and Deaths Registration Act (Cap 149), which defines prescribed particulars concerning registration of birth.

120. As is evident from Section 2(a) of the Births and Deaths Registration Act Cap 149 (reproduced in paragraph 17 above), registration of the particulars of birth is required and such particulars includes the sex of the child. The term sex has not been defined in the Births and Deaths Registration Act, nor has it been defined in the Interpretation and General Provisions Act Cap 2. However, the schedule provided under the Births and Deaths Registration Act for giving the particulars of birth, indicates the sex of the child as either male or female.

121. It is worthy of note that the same term sex has been used in Section 70 of the Constitution. That Section provides general protection of fundamental rights and freedoms of an individual subject to the rights of others and public interest as follows:

> ***"70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –***
>
> ***(a) life, liberty, security of the person and the protection of the law;***
>
> ***(b) freedom of conscience, of expression and of assembly and association; and***
>
> ***(c) protection for the privacy of his home and other property and from deprivation of property without compensation,***
>
> ***the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those***

rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

122. Section 82 of the Constitution which specifically provides for the right not to be discriminated against by prohibiting any law from making any provision that is discriminatory, defines discriminatory in Section 82(3) of the Constitution to mean:

"affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, color, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

123. It is interesting that although both Sections 70 and 82 of the Constitution refer to the term sex as one of the criteria upon which discrimination is ousted, the term sex has not been defined in the Constitution. The question then, is, what did the legislature mean by the term sex? In our attempt to define the term sex, we have noted that the Concise Oxford English Dictionary 11th Edition defines sex as follows:

"either of the two main categories (male and female) into which humans and most other living things are divided, on the basis of their reproductive functions, the fact of belonging to one of these categories, the group of all members of either sex."

124. We have also noted that Black's Law Dictionary 8th Edition defines the term sex as follows-

"1. ***The sum of the peculiarities of structure and function, that distinguish a male from a female organism 2. sexual intercourse. 3 sexual relations."***

The sum total of the above definitions is that the term 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.

125. The question then is what is the status of an intersex person such as the petitioner who has ambiguous genitalia? Whether looked at from the religious point of view or from the scientific point of view, it is evident that the biological sexual constitution of an individual is acquired between the process of conception and birth. By the time of birth, the peculiarities are already fixed and the child either falls into the male or female category. In this regard we are persuaded by ***Corbett vs Corbett*** (supra) where Ormrod J. having had the benefit of the evidence of 5 highly qualified medical doctors, found it common ground between all the medical witnesses, that the biological sexual constitution of an individual is fixed at birth (at the latest) and cannot be changed either by the natural development of the organs of the opposite sex or by medical or surgical means.

126. We did not have the benefit of general local medical opinion regarding the determination of biological sexual constitution at birth, nor do we regard the single report produced in regard to the petitioner to be sufficient to provide appropriate expert opinion in this area. Nevertheless, in addition to ***Corbett vs Corbett*** (supra), we had the benefit of several other decisions from other jurisdictions. These included ***Bellinger vs Bellinger*** (supra), a decision from the United Kingdom; ***In the matter of the estate of Marshall G. Gardiner (No.85030)*** an appeal from the District Court to Court of Appeal of the State of Kansas. ***W vs W*** (supra), a decision from South Africa, ***Sentencia No.SU-337/99*** (the Ramos Case) and ***Sentencia No.T-551/99*** (the Cruz Case), decisions from the Columbian Constitutional Court. The evaluation of evidence relating to determination of biological sexual constitution in these cases was very illuminating.

127. It is common knowledge that under normal circumstances the sex of an individual manifests itself in a clear way at birth, through the physiological appearance so that one is able to tell at once whether the individual falls within the male or female category. The cases referred to above, brought to light those unusual situations where the sex of the individual may

not be so clear cut at birth, particularly where the individual exhibits ambiguous genitalia, as was the case with the petitioner herein. In other situations the physiological appearance may end up being deceptive in the sense that subsequent biological factors may turn out to be incongruent with the physiological appearance.

