



REPORT ON THE STATUS OF INTERSEX PERSONS IN THE CRIMINAL JUSTICE SYSTEM IN KENYA

THE NATIONAL COUNCIL ON
THE ADMINISTRATION OF JUSTICE

**REPORT ON THE STATUS OF INTERSEX PERSONS IN
THE KENYAN CRIMINAL JUSTICE SYSTEM**

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FOREWORD



The Constitution of Kenya 2010, under Article 27(1) affirms that every person is equal before the law and has the right to equal protection and benefit. Article 28 guarantees every person the inherent dignity and the right to have that dignity respected and protected. We recognize that intersex persons are a vulnerable category of persons likely to enter the criminal justice system as victims or persons in conflict with the law. The National Council on the Administration

of Justice (NCAJ) spearheaded the preparation of this report to document the experiences of intersex persons within the criminal justice system.

The report provides crucial interventions to end human rights violations because of the misconceptions, stigmatization, and misunderstanding of the very being of intersex persons. Once implemented, the recommendations proposed in the report shall enhance access to justice for intersex persons within the criminal justice system.

The NCAJ appreciates the progressive efforts by the State toward the protection and recognition of intersex persons. For instance, the 2019 Population and Housing Census, undertaken by the Kenya National Bureau of Statistics (KNBS), recognized and counted 1,524 Intersex persons in all 47 Counties in Kenya. We acknowledge and recognize both the strides made by State and non-State actors of NCAJ geared towards ensuring recognition and respect for all intersex persons rights who pass through the criminal justice system.

We laud the National Intersex Persons Taskforce and the Intersex Persons Implementation and Coordination Committee (IPICC) for their dedication and commitment to documenting challenges faced by intersex persons and advocating for relevant reforms in the justice sector for accommodating intersex persons. This report is timely as it will provide crucial information and contribute to reforms and just outcomes for intersex persons per the Constitutional imperatives.

Hon. Lady Justice Martha Koome, E.G.H.
Chief Justice and President of the Supreme Court of Kenya &
Chairperson, National Council on the Administration of Justice

ACKNOWLEDGEMENTS



The NCAJ, through the National Committee on Criminal Justice Reforms (NCCJR) prepared this report which contains a comprehensive overview of the challenges intersex persons face as victims, accused persons, and convicts in the criminal justice process.

I wish to thank all members of NCCJR for steering the development of this report. I acknowledge the invaluable input of members of the public, users, actors, and stakeholders in various institutions of the criminal justice system, who shared their experiences and views during the development of this report. Special gratitude goes to the Kenya National Commission on Human Rights under the able leadership of Dr. Bernard Mogesa and the Intersex Persons Implementation Coordination Committee under the leadership of Ms. Veronica Mwangi for their invaluable contribution to the development of this report. I appreciate the contribution of the NCAJ Secretariat under the able leadership of Dr. Moses Marang'a, notably Ms. Susan Ouko and Ms. Irene Omari, for their invaluable input in compiling this report.

The production of the report was made possible through the generous support of the International Development Law Organization (IDLO), to whom we are sincerely grateful.

**Hon. Lady Justice Grace Ngenye,
Judge of the Court of Appeal &
Chairperson, NCAJ Committee on Criminal Justice Reforms**

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ACRONYMS

CPC	Criminal Procedure Code
IPICC	Intersex Persons Implementation and Coordination Committee
KNCHR	Kenya National Commission on Human Rights
NCAJ	National Council on the Administration of Justice
NCCJR	National Committee on Criminal Justice Reforms
NPS	National Police Service

EXECUTIVE SUMMARY

An intersex person is a person who is conceived and born with a biological sex characteristic that cannot be exclusively categorised in the common binary of female or male. The challenge in binary categorisation is due to their inherent and mixed anatomical, hormonal, gonadal (ovaries and testes), or chromosomal (X and Y) patterns, which could be apparent before, at birth, in childhood, puberty, or adulthood. “Sex,” therefore, can be interpreted as a person who is male, female, or intersex. Intersex children and adults are a vulnerable group in Kenya. According to the Kenya National Bureau of Statistics, intersex people represent 0.003% of Kenya’s entire population. Whether it is as a victim or as a person in conflict with the law, there is a likelihood that an intersex person will come into contact with the criminal justice system. The Audit Report on the Criminal Justice System in Kenya (2017) revealed that one out of every five Kenyan adults is likely to be held in a police cell every two years.

