



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO 147 OF 2013**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENYA NATIONAL EXAMINATIONS COUNCIL....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE**

**AUDREY MBUGUA ITHIBU**

**JUDGMENT**

In these judicial review proceedings Audrey Mbugua Ithibu is the ex-parte Applicant. The ex-parte Applicant will henceforth be referred to as the Applicant. Kenya National Examinations Council (KNEC) is the 1<sup>st</sup> Respondent whereas the Attorney General of the Republic of Kenya is the 2<sup>nd</sup> Respondent. For completeness of the record it is noted that in the course of these proceedings an organization called the Kenya Christian Lawyers Fellowship sought to be enjoined as an interested party but later withdrew its application through a notice dated 15<sup>th</sup> November, 2013.

Through the notice of motion application dated 10<sup>th</sup> May, 2013 the Applicant prays for:

“a. An order of **MANDAMUS** to compel the 1<sup>st</sup> Respondent to carry out its statutory mandate by changing the particulars of name on the Kenya Certificate of Secondary Education awarded to the Applicant by the 1<sup>st</sup> Respondent to reflect her new name.

b. An order of **MANDAMUS** to compel the 1<sup>st</sup> Respondent to carry out its statutory mandate by removing the Gender Mark on the Kenya Certificate of Secondary Education awarded to the Applicant by the 1<sup>st</sup> Respondent.

3. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

4. Costs of and incidental to the application be provided.”

According to the statutory statement dated 7<sup>th</sup> May, 2014, the orders are sought on the grounds that:

- “a) The refusal by the 1<sup>st</sup> Defendant to effect the change of name and gender mark is unreasonable, unjustified and unfair in the circumstances.**
- b) The refusal to effect the change of name and gender mark is in breach of the rules of natural justice.**
- c) That the refusal to effect the change of name and gender mark is against the legitimate expectations of the Applicant.**
- d) That the refusal to effect the change of name and gender mark is in bad faith.**
- e) The Respondents are subject to supervisory jurisdiction of this Honourable Court.**
- f) Such other and further grounds to be adduced at the hearing hereof.”**

Although the Applicant has presented himself as a female, I will for the purposes of this application refer to the Applicant as a male.

The Applicant's case as gleaned from the documents filed in Court is that he is the holder of Kenya Certificate of Secondary Education (KCSE) No. 1855399 awarded to him by KNEC in 2001 in exercise of its statutory mandate of setting national examinations and awarding certificates to the candidates.

Sometimes in 2008 he was diagnosed and treated for gender identity disorder (G.I.D.) and depression at Mathari Hospital. To date he is still on treatment for the two conditions. The Applicant says that he changed his name from Andrew Mbugua Ithibu to Audrey Mbugua Ithibu. Thereafter he embarked on changing the particulars on his national identity card, passport and academic papers so as to reflect his changed gender from male to female.

On 1<sup>st</sup> December, 2010 he wrote to KNEC enquiring about the possibility of change of name and gender for persons diagnosed with G.I.D. KNEC responded through a letter dated 10<sup>th</sup> December, 2010 as follows:

**“RE: CHANGE OF GENDER ON KNEC CERTIFICATES**

**We acknowledge receipt of your letter dated 1<sup>st</sup> December 2010 on the above matter in which you take issue with the fact that the Kenya National Examinations Council (KNEC) does not allow gender changes to be made on certificates once candidates have sat for an examination. We are glad that you appreciate the need for KNEC to put such stringent measures in place to deter forgery of certificates issued by the Council.**

**While we are strict in enforcing the policy on name and gender changes, we do emphasize (sic) with the plight of individuals who are undergoing or have undergone sex changes. As such, we wish to inform you that KNEC does consider gender changes on certificates of individuals who have sufficient reasons and evidence to proof that their case is genuine. As for the candidates who are undergoing or have undergone sex changes, the Council can consider change of certificates, if the affected individuals present recent medical reports from qualified Medical Practitioners as evidence of their change in gender.**

**We wish you the very best as we all strive to improve the quality of education in Kenya.”**

The letter was signed by one Ambia G. Noor on behalf of the KNEC secretary/chief executive. Upon receiving the said letter, the Applicant wrote to KNEC on 7<sup>th</sup> February, 2011 seeking information on the procedure to be followed in the change of name by a person with G.I.D.