128. We are satisfied that in the case of the petitioner his ambiguous genitalia did not negate the fact that his biological sexual constitution had already been fixed at birth. In requesting for the particulars of the sex of the petitioner as either male or female, the Births and Deaths Registration Act did not therefore exclude the petitioner as an intersex person, because the petitioner in fact falls within one of the two defined categories. The challenge was to determine at birth which side of the divide the petitioner fell particularly, for purposes of registration of the birth i.e. whether male or female.

129. It may have been difficult to conclusively determine the petitioner's gender at that early stage. The best that could be done at infancy was to adopt the category whose external genitalia and physiological features appeared more dominant at that stage. Indeed, this is what the petitioner's mother appeared to have done by naming him "Richard Muasya" and presenting him as a male child. Therefore, we are satisfied that notwithstanding the petitoner's condition as an intersex person, he still fell within the two categories of male and female identified in the schedule to the Births and Deaths Registration Act. His birth could have been registered under that Act. Nevertheless, the petitioner has not satisfied us that any efforts were made to have his birth registered under that Act. The petitioner's complaint that he lacks legal recognition because of his inability to have his birth registered has not been substantiated and must therefore be rejected.

130. It was argued that the term sex in Section 70 and 82 of the Constitution should be interpreted widely, to include intersex persons, as this would provide equal protection of the law to intersex persons. We are weary of

this argument for two reasons: Firstly, in our view, the term sex as used in Sections 70 and 82 of the Constitution encompasses the two categories of male and female gender only. To interpret the term sex as including intersex would be akin to introducing intersex as a third category of gender in addition to male and female. As we have endeavored to demonstrate above, an intersex person falls within one of the two categories of male and female gender included in the term sex. To introduce intersex as a third category of gender would be a fallacy.

131. Secondly, we are not persuaded that as a court it is within our mandate to so expand the meaning of the term sex when the legislature in Kenya has not done so. We are aware that South Africa has specifically provided in their Promotion of Equality and Prevention of Unfair Discrimination Act No.4 of 2000, for the word sex to include intersex. We appreciate that the circumstances of South Africa with regard to the experience of discrimination, is unique. The fact that South Africa has already passed a law recognizing gender reassignment through the Alteration of Sex Description and Sex Status Act 2003 also puts it at a different level from Kenya. Worthy of note, is the fact that the inclusion of intersex in the definition of the term "sex" in South Africa has specifically been provided for through legislation.

132. We believe that the legislature in Kenya would, like South Africa, have provided specifically for such an interpretation of the term sex, either in a statute or the Constitution, if the legislature was of the view that the circumstances of Kenya so warrants it. We are convinced that the term sex in Sections 70 and 82 of the Constitution needs no interpretation beyond its ordinary and natural meaning which is inclusive of all persons including intersex persons within the broad categories of male and female. This is consistent with the international instruments giving everyone a right to legal recognition and equality before the law such as Articles 6 and 7 of the Universal Declaration of Human Rights.

133. An argument was raised that intersexuals should be brought within the category of "other status" included in Article 2 of the Universal Declaration of Human Rights and Article 26 of the International Covenant of Civil and Political Rights. Such inclusion, it was argued, would accord intersex persons a specific right against discrimination. We find that the invocation of the provisions of the international instruments to provide for another category of "other status" is not necessary because intersex persons are adequately provided for within the Kenyan Constitution as per the ordinary and natural meaning of the term sex. Moreover, issues of sexuality are issues which cannot be divorced from the socio-cultural attitudes and norms of a particular society. To include intersex in the category of "other status" would be contrary to the specific intention of the Legislature in Kenya. It would also result in recognition of a third category of gender which our society may not be ready for at this point in time. We therefore reject the argument that we should adopt the criterion of "other status" included in the international instruments. Therefore the petitioner as an intersex person is adequately covered by the law and has suffered no discrimination or lack of legal recognition.

Has the petitioner suffered discrimination or been disadvantaged in Education, Employment, Housing or Democratic Right due to his status?

134. Currently in Kenya, one needs a birth certificate to be registered in a school. For one above the age of 18 years, a birth certificate together with a national identity card, are necessary to enable the person to sit for national examinations. In the case of the petitioner, he was born in the year 1974. This was before the mandatory requirement for production of a birth certificate as a condition for enrolment in school. The petitioner's mother deponed that the petitioner was born at home. Neither the petitioner's mother nor the petitioner deponed to any efforts to register the petitioner's birth or obtain a birth certificate. That however, did not deter the petitioner from going to school.