For a long time, intersex persons have experienced challenges concerning recognition under the law and realization of their rights. The challenges experienced were primarily occasioned by the misconception that intersex issues form part of the Lesbian, Gay, Bisexual, Transsexual, and Questioning (LGBTQ) community on the grounds of sexual orientation, gender expression, and identity. The marginalization of intersex persons has had adverse consequences. The National Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons, in a report published in 2018, highlighted the marginalization of the intersex community in Kenya.

Concerning the Kenyan criminal justice system, many actors have not been sensitized and lack awareness of intersex persons. As a result, intersex persons who are victims of crime do not feel safe reporting crimes such as harassment, sexual and gender-based violence, or assault to the police. Intersex inmates are also a vulnerable category of persons in detention. They are exposed to harassment, ridicule, sexual abuse, and physical assault due to a lack of well-established mechanisms that ensure their protection within the criminal justice institutions.

The report reviews the legal framework in Kenya and the extent to which intersex persons are provided for within the criminal justice system. The report proposes legislative and institutional recommendations for enhancing the protection of intersex persons and ensuring all actors within the criminal justice system treat intersex persons with dignity.

There is a need for a comprehensive review and amendment of legislation such as the Criminal Procedure Code, Prison Rules, and the Sexual Offences Act to ensure intersex persons are adequately provided for and comprehensively defined. There is a need to develop specific guidelines on handling intersex persons (children and adults) within the criminal justice system and to conduct training and sensitization for all actors across the agencies.

1.0 INTRODUCTION

The term “Intersex” describes various medical conditions in which a person is born with reproductive or sexual anatomy that does not fit the atypical definitions of a female or male. Intersex persons are born with sex characteristics, including genitals, gonads, hormones, and chromosomes patterns, that do not fit the usual (atypical) binary notions of male or female bodies.¹ For some intersex persons, these traits are apparent at birth, while for others they emerge later on in life, often at puberty or adulthood. Intersex status is, therefore, biological and unrelated to sexual orientation or gender identity.

The definition of “intersex” put forth by the Kenya National Commission on Human Rights (KNCHR) and the Taskforce on Policy, Legal, Institutional and Administrative Reforms on Intersex persons; explains that an Intersex person is- “a person who is conceived and born with a biological sex characteristic that cannot be exclusively categorised in the common binary of female or male due to their inherent and mixed anatomical, hormonal, gonadal (ovaries and testes) or chromosomal (X and Y) patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood. The word “sex” therefore means a person who is male, female or intersex.”²

According to the Kenya National Bureau of Statistics, intersex people enumerated in the 2019 population and housing Census represent 0.003% (1,524) of Kenya’s entire population. The Audit Report on the Criminal Justice System in Kenya (2017) revealed that one out of every five Kenyan adults is likely to be held in a police cell every two years. Whether as a victim or as a person in conflict with the law, research has revealed that it is inevitable that intersex persons will come into contact with the criminal justice system.

Intersex persons ought to be accorded the equal status that other citizens enjoy and are to be protected from discrimination. Article 27(1) of the Constitution of Kenya 2010 affirms that every person is equal before the law and has the right to equal protection and benefit, while Article 28 provides that every person has inherent dignity and the right to have that dignity respected and protected.

Further, Korir J in *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu* [2014] eKLR adopted the view that:

¹ *The definition of intersex persons provided by the UN Human Rights Office of the High Commissioner, “Intersex Persons” Available at <https://www.obchr.org/EN/Issues/LGBTI/Pages/IntersexPeople.aspx#:~:text=Intersex%20people%20are%20born%20with,of%20male%20or%20female%20bodies.&text=Human%20rights%20abuses%20against%20intersex,infanticide>*

² *Ibid* 2

“Human dignity is that intangible element that makes a human being complete. It goes to the heart of human identity. Every human has a value. Human dignity can be violated through humiliation, degradation or dehumanisation. Each individual has inherent dignity which our Constitution protects. Human dignity is the cornerstone of the other human rights enshrined in the Constitution.”

Kenya is gradually eradicating the stigma about intersex persons and transitioning toward ensuring recognition and respect of their rights.