KNEC replied through the letter dated 9<sup>th</sup> February, 2011 that:

**“RE: CHANGE OF NAME ON KNEC CERTIFICATES FOR TRANSGENDER CASES**

**We acknowledge receipt of your letter dated 7<sup>th</sup> February 2011 on the above matter in which you requested for clarification on whether the Kenya National Examinations Council (KNEC) does allow name changes to be made on certificates once candidates have sat for an examination. It is important to appreciate the need for KNEC to put stringent measures in place to deter forgery of certificates so as to ensure the credibility of the certificates issued by the Council.**

**While we are strict in enforcing the policy on name change, we do empathize with the plight of individuals who are undergoing or have undergone sex changes. As such, we wish to inform you that KNEC will have to develop a policy on the same to make provisions for persons who have undergone gender changes so as to make adequate arrangements for certification of individuals who have submitted the prerequisite evidence to proof that their case is genuine. All candidates who are undergoing or have undergone sex changes, the Council can consider change of name on certificates, if the affected candidates present recent medical reports from qualified Medical Practitioners, Affidavit, Birth Certificate, Any certification from the Council, a registered deed poll and a copy of a gazette notice. Other individuals who are over 18 years must submit their new and old identity cards as evidence of their change in name in addition to all the other evidence required of candidates.**

**We wish you the very best as we all strive to improve equity in our society. We appreciate your effort and look forward for a meeting where we can develop the relevant benchmarks to initiate the policy for transgender cases.”**

The letter is signed by the same Ambia G. Noor.

On 3<sup>rd</sup> August, 2012 the Applicant wrote an email to KNEC seeking a change of name in his certificate. In an email dated 11<sup>th</sup> August, 2012 KNEC changed its position and informed the Applicant that it does not effect change of names once examination results have been released.

There was a back and forth exchange of letters and emails culminating in the letter dated 22<sup>nd</sup> March, 2013 in which KNEC categorically stated as follows:

**“RE: CHANGE OF NAME AFTER RELEASE OF EXAMINATION RESULTS**

**Reference is made to your letter dated 28<sup>th</sup> February 2013. The Kenya National Examinations Council rules and regulations on award of certificates require that all candidates’ details including name are captured on the registration documents before the administration of the examination. It is the responsibility of the candidates to ensure that entries including names are correct before signing the registration documents.**

**The KNEC regulations do not allow addition or deletion of a name after award of a certificate to a**

**candidate.**

**The Council only allows change of name during the registration for subsequent examinations on submission of a Kenya Gazette notice.**

**Please use the gazette notice to support the differences in names on the certificates.”**

This change of name was conveyed by Ambia G. Noor.

The Applicant prays for issuance of judicial review orders on the grounds already cited in this judgement.

KNEC opposed the application through a replying affidavit sworn on 18<sup>th</sup> July, 2013 by its Chief Executive and Secretary Mr Paul M. Wasanga. KNEC confirms that the Applicant who appears in their records as Ithibu Andrew Mbugua sat for the KCSE examination in November/December 2001 and was issued with KCSE Certificate No. 1855399. KNEC states that the Applicant sat for the examination at Kiambu High School, a school for boys, where he had undertaken his high school studies between 9<sup>th</sup> February, 1998 and November, 2001. KNEC states that the Applicant had also sat his Kenya Certificate of Primary Education examination as Ithibu Andrew Mbugua.

It is KNEC's case that it only prints one certificate per candidate for any examination it administers. Further, that KNEC never originates any information regarding candidates but compiles candidates' data furnished by the various examination centres/schools and education officers countrywide and that the records reproduced on the Applicant's certificates are as were furnished it by the Applicant through the head teachers of his former schools.

On the Applicant's medical condition, KNEC submitted that the documents availed by the Applicant are vague and it is not clear whether the Applicant has transitioned to a female. Further, that it is not clear whether the transition will be achieved and whether the transition is sanctioned by the law or whether a formal structure exists for effecting such a process. It is KNEC's case that the medical report does not indicate what the medical treatment is meant to achieve and is deliberately vague and confusing.

KNEC's CEO avers that he had looked up the meaning of the condition described as Gender Identity Disorder and the same is described as **“a conflict between a person's physical gender and the gender that he or she identifies with.”** His research also shows that adults suffering from G.I.D. exhibit certain symptoms such as dressing like the opposite sex; feeling lonely; suffering depression or anxiety; desire to live as a person of the opposite sex; wish to be rid of their genitals and that the disturbance may be so persuasive that the mental lives of such individuals may revolve only around activities that lessen the gender distress. KNEC concedes that the medical report and the Applicant's presentation as a woman seem to be symptomatic of G.I.D.