135. The mother to the petitioner, the petitioner's grandfather and grandmother all deponed that the petitioner started going to Primary School

but abandoned school at Class 3. The reason for the petitioner abandoning school has been given by his mother as the petitioner's allegation that he could not see anything written on the blackboard. The petitioner apparently refused to go to school despite efforts by the family convincing him to do so. We find that the petitioner did not fail to go to school because he was disadvantaged due to his intersex status as he alleged. The petitioner's effort in seeking employment at a later stage, were frustrated. This was not due to his intersex status but simply because the petitioner did not have any educational background which would have enhanced his bargaining power in the labour market.

136. In the result, we reject the contention that the petitioner was disadvantaged in education, employment or housing due to his intersex status. As regards the petitioner's right to vote, this right was available to the petitioner provided he obtained an appropriate national identity card for identification purposes during the voting exercise. It is evident that the petitioner did not make any efforts to obtain a national identity card, nor did he make any efforts to obtain a voter's card. We find that the petitioner was never denied his right to vote. Rather, it is the petitioner who disenfranchised himself by deliberately failing to meet the prerequisites for voting.

Is the petitioner as an intersex person discriminated against in Marriage?

137. It was argued that the petitioner as an intersex person was discriminated against in the area of marriage. This was because the Kenyan Law only recognized a marriage between a male and a female, and the petitioner being allegedly neither male nor female, was not in a position to enter into a valid marriage. Our finding that the petitioner is in fact capable of being classified in one of these two categories albeit with difficulties, defeats the petitioner's argument.

138. Further we have come across several decisions from other jurisdictions dealing with issues of determination of sex for purposes of marriage. The issue of factors to be taken into account in determining the sex

of a person was addressed in ***Corbett vs Corbett*** (supra) where Ormrod J. laid out the test for determination of the sex of a person for the purpose of marriage as chromosomal factors, gonadal factors i.e presence or absence of testes or ovaries and genital factors including internal sex organs. These parameters were expanded further in ***Bellinger vs Bellinger*** (supra) to include physiological factors, hormonal factors and secondary sexual characteristics such as distribution of hair, breast development, physique etc. We have also taken note of ***Re Kevin (2001) FamCA***, an Australian decision in which Chisholm J. stated as follows:

> ***"To determine a person's sex for the law of marriage, all relevant matters need to be considered. I do not seek to state a complete list or suggest that any factors necessarily have more importance than others. However the relevant matters include, in my opinion, the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person's life experiences, including the sex in which he or she was brought up and the person's attitude to it; the person's self-perception as a man or a woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex re-assignment treatments the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of the marriage...."***

139. In the case of the petitioner although the petitioner's counsel applied and the court granted an order which was issued on 4th November, 2008, for the petitioner to be examined by a team of doctors, there is nothing on record to confirm whether the petitioner was examined, and if so the result of such examination. Therefore the court is only left with the report of Dr. Nyakeri which as we have already mentioned in paragraphs 112 and 113 of this judgment, is inadequate. We are handicapped by this paucity of medical and scientific evidence on the petitioner because we have no conclusive evidence on any of the 6 parameters mentioned in ***Bellinger vs Bellinger*** (supra). It follows that we are unable to conclusively determine, whether the results of a test using the parameters laid out in ***Corbett vs Corbett*** (supra)

and ***Bellinger vs Bellinger*** (supra) would be consistent with the assigning of the male gender to the petitioner, by his mother. The issue of determination of the petitioner's sex is particularly important in light of the fact that same sex marriages are outlawed in this country.

140. Be that as it may, although the report of Dr. Nyakeri shows that the petitioner leans towards male hermaphroditism, the report shows that the petitioner's penis is undeveloped and testes are absent. What this means is that the petitioner is essentially incapable of consummating a marriage as a man. This has been confirmed by the petitioner's mother and grandmother who depone that the petitioner's attempt to get a wife were all unsuccessful as the women he attempted to marry could not live with the petitioner's inability to consummate the marriage. From the legal, cultural and religious standpoint in this country, the joining together of a man and a woman in marriage is underpinned by the consummation of marriage through coitus.