2.0 LEGAL AND REGULATORY FOR INTERSEX PERSONS WITHIN THE CRIMINAL JUSTICE SYSTEM IN KENYA

2.1 The Constitution of Kenya, 2010

Although the Constitution does not specifically reference intersex persons, Article 19(3) categorically states that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State. Article 28 provides that every person has inherent dignity and the right to have that dignity respected and protected. Article 20(3) provides that in applying the Bill of Rights, a court must develop the law to the extent that it does not give effect to a right or freedom. This is further complemented by Article 259(1), which provides that the Constitution must be interpreted in a manner that permits the development of the law and advances human rights.

Article 260 - defines ‘marginalised group’ as a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4). Article 27 affirms that every person is equal before the law and has the right to equal protection and equal benefit of the law.³ This Article provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.⁴ Further, to give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.⁵ Article 56 also creates an obligation on the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups are provided special opportunities in educational and economic fields, and special opportunities for access to employment.

2.2 The Persons Deprived of Liberty Act, 2014

The Persons Deprived of Liberty Act was the first piece of legislation in Kenya to recognize and provide for intersex persons. Section 2 provides the following definition of an intersex person:

“A person certified by a competent medical practitioner to have both male and female reproductive organs.”

Albeit progressive, the definition provided has been criticized for being too narrow. The Intersex Persons Implementation Coordination Committee (IPICC) recommends the review and amendment of this definition as it fails to capture

all the possible variations of the intersex condition.⁶ The KNCHR recommends the enactment of a legal definition of intersex persons that is broader and that recognizes the diversity of intersex variations.⁷

The IPICC recommends a more detailed definition as follows:

“A human being whose physiological characteristics cannot be classified as exclusively fitting into the binary concept of ‘male’ or ‘female.’ This is because the ambiguity maybe anatomical (vagina, penis, breasts), hormonal (estrogen, testosterone) gonadal (ovaries, testes) or chromosomal (XX, XY.)”⁸

Section 10 of the Persons Deprived of Liberty Act creates an obligation on officers to respect the self-identified sex/gender of intersex persons and make reasonable accommodations to protect the security and rights of intersex persons. The section reads as follows:

- “(1) A person deprived of liberty shall not be subjected to an unreasonable body search.
- (2) A body search of any person shall be carried out only by a person of the same sex.
- (3) Despite subsection (2), an intersex person has the right to decide the sex of the person by whom they should be searched.”

Section 12(3)(e) provides that intersex persons deprived of liberty shall be held separate from other persons.

2.3 Prisons Act (Cap 90)

There is a gap in the legislation concerning how intersex persons in pretrial detention and those who are handed custodial sentences are to be handled within the various correctional institutions in Kenya. The lack of specific provisions addressing the measures and procedures to comply with increases the vulnerability of intersex persons within correctional institutions. As such, there is a need for a legislative amendment to expressly provide for intersex persons at every stage of the criminal process.

⁶ KNCHR (2018) (n 4) [page 10]

⁷ *Ibid.* The Commission recommends the definition adopted by the UN Human Rights Office and the African Commission on Human and Peoples’ Rights: Intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/ or chromosomal patterns) that do not fit the typical definitions for male or female bodies. For some intersex people these traits are apparent at birth, while for others they emerge later in life, often at puberty (UN Human Rights Office, 2016, October 24)

⁸ See Note 18. IPICC Advisory to the Chairperson NCAJ- Committee on Criminal Justice Reforms on the Inclusion of Intersex Persons Provisions in the Ongoing Criminal Justice Law Reform Process.

Regarding searches, Rule 35 of the Prison Rules provides that every prisoner shall be searched when taken into custody by a prison officer, on admission into prison, and at subsequent times as the officer in charge directs. In addition, all unauthorized materials shall be confiscated. Rule 36(2) requires that a prisoner be searched only by officers of the same sex as the prisoner. A gap, therefore, exists regarding search procedures for intersex persons.

Upon admission, it is a requirement under Rule 38 of the Prison Rules that the prisoner's name, race and tribe, age, weight, particular marks, and such other measurements and particulars be recorded, and again from time to time, in such manner, as the Commissioner directs. While there is no specific requirement that the sex of the inmate must be indicated, it is recommended that this information be recorded and records are kept for male, female and intersex prisoners.