Mr Wasanga avers that a perusal of Gazette Notice No. 9395 shows that before the Applicant changed his name to Audrey Mbugua Ithibu he was known as Mbugua Ithibu which name does not accord with the Applicant's name in the KCSE certificate i.e. Ithibu Andrew Mbugua. Further, that although the Applicant's passport issued on 15<sup>th</sup> April, 2013 shows his name as Audrey Mbugua Ithibu, his national identity card number 23037878 issued on 6<sup>th</sup> February, 2012 shows his name as Mbugua Ithibu.

At paragraphs 18-23 of his affidavit Mr Wasanga avers:

**“18. THAT there is no requirement in law for the Council to effect a name change on the Applicant's or any other person's certificate and in any event the Council does not effect name**

changes on certificates that have already been issued as doing so may encourage creation of fraudulent certificates.

19. **THAT it is clear from the Applicant's National Identity Card and Passport that the Applicant is a male and not a female.**

20. **THAT the Council does not, as indeed many other examination bodies worldwide as a matter of policy effect name changes on certificates that it issues nor does it issue duplicates of the certificates in a bid to ensure that there are no free/idle certificates in circulation that may be used for fraudulent activities.**

21. **THAT there is also the danger that if the Council allowed former candidates to effect changes to their records; it could become nigh impossible to authenticate certificates produced to potential employers or educational institutions and other interested parties as the Council only authenticates such certificates against records as submitted by candidates at the time they registered for examinations.**

22. **THAT the Council has records in the millions for candidates dating as far back as 1929 and entertaining the Applicant's prayer may encourage other candidates to make similar requests.**

23. **THAT the Council is funded by public resources and it does not have the resources or manpower to undertake an exercise of this nature."**

KNEC finally asserts that it is up to the Applicant to prove to potential employers that he is the Ithibu Andrew Mbugua named in the certificates.

The Attorney General opposed the application through grounds of opposition dated 30<sup>th</sup> July, 2013, as reproduced hereunder:

**"1. THAT the exparte applicant's application dated 10<sup>th</sup> May, 2013 is bad in law, incompetent, without merit and a gross abuse of the court's process.**

**2. THAT the exparte applicant has not demonstrated any case against the 2<sup>nd</sup> Respondent in particular and there is no prima facie case to warrant the issuance of the Judicial Review remedies in his favour.**

**3. THAT Judicial Review remedies are public in nature and cannot be issued to enforce private law rights.**

**4. THAT Judicial Review is only concerned with the decision making process and procedure but not on the merits of the decision."**

In response to the respondents' papers, the Applicant swore a further verifying affidavit on 20<sup>th</sup> August, 2013. Through the said affidavit the Applicant averred that G.I.D. is classified under mental health disorders and like any other medical condition the same is subject to medical treatment which he is currently undergoing. In support of this statement he annexed a clinic attendance card from Kenyatta National Hospital.

The Applicant averred that the Higher Education Loan Board (HELB) and the Department of Immigration had accepted his medical condition and regarded him as Audrey Mbugua Ithibu. He exhibited copies of

an ATM and a passport from HELB and the Immigration Department respectively in support of his averment. On KNEC's claim that the deed poll showed that his name was changed from Mbugua Ithibu to Audrey Mbugua Ithibu, he averred that by a deed poll dated 7<sup>th</sup> May, 2010, he changed his name from Andrew Mbugua Ithibu to Mbugua Ithibu before eventually changing the name from Mbugua Ithibu to Audrey Mbugua Ithibu. The Applicant also informed the Court that he has already applied to have the gender mark in his birth certificate, national identity card and passport changed from male to female.

It is the Applicant's case that other countries have policies for effecting change of names on examination certificates and other identification documents for persons with G.I.D.

Sometimes it is important to let parties speak for themselves. In the Applicant's written submissions dated 28<sup>th</sup> February, 2014 and filed on 3<sup>rd</sup> March, 2014, Mr Ojiambo for the Applicant writes at page 2 that:

**“Audrey Mbugua Ithibu was born in 1984 and named Andrew Mbugua Ithibu. She was identified in the records at birth as a male child. However, from as long as she could remember she felt more inclined to be female. She had an increasing urge to live as a woman rather than as a man. Along the way she became increasingly uncomfortable and depressed, which led her to an attempt to commit suicide. She was taken to hospital, and first consulted a psychiatrist at Mathari Hospital in 2008. She was diagnosed with Gender Identity Disorder, hitherto a rare medical condition in Kenya. She had a long course of counselling and put on hormonal treatment. She was later booked for surgery at the Kenyatta National Hospital....**

**The Applicant now dresses and lives as a woman. She is officially referred to as AUDREY MBUGUA ITHIBU.”**

In my view, that essentially describes the Applicant herein. KNEC attempted to cast aspersions on the diagnosis of the Applicant's condition and on the treatment he has undergone. This was not a successful strategy as the Applicant adduced evidence to show that he has indeed been diagnosed with G.I.D. In fact KNEC's CEO conceded in his affidavit that the symptoms exhibited by the Applicant were indicative of G.I.D.