141. Thus in this case the petitioner has not been denied the right to marry nor is he precluded from entering into a valid marriage by virtue of his intersex status. The petitioner is limited by nature as he does not have the ability to consummate the marriage. His handicap is biological rather than legal. Issues concerning the petitioner's right to adopt a child were raised before us as general issues. There being no evidence that the petitioner has adopted or intends to adopt a child, we do not find it appropriate to address the issue of adoption. Indeed, such an application would have to be dealt with under the Children's Act taking into account all the circumstances of the particular case.

Petitioner's right to determine gender or define sexual identity.

142. As to the petitioner's right to determine his gender or define his sexual identity, the petitioner is an adult and does not require the consent of any person to define his sexual identity provided that this is done within the confines of the law. The petitioner was assigned the male gender by his mother. He has lived as a man all his life. There is no indication that he would want to

change from that gender. Corrective surgery is an option available to the petitioner for purposes of clearly defining his sexual identity. We do realize however, that such surgery would be a delicate and expensive affair. The petitioner's condition is not any more precarious or urgent than cancer patients or HIV/Aids patients. The government is limited in providing medical facilities and resources due to the socio-economic conditions. Thus, the government cannot be blamed for failing to provide necessary facilities to enable the petitioner have corrective surgery as there is no justification as to why such gender corrective surgery should be given priority in accessing funds. Secondly, it has not been established that there are local medical experts who can provide the necessary medical expertise for performing such gender corrective surgery.

143. The 2nd interested party was particularly concerned with the issue of parental responsibility with regard to corrective surgery or assigning gender. i.e. whether parental responsibility should be absolute in assigning a gender to a child. We find this question to be of mere academic interest in this case, considering that the petitioner is well over the age of majority, and that there was no evidence that the issue of corrective surgery was ever considered while he was a minor. The question being raised is no doubt a pertinent issue which we would have had to address if the petitioner before us was an intersexual "child" in respect of whom such issues had to be determined. In our view although the 2nd interested party raised valid legal issues of concern, they boarded the wrong train which could not take them to their destination in so far as the answers to their questions are concerned. The petitioner is past the age of majority, he is capable of making his own decision with regard to gender assignment. He is not a child in respect of whom the questions posed by the 2nd interested party can apply.

144. It would serve no useful purpose to get into a tirade of suppositions as to what ought to have happened to the petitioner when he was a minor. Nor can we consider the plight of intersex children generally because

as we have stated the petitioner has no locus standi to bring this petition on behalf of other intersexuals. Moreover, opinion is varied as to the need and efficacy of reconstructive surgery on infants or minor children below the age of puberty. Each case would therefore have to be considered on its own peculiar circumstances and no general rule can be laid down. It is true that there is no legislation regarding responsibility in assigning gender or corrective surgery involving a minor. The court cannot however address this issue as it is not properly before it.

Social Stigma

145. The social stigma suffered by the petitioner is something of concern. However in our view the problem of social stigma is not a legal problem. What needs to be done is for parents and those who have such special conditions to be open about their situation, and for the society to be educated to respect the dignity of such people as human beings. As a court, we can issue orders and make declarations, but this will be of little effect considering that the stigma is connected with the public perception which is based on the public's limited knowledge of intersex status. Few seem to appreciate the fact that the issue of gender definition for an intersex person unlike a transsexual or a homosexual, is a matter of necessity and not choice. Tolerance and acceptance in this area will come with dissemination of appropriate information leading to enhancement of knowledge and better understanding of the condition. The challenge is with the government and the civil society to educate the masses. Indeed, this is what has happened in cases of mentally challenged persons. Society has not only come to appreciate their situation but also the need to have special schools for affected children. No doubt the society has come a long way from the days when such mentally challenged children were killed or abandoned due to cultural biases and beliefs. Such a development and change of attitude can only come gradually with time.