Sleeping accommodation procedures in prisons are addressed under Rule 32 of the Prison Rules. It is provided thereunder that prisoners shall sleep in communal wards or separate cells, and male and female prisoners shall be kept absolutely separate from each other and confined in different buildings. The wards, cells, and yards where women prisoners are confined shall be secured by locks different from those securing those of male prisoners, and women officers shall in all cases attend women prisoners. The rules further provide that a male prison officer shall not enter prison or part of a prison appropriated to women prisoners, except on duty, accompanied by a woman prison officer; and prisoners appearing to be under seventeen years of age, whether male or female, are to be kept apart as far as practicable from adults, and confined in separate buildings or a separate part of the prison. Section 28 of the Prisons Act provides specific protection for female prisoners by requiring that in any prison in which any female prisoner is imprisoned, there shall be a woman prison officer who shall have the care and the superintendence of female prisoners and who shall be responsible for their discipline.

The law is silent on the accommodation procedures of intersex persons altogether, and there are no comprehensive provisions to ensure the personal and physical integrity of intersex prisoners. Similar provisions should therefore be created to ensure that intersex inmates are placed in correctional facilities which ensure their protection; and their placement under the supervision of prison officers who have undergone training and sensitization on intersex persons.⁹

With regards to medical examination, Rule 25 provides that a medical officer shall examine a prisoner upon their admission to prison. Rule 42 of the Prison Act provides every prisoner shall, on the day of their admission or as soon as possible, be separately examined by the medical officer, who shall record the state of health

⁹ See note 2. *Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya (2018)* p. 135

of the prisoner and such other particulars as may be directed. IPICC observes that in the event the status of an intersex prisoner has not already been discovered, their status shall be uncovered at this point. Medical officers should also be included in training and sensitization sessions on intersex persons in the criminal justice system.

2.4 Borstal Institutions Act, Cap 92 and Probation of Offenders Act (Cap 64)

Similar to the issues identified in the Prisons Act, the Borstal Institutions Act does not mention the accommodation and management of intersex offenders. The Borstal Act under section 18 requires that male and female offenders be accommodated in separate institutions. There exists no provision for intersex youth offenders. The Borstal Rules (1963) provide for search upon admission under Rule 21. Rule 23 requires that an inmate be searched only by officers of the same sex as the inmate. Rule 27 further provides that every inmate is, upon admission, required to undergo a medical examination by a medical officer, who records the state of health of the inmate and such other particulars as may be directed.

Rule 17 of the Borstal Rules, 1963, provides for sleeping accommodation provisions in rooms or dormitories under the following conditions: male and female inmates are to be kept separate from each other and in different buildings. The rooms, dormitories, and yards where female inmates are confined shall be secured by locks different from those securing those of male inmates, and female inmates shall, in all cases, be attended by women officers.

A male prison officer on the staff of the borstal institution shall not enter an institution or part of an institution appropriated to female inmates, except on duty and accompanied by a woman prison officer. It is important that similar protective rules be enacted in the context of intersex youthful offenders to ensure their placement under the supervision of medical officers, principal borstal officers, and superintendents who have undergone training and sensitization on intersex persons.

The IPICC recommends that the Minister (now Cabinet Secretary), who is empowered by Section 57 of the Borstal Act, develop rules for comprehensively defining the process of accommodating intersex youthful offenders into borstal institutions.

2.5 Probation of Offenders Act (Cap 64)

Subsection 14(2) of the Probation of Offender Act provides for search procedures. Similar to the Prison Act and the Borstal Act, a female probation officer must conduct the search of female persons subject to probation. It is recommended that provision should be made for intersex persons to choose a probation officer of the sex that they are most comfortable with, similar to the provision made for searches in the Persons Deprived of Liberty Act under Section 10.

2.6 Criminal Procedure Code (CPC) (Cap 75)

The CPC contains provisions on search procedures. In particular, Sections 27 and 120(4) provide that whenever it is necessary to cause a woman to be searched, the search shall be done by another woman with strict regard to decency. A similar provision is recommended to protect the dignity of intersex persons and allow them to choose to be searched by a person with whom they are comfortable.

The law as regards registration of identification documents is limited to the male-female binary, and intersex persons may open themselves up to criminal liability by making a false statement to obtain an identity document contrary to Sections 320, 321, and 323 of the Penal Code. Section 320 of the Penal Code provides that any person who willfully procures or attempts to procure for himself or any other person any registration, license, or certificate under any law by any false pretense is guilty of a misdemeanor and is liable to imprisonment for one year.

Section 321 similarly states that any person who makes a false statement when procuring a passport, whether for himself or any other person, is likewise guilty of a misdemeanor. Section 323 also provides that any person who knowingly and with intent to procure the same to be inserted in a register of births, deaths, or marriages, makes any false statement touching any matter required by law to be registered in the register is guilty of a felony and is liable to imprisonment for three years.