Further, the history of the Applicant's medical condition was clearly brought out by a letter dated 12<sup>th</sup> March, 2013 written by Dr. Catherine Syengo Mutisya, a Deputy Medical Superintendent at Mathari Hospital. The letter states in part:

**“RE ANDREW MBUGUA ITHIBU-IP NO. 75801**

**Andrew Mbugua Ithibu has been treated in our hospital since October 2008. She has been treated for gender identity disorder and depression. She was evaluated by a panel of psychiatrists (medical board) from the hospital on 27/1/2008 and the board confirmed that she has gender identity disorder (trans-sexual) and had already begun the medical transition. The board then recommended the appropriate treatment. She was also followed up and treated for depression in the hospital.**

**On examination today she is still distressed by the challenges she is encountering as a result of her condition...”**

The respondents did not avail any evidence to show that the Applicant does not suffer from G.I.D.

The condition afflicting the Applicant has previously been a subject of litigation. Lord Nicholls of Birkenhead succinctly described this medical condition in **BELLINGER v BELLINGER [2003] UKHL 21**. I beg to quote him at length. At paragraphs 7-10 he stated:

**“7. Transsexual people are to be distinguished from inter-sexual people. Transsexual is the label given, not altogether happily, to a person who has the misfortune to be born with physical characteristics which are congruent but whose self-belief is incongruent. Transsexual people are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex. They experience themselves as being of the opposite sex. Mrs Bellinger is such a person. The aetiology of this condition remains uncertain. It is now generally recognised as a psychiatric disorder, often known as gender dysphoria or gender identity disorder. It can result in acute psychological distress.**

**8. The treatment of this condition depends upon its severity and the circumstances of the individual. In severe cases conventional psychiatric treatment is inadequate. Ultimately the most that medical science can do in order to alleviate the condition is, in appropriate cases, to rid the body of its intensely disliked features and make it accord, so far as possible, with the anatomy craved. This is done by means of hormonal and other treatment and major surgery, popularly known as a 'sex change' operation. In this regard medical science and surgical expertise have advanced much in recent years. Hormonal treatment can change a person's secondary sexual characteristics. Irreversible surgery can adapt or remove genitalia and other organs, external and internal. By this means a normal body of one sex can be altered so as to give the appearance of a normal body of the other sex. But there are still limits to what can be done. Gonads cannot be constructed. The creation of replica genital organs is particularly difficult with female to male gender reassignment surgery. Chromosomal patterns remain unchanged. The change of body can never be complete.**

**9. Surgery of this nature is the last step in what are typically four steps of treatment. The four steps are psychiatric assessment, hormonal treatment, a period of living as a member of the opposite sex subject to professional supervision and therapy (the 'real life experience'), and finally, in suitable cases, gender reassignment surgery. In February 1981 Mrs Bellinger, having been through the previous stages of treatment, successfully underwent this form of surgery. This involved removal of her testes and penis and, in the words of Johnson J, 'the creation of an orifice which can be described as an artificial vagina, but she was still without uterus or ovaries or any other biological characteristics of a woman.' A chromosomal test, dated 8 April 1999, showed her to have a karyotype 46XY pattern, an apparently normal male karyotype.**

**10. For completeness I should mention in passing that a transsexual person is to be distinguished from a homosexual person. A homosexual is a person who is attracted sexually to persons of the same sex. Nor should a transsexual person be confused with a transvestite. A transvestite is a person who, usually for the purpose of his or her sexual gratification, enjoys dressing in the clothes of the opposite sex.”**

In **RICHARD MUASYA v THE ATTORNEY GENERAL & OTHERS**, Nairobi High Court, Petition No. 705 of 2007 this Court (H. M. Okwengu, J (as she then was), G. Dulu and R. N. Sitati, JJ) addressed the question of the creation of a third gender and after considering the arguments of the parties opined that:

**“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.”

In India (The Supreme Court of India **NATIONAL LEGAL SERVICES AUTHORITY v UNION OF INDIA AND OTHERS**, Civil Original Jurisdiction Writ Petition (Civil) No.400 of 2012; Writ Petition (Civil) No.604 of 2013) and Nepal (The Supreme Court of Nepal in **SUNIL BABU PANT & OTHERS V NEPAL GOVERNMENT**, Writ Petition No.917 of 2007 decided on 21<sup>st</sup> December, 2007) the courts have created the third gender.