146. A look at similar developments in the United Kingdom shows that the Kenyan situation is not unique. For example, the struggles that transsexuals and intersex persons have had to go through in the United Kingdom to attain legal recognition of their gender reassignment status and right to marry, has spunned over a period of many years, during which period the struggle moved from the domestic courts to the European Court of Justice. This struggle is recapitulated in the case of ***Christine Goodwin vs the United Kingdom Application No.28957/95***, delivered by the European Court of Justice on 11th July, 2002. It is noteworthy that in ***Rees vs the United Kingdom*** decided in 1986, ***Cossey vs the United Kingdom*** decided in 1990, and ***Sheffield & Hosham vs the United Kingdom*** decided in 1998, the European Court of Justice was hesitant to enforce the rights of the transsexuals holding that it was not shown that the failure by the United Kingdom government to accord legal recognition of the change in gender, had given rise in the applicants' own case histories to detriment of sufficient seriousness to override the United Kingdom's margin of appreciation.

147. In the case of ***Christine Goodwin vs the United Kingdom*** decided in the year 2002, the European Court of Justice moved from its previous position and held that the United Kingdom government could no longer claim that the matter fell within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. The European Court of Justice found that there were no significant factors of public interest to weigh against the interest of the transsexual applicant in obtaining legal recognition of her gender re-assignment. It reached the conclusion that the fair balance that is inherent in the Convention tilted decisively in favour of the applicant, and ruled that there was failure to respect her right to private life in breach of Article 8 of the Convention. This decision led to the passing of the Gender Recognition Act 2004 in the United Kingdom. This Act allowed transsexuals to obtain new

birth certificates affording them full recognition of their acquired status for all purposes.

148. 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 rationalized or compromised through science. In any case, rationalization of such values can only be done through deliberate action on the part of the Legislature taking into account the prevailing circumstances and the need for such legislation.

Violation of fundamental rights during the hearing of Criminal Case No.1146 of 2005 at Kitui Court

149. It is not disputed that the petitioner was arrested, tried and convicted for the offence of robbery with violence, contrary to Section 296(2) of the Penal Code, and that he is currently a condemned prisoner at Kamiti Maximum Prison. The petitioner has maintained before us that his fundamental rights were violated during the criminal trial. Nevertheless, during the pendency of the criminal trial, the petitioner did not move the court under Section 84(3) of the Constitution, for reference to the High Court for determination of the question regarding the alleged violation of his rights. The petitioner has not given any reason for this failure. Be that as it may, the petitioner's alleged violation of his fundamental rights is anchored on the fact that he was detained at Kitui Police station during the pendency of his criminal trial. He contends that the said detention was illegal and unconstitutional.

150. The petitioner having been an accused person facing a charge of robbery with violence which is punishable by death, was not under Section 72(5) of the Constitution entitled to bail during the pendency of the criminal trial. The petitioner ought to have been remanded in custody during the pendency of the criminal trial. Indeed, it is not disputed that the petitioner was remanded in prison custody at Kitui Police Station pursuant to a court order. The order was made taking into account the petitioner's intersex status, and the fact that there was nowhere appropriate to remand the petitioner

during the pendency of the criminal trial. The detention of the petitioner at the police station was therefore legal as it was done pursuant to a court order which was necessitated by the circumstances of the petitioner. Moreover the petitioner's fundamental right to liberty during the pendency of the criminal trial was limited under section 72(1)(e) and(5) of the Constitution by the fact that he was facing a capital charge.

151. The petitioner was tried and convicted of the criminal offence by a court of competent jurisdiction. There is no evidence that the petitioner was not afforded a fair hearing, or that the court was not independent or impartial. No reason has been given vitiating the petitioner's trial other than the alleged violation of his right to liberty because he was detained at Kitui Police Station. But even assuming for the sake of argument, that the petitioner was illegally detained, or that he has been discriminated against, such violation of his rights would not vitiate his criminal trial, but would only give the petitioner a cause of action for damages. We are fortified in this view by the position recently taken by the Court of Appeal in ***Julius Kamau Mbugua vs Republic (2010) eKLR*** as follows:

> ***"Lastly, had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would be compromised. If by the time an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case, then, the only appropriate remedy under Section 84(1) would be an order for compensation for such breach. The rationale for prescribing monetary compensation in Section 72(6) was that the person having already been unlawfully arrested or detained such unlawful arrest or detention cannot be undone and hence the breach can only be vindicated by damages."***

152. Consequently, we reject the petitioner's contention that his rights were violated during the criminal trial in Kitui Court. We find no just cause to interfere with the petitioner's conviction of the criminal offence either due to his

intersex status or alleged violation of his constitutional rights and reject his pleas for acquittal.