2.7 The Sexual Offences Act (2006)

The Act, under Section 2, describes a “vulnerable person” to mean a child, a person with mental disabilities, or an elderly person, and “vulnerable witness” shall be construed accordingly. It is recommended that intersex persons be included as part of the vulnerable category.

The same is noted with the Post Rape Care form prescribed in the Schedule to the Sexual Offences Subsidiary Legislation, which only provides options for a person, either male or female, to report a crime of rape.

2.8 Prevention of Torture Act (No.12 of 2017)

The acts of forced medical interventions, invasive searches, and medical procedures without informed consent amount to torture, inhumane and degrading treatment contrary to the Prevention of Torture Act. Cruel, inhuman, and degrading treatment or punishment as defined under the Act includes a deliberate and aggravated treatment or punishment not amounting to torture, inflicted by a public officer or a person acting on behalf of a public officer against a person under their custody, causing suffering, gross humiliation or degradation to the person. The Schedule to the Prevention of Torture Act provides that acts constituting torture include mutilation of body parts such as the genitalia. Section 25 provides that any person who commits torture is liable to imprisonment of up to twenty-five years.

3.0 LEGAL RECOGNITION OF INTERSEX PERSONS IN KENYA

3.1 The R.M. v. Attorney General Case

The first time the issue concerning the legal recognition of intersex persons was raised and addressed in Kenya was in the 2010 decision in the case of R.M. v. Attorney General & 4 others. The Petitioner was charged with robbery with violence in 2005, and while in remand, the statutory prison search revealed that he had both male and female genital organs. The Petitioner was taken to the hospital to verify his gender, and the doctor's report confirmed that he had ambiguous genitalia. As a result, a Court order was made to remand the Petitioner to Kitui Police Station during the pendency of his trial. Upon conviction, the Petitioner was sentenced to death and committed to Kamiti Maximum Prison for men, where he shared cells and facilities with other male inmates. He alleged that while at the maximum prison, he was exposed to abuse, mockery, ridicule, inhuman treatment, and sexual assault by other male inmates.

This case presented novel issues for the Kenyan Court as the Petitioner argued that the failure of the legal framework to recognize intersex persons resulted in the infringement of his fundamental rights to dignity, freedom from inhuman treatment, freedom from discrimination based on sex, freedom of movement, freedom of association, the right to a fair hearing and the right to protection under the law. While the Petitioner failed on the claim that the legal framework did not recognize and therefore discriminated against intersex persons, he succeeded in the claim that prison officials treated him in a manner that was cruel and degrading and was awarded damages for violation of the right to dignity. The Court did find that the strip searches the Petitioner had been subjected to during incarceration were "cruel and brought ridicule and contempt" and, as a result, constituted inhumane and degrading treatment in violation of the Constitution.

With specific reference to the issue of whether the Petitioner could sue on behalf of the body of intersex persons in Kenya, the Court held that the Petitioner, along with the interested parties and amici curiae, had failed to provide any evidence that there was a definite number of intersex people in Kenya to form a body of people whose interests he represented. This can be explained by the fact that Kenya had yet to conduct a census including intersex persons in addition to the male/female sex binary.

3.2 The Baby “A” Case

In 2014, the case of Baby A¹⁰ was the second to be decided in the Kenyan courts concerning the rights of intersex persons. The Court, in this case, departed from the traditional understanding of the meaning of sex as only encompassing the male/female binary and recognized the existence of intersex persons as a separate category. This case forged new ground toward ensuring recognition and respect of their rights. The Court proposed that people with intersex conditions be recognized as such under the law and that the failure of the Registration of Births and Deaths Act or the Constitution to recognize them should not be interpreted to mean that their rights could be infringed.

Reference was made to two decisions of the Colombian Constitutional Court, Sentencia No.54-337/99 (the Ramos case) and Sentencia T 551/99 (the Cruz case), and the Court concluded that the state had a duty to protect the rights of children and persons with intersex conditions by putting in place a legal framework which would govern issues such as their registration, medical examinations, and corrective surgeries. The Court urged Parliament to enact the necessary legislative framework. In addition, the Court ordered the issuance of a Birth Certificate to Baby A; and directed the Attorney General to establish a body that would conduct a census of intersex persons in Kenya and develop guidelines and policies for their recognition and support.