I have intentionally alluded to the transgender question so as to put the Applicant’s case in its proper perspective. The Applicant herein does not seek the creation of the third gender. He has, however, clearly indicated that he is on transit from the male gender to the female gender. Whether the law allows



him to do so is not a question to be decided in this matter. I will not therefore engage my mind on the question of the third gender since the same is not an issue before this Court. I have only highlighted the decisions on transgender cases as a background to the Applicant's case.

The Applicant seeks the removal of the gender mark from his KCSE certificate. He has given his medical condition as the reason for seeking the removal of the gender mark. His counsel submitted at length on G.I.D. In my view, however, the question boils down to whether the law requires KNEC to indicate the gender mark of a candidate on secondary school certificates.

Counsel for the Attorney General submitted that the Applicant ought to have filed a petition in order to assert his rights as the issue brought out by the application is one of infringement of a constitutional right. The answer to this argument is found in Article 23(3) of the Constitution which provides that an order of judicial review is among the remedies that a court can grant where a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. It follows therefore that a right found in the Bill of Rights can be enforced through judicial review proceedings.

Among the functions of KNEC as outlined by Section 10 of the Kenya National Examination Council Act (the Act) is **“to conduct such academic, technical and other examinations within Kenya as it may consider desirable in the public interest.”** After administering the examinations KNEC is mandated **“to award certificates or diplomas to successful candidates in such examinations.”**

KNEC discharged its mandate in the Applicant's case. The Applicant was issued with KCSE certificate No. 1855399 in the name of Ithibu Andrew Mbugua. Immediately after the name there appears the letter M in quotes followed by Index No. 205209/007. It is agreed by the parties herein that the “M” stands for male. The Applicant now seeks an order compelling KNEC to change the name in his certificate and to delete the gender mark so that the certificate will not have any gender mark.

He stated that by deed poll, he changed his name from Ithibu Andrew Mbugua to Mbugua Ithibu before once again changing the name to Audrey Mbugua Ithibu. He produced evidence to support this assertion. He specifically produced Kenya Gazette Notice No. 9395 indicating that by a deed poll dated 19<sup>th</sup> January, 2012 he changed his name from Mbugua Ithibu to Audrey Mbugua Ithibu.

Ms Chege who appeared for the Attorney General indicated that the Attorney General would not be opposed to a change of name in the certificate of the Applicant. Ms. Njenga for KNEC, however, insisted that KNEC was opposed to the issuance of such an order.

A perusal of the papers filed in Court clearly shows that the Applicant changed his name through a deed poll which is a legally recognised method. It is not the business of state agencies to select names for Kenyan citizens. I think the only issue to be considered is whether change of name in a KCSE certificate is allowed by the law.

On the issue of the removal of the gender mark, the respondents were united that such an order should not issue. They submitted that there is no law to support the issuance of such an order. KNEC contended that allowing the application would make it difficult for it to authenticate certificates and may lead to commission of fraud. Further, that it would be expensive to implement the order.

In my view, these are not legitimate reasons for denying the Applicant's request. Records of any changes made will always be kept by KNEC and it can always verify the information when asked to do so. Criminals do not clothe their nefarious activities with a semblance of legality by approaching the courts like the Applicant has done. On the issue of the expense, the Applicant correctly countered the

respondents' submission by stating that he is willing to pay a reasonable fee for the issuance of an amended certificate.

What does the law say about the Applicant's request? The Applicant is the only party who identified the law governing issuance of certificates by KNEC. The law is found in the Kenya National Examinations Council (Kenya Certificate of Secondary Education Examinations) Rules 2009, hereinafter simply referred to as the Rules. Rule 9 deals with certificates and states:

**"9. Certificates.**

**i. A certificate awarded to a candidate shall show the name of the candidate, the candidate's index number, the name of the school in the case of a school candidate, and all subjects taken by the candidate in the examination with the respective codes and the grades obtained in all the subjects taken.**

**(ii) All certificates shall be issued to the headteachers and to private candidates through the Provincial Directors of Education or the District Education Officers.**

**(3) The Council may at any time withdraw a certificate for amendment or for any other reasons where it considers it necessary."**

The Applicant correctly pointed out that the gender of a candidate is not among the things that are required to appear in a KCSE certificate. The imposition of a candidate's gender mark is therefore not a requirement of the law. On this issue Ms Njenga for the KNEC submitted that the tradition of imposing a gender mark in the certificate is meant to assist in the proper identification of a candidate. It may indeed be a tradition but it is a tradition that is not backed by the rules.