Whether the provisions of The Prisons Act and Prisons Rules are discriminatory against the petitioner.

153. The petitioner identified Sections 28, 30, 31 and 38 of The Prisons Act, as well as Rules 25(1), 103, and 104 of The Prisons Rules, as resulting in the violation of his fundamental rights. We have perused these provisions. Section 28 of The Prisons Act provides for a woman prison officer to take care of female prisoners. Section 30 of The Prisons Act, provides for every prisoner to be in lawful custody of the officer in charge of the prisons, while Section 38 of The Prisons Act provides for removal of prisoners of unsound mind. We fail to understand how these provisions have resulted in violation of the petitioner's rights. The petitioner does not allege that he is a woman, nor has any allegation been made that he suffers from any mental incapacity.

154. As regards The Prison Rules, Rule 25 provides for regular medical examination of all prisoners, whilst Rule 103 provides that prisoners sentenced to death be confined separately from other prisoners and allowed special facilities. Rule 104 provides for restrictions of access to prisoners under sentence of death. Again, although these rules are applicable to the petitioner, we fail to understand how the rights of the petitioner have been violated. The rules provide for general provisions which are applicable to all affected prisoners. They are neither discriminatory nor do they negate the constitutional rights of the prisoners whose right to liberty has already been compromised by the conviction and committal to jail. We see no reason why an exception should be made in the case of the petitioner.

155. It would appear to us that the petitioner's main complaint with regard to his incarceration at Kamiti Maximum Prison is the fact that he was put in the male section of the prison. It was argued that the prison Act provides for male and female prisoners to be put in separate prisons, and that the petitioner as an intersex person ought to have been put in a separate

prison other than the male prison. The petitioner should also be taken care of by intersex persons or people who have training in that area. Section 36 of The Prisons Act, provides as follows:

> ***"Male and female prisoners shall be confined in separate prisons or in separate parts of the same prison in such manner as to prevent, as far as practicable their seeing or conversing or holding any communication with each other."***

156. It is evident that because of his ambiguous genitalia, and the fact that the petitioner has held himself out as a man in name and clothing, the petitioner would not fit in a prison for female prisoners. In appreciation of the difficulty surrounding the petitioner's ambiguous sex status, the court issued an order on 6th November, 2007 for the petitioner to be accorded exclusive or separate accommodation from the male convicts. The petitioner's situation is unique, and was not anticipated by the Legislature. Moreover, there is no evidence that there are any prison officers who are intersex persons or have training in that area. Thus it would not be practical to expect a prison facility for the petitioner alone. Further, a perusal of Section 36 of the Prisons Act reveals that prisoners of different gender can still be held in separate parts of the same prison. This is what the court order of 6th November, 2007 provided for.

157. The petitioner's situation is akin to that encountered in the United States case of ***The Estate of Miki Ann Dimarco*** (supra), where Dimarco, an intersex person was committed to serve sentence in Wyoming Women's Correctional Facility because she held herself out as a woman. Upon discovery of her intersex status, Dimarco had to be placed in solitary confinement in a separate part of the prison during the period of her sentence. The United States Court of Appeal, Tenth Circuit, reversed the District Court's finding that Dimarco's rights were violated as a result of her solitary confinement. The Court of Appeal held inter alia that Wyoming provided adequate procedural protection to justify its placement decision and that the initial placement decision was appropriate given Dimarco's unique background. Dimarco's

confinement was necessary due to the legitimate reason of potential and substantial risk of serious harm either to the female inmates or to Dimarco. Therefore, the Court of Appeal concluded Dimarco did not have a protected liberty interest that Wyoming violated. Likewise, in this case, the petitioner's confinement in separate accommodation is necessary for the petitioner's own good. It is interesting that counsel for the petitioner unwittingly relied on the judgment of the District Judge Clarence Brimmer which was overturned by the Court of Appeal. The petitioner's confinement in special accommodation cannot therefore be a violation of his fundamental rights.

Freedom of movement and association, and right to privacy.