3.3 The establishment of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya.

In acknowledgment of the need to safeguard the interests of intersex persons, the Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons in Kenya was formed by the Attorney General in May 2017. The Taskforce was mandated to compile comprehensive data regarding the number, distribution, and challenges of intersex persons; and to examine the existing policy, institutional, legislative, medical, and administrative structures and systems governing them with a view to recommending comprehensive reforms to safeguard their interests.

The membership of the Taskforce was drawn from various institutions, including the Kenya Law Reform Commission (KLRC), Office of the Attorney General-Department of Justice, Directorates of Immigration & Registration of Persons, National Gender and Equality Commission (NGEC), KNCHR, the CRADLE and Intersex Persons Society of Kenya. Efforts and recommendations by the Taskforce led to the official recognition of intersex persons in Kenya and increased targeted advocacy; and in 2019, Kenya became the first country in Africa to collect data on

¹⁰ *Baby “A” (suing through her mother, E.A.) and The Cradle the Children Foundation v. Attorney General, Kenyatta National Hospital, and the Registrar of Births and Deaths [2014] eKLR, Petition No. 266 of 2013, Kenya, High Court (Constitutional and Human Rights Division)*

intersex persons in the National census undertaken by the Kenya National Bureau of Statistics.

3.4 2019 Population and Housing Census

According to the 2019 Population and Housing Census by the Kenya National Bureau of Statistics, there are 1,524 intersex people in the country, with Nairobi and Kiambu counties among the top counties with the highest numbers of intersex persons having 245 and 135 intersex persons, respectively. Table 1 provides the 2019 census data on the intersex population in Kenya.

Table 1: Intersex Population Data in Kenya

	County	N.o of intersex persons		County	N.o of intersex persons
1	Mombasa	30	25	Samburu	7
2	Kwale	18	26	Trans Nzoia	28
3	Kilifi	25	27	Uasin Gishu	28
4	Tana River	2	28	Elgeyo Marakwet	12
5	Lamu	4	29	Nandi	22
6	Taita Taveta	7	30	Baringo	13
7	Garissa	34	31	Laikipia	18
8	Wajir	49	32	Nakuru	95
9	Mandera	37	33	Narok	26
10	Marsabit	18	34	Kajiado	38
11	Isiolo	9	35	Kericho	28
12	Meru	49	36	Bomet	23
13	Tharaka Nithi	7	37	Kakamega	40
14	Embu	24	38	Vihiga	12
15	Kitui	33	39	Bungoma	35
16	Machakos	34	40	Busia	28
17	Makueni	20	41	Siaya	18
18	Nyandarua	20	42	Kisumu	23
19	Nyeri	31	43	Homa Bay	23
20	Kirinyaga	31	44	Migori	35
21	Murang'a	31	45	Kisii	38
22	Kiambu	135	46	Nyamira	13
23	Turkana	21	47	Nairobi	245
24	West Pokot	15			

4.0 CHALLENGES FACING INTERSEX PERSONS IN THE CRIMINAL JUSTICE SYSTEM

For a long time in Kenya and Internationally, intersex persons have experienced challenges concerning recognition under the law and the realization of their rights as intersex persons. This is because the intersex condition has been perceived as a medical concern.¹¹ Consequently, the initial medical goal was to ‘normalize’ or ‘fix’ their bodies through surgical interventions to ensure adherence to the male/female sex binary. Reluctance to bring intersex persons to the forefront of discussions as regards their legal recognition and rights has also been curtailed by stigma stemming from cultural bias and belief, as well as the misconception that intersex issues form part of the Lesbian, Gay, Bisexual, Transsexual, and Queer (LGBTQ) community on the grounds of sexual orientation, gender expression, and identity.¹²

Exclusion and marginalization of intersex persons have had significant consequences in Kenya. One of the greater challenges facing intersex persons is in the application and acquisition of national documents such as birth certificates, passports, and identification cards due to their sex status.¹³ The lack of correct recognition and documentation of their sex marker from the point of birth, results in numerous human rights violations. Intersex persons in Kenya further face stigmatization, discrimination, and abandonment by society.