Ms Njenga went ahead and contended that the Applicant has not demonstrated why he should be treated differently. In my view, the Applicant has clearly demonstrated that he is different. His unique situation ought to be put into consideration when addressing his application. His case cannot be compared to that of a married woman changing her maiden name to her husband's name. In a layman's language, the Applicant is a person with the body of a man and the mind of a woman. For him, the pull of his feminine mind-set is overwhelming. It has emerged that he at one time attempted to commit suicide because of his condition.

The plight of people with G.I.D. was succinctly captured by the Supreme Court of India in **NATIONAL LEGAL SERVICES AUTHORITY v UNION OF INDIA AND OTHERS, CIVIL ORIGINAL JURISDICTION WRIT PETITION (CIVIL) NO.400 OF 2012; WRIT PETITION (CIVIL) NO.604 OF 2013** when it stated that:

**"Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change."**

In Article 10 of our Constitution, human dignity is one of the national values and principles of governance

which must be applied in interpreting the Constitution; enacting, applying or interpreting any law; or making or implementing public policy decisions.

Article 28 of the Constitution provides that:

**“Every person has inherent dignity and the right to have that dignity respected and protected.”**

In **NATIONAL LEGAL SERVICES AUTHORITY v UNION OF INDIA AND OTHERS, CIVIL ORIGINAL JURISDICTION WRIT PETITION (CIVIL) NO.400 OF 2012; WRIT PETITION (CIVIL) NO.604 OF 2013** the Supreme Court of India observed that human dignity is intertwined with the development of a nation. In this respect the Court stated at paragraph 99:

**“Thus, the emphasis is on the development of an individual in all respects. The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity.”**

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.

The Applicant herein seeks an order of mandamus. Explaining the reach of judicial review orders, the Court of Appeal in the case of the **KENYA NATIONAL EXAMINATION COUNCIL v REPUBLIC, EXPARTE GEOFFREY GATHENJI & 9 OTHERS, Nairobi Civil Appeal No. 266 of 1996** described the purpose of an order of mandamus as follows:

**“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**

**“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”**

At paragraph 90 headed “the mandate” it is stated:

**“The order must command no more than the party against whom the application is made is**

**legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”**

**What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.....”**

The questions therefore are: whether KNEC owes a duty to the Applicant to change the name and remove the gender mark, whether the Applicant has asked KNEC to change the name and remove the gender mark and whether it has refused to do so.

As already demonstrated, the law does not require that a gender mark be imposed on a KCSE certificate. A KCSE certificate can therefore be complete without a gender mark. The Court takes judicial notice of the fact that examinations in this country are not administered based on the gender of the candidate. Marks are also not awarded based on gender. Removal of the gender mark will therefore not dilute the quality of the certificate.

According to Rule 9(3) of the Rules, KNEC may withdraw a certificate for amendment or for any other reason where it considers it necessary. It therefore has the legal backing to comply with the Applicant's request. Where it fails to do so, then this Court can issue an order of mandamus to compel it to perform the duty.

Issuance of orders will not affect the rights of any other Kenyan. The Applicant has indicated that he is willing to pay a nominal fee for the issuance of a new certificate. The respondents have not demonstrated why the orders the Applicant seek should not be issued. These are orders that will make the Applicant feel complete as a human being.

The Applicant has satisfied this Court that the orders should issue. An order of mandamus is therefore issued to compel KNEC to recall the Applicant's KCSE certificate No. 1855399 issued in the name of Ithibu Andrew Mbugua and replace the said certificate with one in the name of Audrey Mbugua Ithibu. The replacement certificate shall be without a gender mark. This should be done within 45 days from the date of this judgement and will be subject to payment of a reasonable fee, if necessary, by the Applicant.

On the issue of costs, I note that this is a novel issue and KNEC cannot be faulted for refusing to issue an amended certificate to the Applicant. In the circumstances, I order each party to meet own costs of these proceedings.

Dated, signed and delivered at Nairobi 7<sup>th</sup> day of October, 2014

**W. KORIR,**

**JUDGE OF THE HIGH COURT**



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