158. The petitioner also complained that he had been denied his fundamental freedom with regard to movement and association as enshrined in Sections 80 and 81 of the Constitution. We find that the petitioner has not demonstrated any violation of such rights. The petitioner's freedom of movement and association is currently curtailed pursuant to a lawful court order. The petitioner cannot complain about his inability to move freely prior to his arrest. This is because the petitioner's inability to obtain a national identity card and a passport is caused by the petitioner's deliberate action of failing to register his birth (even as a late registration), to enable him qualify to obtain a national identity card or passport.

159. With regard to the petitioner's right to privacy, Section 70(c) of the Constitution provides a general right for protection for the privacy of one's home and other property, and from deprivation of property without compensation, whilst Sections 75 and 76 of the Constitution provide for specific rights to protection from deprivation of property and protection against arbitrary search or entry. The petitioner has not laid any evidence before this court to demonstrate any interference with any of these rights. Of course, being a convict, the petitioner is not able to enjoy the comfort of his home and the privacy that goes with it. That right has however been taken away legally following the petitioner's conviction and sentence for the criminal offence.

Protection against inhuman and degrading treatment.

160. Section 74 of the Constitution states as follows:

> ***"(1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment.***
>
> ***(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963".***

161. The petitioner has complained that he has been subjected to torture, degrading and inhuman treatment contrary to Section 74(1) of the Constitution and Article 5 of the Universal Declaration of Human Rights. The petitioner has identified his being confined in a male institution and exposure to male inmates and male prison warders as an act of torture which has converted him into a withdrawn and embarrassed person. He explains that he has been a subject of curiosity and ridicule. He has identified specific incidents, one in which an officer at Kamiti prison trespassed on his person on the 29th October, 2009, and two other incidents in which prison officials knowing that he is an intersexual asked him to spread his legs and expose his private parts during searches. This was done in the open and in front of all inmates who laughed and humiliated the petitioner. The petitioner also complained about some blood having been drawn from him by a doctor sent by the respondents without the petitioner's consent, or information as to the purpose for which the blood was drawn.

162. The petitioner's allegations in this regard were supported by Jedidah Wakonyo Waruhiu, the Executive Director of the 2nd interested party. In her affidavit, Jedidah claimed to have been informed by paralegal staff, that the petitioner had reported having been sexually harassed and that on two occasions the petitioner had been asked to strip and spread his legs causing other prisoners to mock and laugh at the petitioner. Ms Wakonyo did not identify the paralegal staff who gave her the information about the petitioner's

sexual harassment, nor has any prison paralegal sworn an affidavit to confirm the allegation. Thus, the matters deponed to by Jedidah Wakonyo in relation to the petitioner's physical abuse or harassment is hearsay and of no evidential value.

163. Julius Kaliakamur, a prison warder at Kamiti Maximum Prison, swore an affidavit in which he maintained that although the petitioner was being held at a male prison, the petitioner is accorded separate accommodation. Kaliakamur also denied that the petitioner was subjected to physical or psychological abuse. In particular, Kaliakamur denied that the petitioner has ever been asked to strip in front of other inmates, and maintained that the petitioner has not lodged any complaint with the prison authorities regarding any mistreatment. Joyce Kabaki the Executive Officer of the 5th interested party swore that she visited the petitioner at Kamiti Maximum Prison, and that the petitioner confirmed to her that he had not received any mistreatment of any kind. In particular the petitioner denied having been sexually molested or touched physically in a sexual manner by other inmates.

164. We have evaluated all the evidence relating to the breach of the petitioner's right against inhuman and degrading treatment. The petitioner maintained that he was subjected to physical abuse and ridicule. The attempts by the prison warder Julius Kaliakamur to deny the allegations were weak and unconvincing. Essentially Kaliakamur appears to rely on the fact that the petitioner has not lodged any complaints in accordance with The Prisons Rules. We find that it is unrealistic to expect that if indeed the petitioner had made such complaints the prison officers would incriminate themselves by acknowledging the existence of such complaints. The affidavit of Joyce Kabaki does not provide ample evidence to contradict the petitioner's allegations as she appears to have been dealing with the petitioner's condition as at the time of her interaction with the petitioner and not necessarily what had transpired earlier. We do note that Rule 35 of The Prisons Rules provides for searching of

prisoners who are in custody. Rule 36 which provides for the manner of searching states as follows:

> ***"(1) the searching of the prisoner shall be conducted in seemly a manner as is consistent with the necessity for discovering concealed articles.***
> ***(2) A prisoner shall be searched only by officers of the same sex as the prisoner."***

165. The fact that prisoners are subjected to invasive body searches including their private parts is common knowledge. This would appear to be consistent with Rule 36 of The Prisons Rules as the focus is on discovering concealed articles wherever they may be hidden. The searching of the petitioner involving his having to expose his private parts would be consistent with such strip searches. We are inclined to believe and accept the petitioner's statement made under oath that he was subjected to humiliating invasive body searches. It is evident that, in the case of the petitioner, the strip searches were motivated by an element of sadism or mischievous curiosity, to expose the petitioner's unusual condition.

166. In ***Samwel Rukenya Mburu vs Castle Breweries, Nairobi HCC 1119 of 2003***, Justice Visram held that:

> ***"Prohibition against torture, cruel or inhuman and degrading treatment implies that an "action is barbarous, brutal or cruel" while degrading punishment is "that which brings a person dishonour or contempt."***

167. We agree with that definition. We find that the strip searches conducted by the prison wardens exposed the petitioner to inhuman and or degrading treatment because of the petitioner's peculiar circumstances. Exposing the petitioner's ambiguous genitalia in the presence of other persons was cruel and brought ridicule and contempt to the petitioner. More so because in the absence of conclusive medical evidence, it was not clear whether petitioner was being searched by officers of the same sex as required by Prison Rule 36(2).

168. We do appreciate that conducting searches of prisoners in prison is a very important exercise. However, such searches must be done with utmost decorum and respect for human dignity. Where necessary, as is the case with the petitioner, such invasive body searches should be done by use of modern technology such as is employed in some airports. We do note that the right to protection against inhuman and degrading treatment is an absolute right, only limited in one instance i.e. where the act complained of is the infliction of a punishment authorized by law. Searches of prisoners, though authorized by law, is not a punishment and cannot therefore limit the petitioner's constitutional right to protection against inhuman and degrading treatment. We come to the conclusion that the petitioner's right to protection against inhuman and degrading treatment as provided under Section 74 of the Constitution was violated by prison officials.

169. Under Section 84 of the Constitution, this court is obliged to provide redress for the wrong that the petitioner has suffered through the violation of his fundamental right to protection against inhuman and degrading treatment. We have taken note of the petitioner's circumstances as a condemned convict. Nonetheless, every person regardless of their status in life is entitled to respect for his human dignity. It is therefore necessary that we award the petitioner damages so as to vindicate and restore his dignity. We find that a sum of Kshs.500,000/= would be appropriate in that regard.

170. In light of the above finding, we dismiss the petition except for prayer (q) of the amended petition in respect of which we give judgment for the petitioner and issue a declaration that the petitioner's right to protection against inhuman and degrading treatment has been violated. We award the petitioner general damages of Kshs.500,000/=. The petitioner having only succeeded in respect of one of his many claims, we award him 20% of his costs as against the 1st and 2nd respondents. All the other parties will meet their own costs. For the avoidance of doubt, we reiterate that in view of the ambiguity surrounding the sex of the petitioner the order for the petitioner to

be held in separate and exclusive accommodation from other male convicts will continue to remain in force.

Those shall be the orders of the court.

Dated and delivered at Nairobi this 2nd day of December, 2010.

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H. M. OKWENGU
JUDGE

.....
G. DULU
JUDGE

.....
R.N. SITATI
JUDGE

In the presence of:
Chigiti for the petitioner/applicant
Obiri & Tanui for the 1st to 5th respondents
Gatuguta for the 1st and 3rd amicus curiae
Gatuguta H/B for the 2nd amicus
Ms Wakonyo for the 1st interested party
Ms Wakonyo H/B for Ms Njeru for the 2nd interested party
Chigiti H/B for Ms Angote for the 3rd interested party
Ms Wakonyo H/B for Wambua for the 4th interested party
Mr. Kinyanjui for the 5th interested party
B. Kosgei
Catherine } Court clerks
Jane