With specific reference to the criminal justice system, there exists a gap in legislation regarding how intersex persons in conflict with the law are to be handled. Arrested persons are often traumatized by unnecessary and intrusive body searches by law enforcement¹⁴ despite the National Police Service (NPS) Standing Orders decreeing that detained intersex persons have the right to choose the gender of the police officer to conduct such searches on them.¹⁵ The law has also not addressed the issue of prison systems and protocols that cater for intersex people. Intersex inmates are therefore exposed to sexual harassment, ridicule, and physical assault as a result of a lack of awareness and mechanisms which ensure their protection within the criminal justice institutions.¹⁶

¹¹ See Benjamin Moron-Puech (2018). *The Protection of Intersex Persons by Public International Law*. Université Panthéon-Assas (Paris II). Archive ouverte HAL. Also see Travis, Mitchell & Garland, Fae. (2018). *Legislating Intersex Equality: Building the Resilience of Intersex People through Law*. *Legal Studies*. 38. 10.1017/lst.2018.17.

¹² *Equal in Dignity and Rights: Promoting the Rights of Intersex Persons in Kenya (2018) Report by the KNCHR* accessed from <https://www.knchr.org/Portals/0/GroupRightsReports>

¹³ Judy Wasonga & Charles Kirundi (2019). *Kenyans Urged To Embrace Intersex Community*. Kenya News Agency. Available at <https://www.kenyanews.go.ke/kenyans-urged-to-embrace-intersex-community/>

¹⁴ Bernadette Khaduli (2019). *Judiciary Determined To Address Criminal Justice In Courts*. Kenya News Agency. Available at <https://www.kenyanews.go.ke/judiciary-determined-to-address-criminal-justice-in-courts/>

¹⁵ The NPS Standing Orders, Paragraph 15.4 provides for the protection of the rights of intersex persons upon arrest and detention. An intersex persons should be searched upon arrest by a person of their choice (female or male) and detained separately in a police station.

¹⁶ *Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya (2018)*. Submitted by the Taskforce on Policy, Legal, Institutional and Administrative Reforms

Owing to a lack of understanding and awareness of what it means to be intersex, research has revealed that many actors within the criminal justice system often share popular prejudices against intersex people and fail to take a human rights approach in the execution of their duties. Intersex persons who come into contact with the criminal justice system as victims or offenders fear revealing their status.

Victims of crimes such as assault or harassment do not feel safe to report a crime to the police. At the same time, intersex offenders fear disclosing their true identity owing to a lack of comprehensive policies specifically addressing the management of intersex offenders within the criminal justice system.

Reference can be made to the case of *RM v Attorney General*,¹⁷ wherein the High Court determined that Richard Muasya was the victim of inhumane and degrading treatment on the part of the prison officers. The Court held that the strip searches conducted by the prison officers were motivated by an element of sadism or mischievous curiosity to expose the petitioner's unusual condition. Exposing the petitioner's ambiguous genitalia in the presence of other persons was cruel and brought ridicule and contempt to the petitioner.

Kenyan criminal laws define infanticide as the systematic and deliberate killing of children below twelve months by their biological mothers at birth or after.¹⁸ The Kenya Annual Crime Report, 2018¹⁹ reveals that the number of reported cases of infanticide was thirty-four in the year 2018, thirty-three in the year 2017 and forty-two in the year 2016. Although the statistics do not indicate which of the reported cases are intersex related, the human rights agencies acknowledge that intersex infanticide is practiced in Kenya, albeit information and statistics are lacking.²⁰ According to a Baseline Survey on intersex realities in East Africa,²¹ in Uganda, Rwanda and Kenya, when an intersex child is born, the family treats the birth with extreme secrecy, and intervention strategies are limited to close family members. It was reported that the mother of such a child would be stigmatized, and most intersex infants would be killed shortly after birth. The majority of the cases of intersex child infanticide would therefore remain unreported.

The United Nations Convention on the Rights of the Child, under Article 24(3), obligates States Parties to strive to ensure that no child is deprived of his or her

Regarding the Intersex Persons in Kenya. Available at <http://www.klrc.go.ke/images/TASKFORCE-REPORT-on-INTERSEX-PERSONS-IN-KENYA.pdf>

¹⁷ *RM v. Attorney General & 4 Others* [2010] eKLR Petition No. 705 of 2007, Kenya, High Court

¹⁸ Section 210 of the Penal Code

¹⁹ Office of the Inspector General (Kenya), NPS Annual Crime Report for the year 2018. Available at <http://www.nationalpolice.go.ke/crime-statistics.html>

²⁰ KNCHR (2018) (n 4) [page 80]

²¹ SIPD Uganda (2017) "Baseline Survey on intersex realities in East Africa with Specific focus on Uganda, Kenya, and Rwanda." Available at <https://sipdug.org/baseline-survey-on-intersex-realities-in-east-africa/>

right of access to the highest attainable health care services, which include the development of effective and appropriate measures geared towards abolishing traditional practices prejudicial to the health of children. In some cases, surgical procedures are done on intersex children with the aim of “normalizing” them to conform to a particular sex assignment, either male or female. Non-consensual, medically unnecessary, irreversible, cosmetic genital surgeries are considered to amount to intersex genital mutilation; and it is recommended that an Anti-Intersex Genital Mutilation Board be established with the aim and responsibility of designing programmes aimed at eradicating such practices, including the undertaking of activities to promote public awareness.²²

²² IPICC, “Advisory to the Chairperson NCAJ- Committee on Criminal Justice Reforms on the Inclusion of Intersex Persons Provisions in the Ongoing Criminal Justice Law Reform Process.” 16th June, 2021. Similar to the Anti-FGM Board established under Section 3 of the Prohibition of Female Genital Mutilation Act, No. 32 of 2011.

5.0 RECOMMENDATIONS

5.1 Legislative Recommendations

1. Introduce an Intersex (I) marker in all official documents that require identification of sex within the criminal justice system, including court returns tools/ reports and systems.
2. Undertake a comprehensive review of the legislation within the criminal justice system and amend statutes to ensure intersex persons are adequately provided for and comprehensively defined. It is recommended that:
 - a. The Prisons Act and Prison Rules be amended to provide for intersex persons to ensure that intersex inmates are placed in correctional facilities which ensure the protection of their inherent right to dignity; as well as setting place procedures for their management (search procedures, medical examination procedures, sleeping accommodation, training and sensitization of prison officers.) The Prisons Rules, Section 36(2) be amended to provide for the search of intersex inmates. The Rules should ensure that an intersex person is allowed to choose the sex of the officer to conduct the search.
 - b. The CPC, Cap 75 Section 25 be amended to ensure that an arrested intersex person is allowed to choose the preferred sex of the officer to conduct the search.
 - c. The Borstal Institutions Act, Cap 92, and Borstal Institution Rules be amended to provide for intersex persons to ensure that intersex youthful offenders are placed in correctional facilities which ensure the protection of their inherent right to dignity; as well as setting place procedures on their management (search procedures, medical examination procedures, sleeping accommodation, training and sensitization of prison officers.) The Borstal Institutions Rules, Rule 21 be amended to provide that an intersex person be allowed to choose the preferred sex of the officer to conduct the search
 - d. The Persons Deprived of Liberty Act, 2014 section 2 b a mended to capture all possible variations of the intersex condition.
3. The Sexual Offences Act (2006) section 2 describes a “vulnerable person” to mean a child, a person with mental disabilities or an elderly person and “vulnerable witness” shall be construed accordingly. It is recommended that intersex persons also be included as part of the vulnerable category of persons.

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4. The Post Rape Care Form prescribed in the Schedule to the Sexual Offences Subsidiary Legislation, be amended to include options for intersex persons to report a crime of rape.

5.2 Institutional and Policy Recommendations

1. Conduct intersex awareness training for all actors within the criminal justice sector. Awareness training should ensure that basic knowledge of intersex conditions is provided, as well as comprehensive knowledge of the rights of intersex persons as it pertains to their specific area of work.
2. The NCAJ to upscale the inclusion of intersex children and adults as a special interest group within institutions of the criminal justice sector.
3. Intersex awareness workshops should be organized by institutions of the criminal justice system for all actors, with participation of intersex persons.
4. Develop guidelines on how to handle intersex persons and ensure their protection across all detention facilities.
5. The National Crime Research Centre, to conduct a nationwide study on the issue of intersex children to assess the scope of the problem and come up with a strategy to protect these vulnerable children.
6. The Inspector General of Police, KNCHR, Office of the Director of Public Prosecutions to ensure that human rights violations against intersex people are documented, investigated, and alleged perpetrators prosecuted and that victims of such violations receive redress.

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The Constitution of Kenya, 2010

The Criminal Procedure Code (Cap 75)

The National Police Service Standing Orders

The Penal Code of Kenya (Cap 62)

The Persons Deprived of Liberty Act, 2014

The Prevention of Torture Act (2017)

The Prisons Act (Cap 90)

The Probation of Offenders Act (Cap 64)

The Sexual Offences Act (2006)



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