



# **The Kenya School of Law**

## **Advocates Training Programme**

### **2009/2010 Academic Year**

### **Moot Court Question.**



1. Richard Muasya was born with both male and female genital organs and remains so to date. He was born in Kitui District of Eastern Province.
2. Richard's medical condition is scientifically referred to as Hermaphrodite.
3. Sometime in February 2005, Richard was arrested in a village in Kitui District on suspicion of involvement in rape and robbery with violence. He was taken to Kitui Police Station.
4. While at Kitui police station, Richard was exposed to male suspects and police men and he shared cells and sanitary facilities with them.
5. Richard remained at Kitui police station pending investigations of the alleged offences before being arraigned at the Kitui Magistrates' Court where he was charged with the offences of rape and Robbery with Violence.
6. Richard entered a plea of Not Guilty and was committed to Kitui prisons to await the hearing and determination of his case. At the Kitui prisons he was subjected to a physical body search by male prison officials who realized that he had both male and female genital organs.
7. Richard was then taken before the presiding magistrate at the Kitui Magistrates' Courts who ordered that he be taken to Kitui District Hospital for purposes of verifying his gender.
8. The findings at Kitui District Hospital confirmed that indeed Richard was hermaphrodite as a result of which the count of rape was promptly abandoned by the prosecution and withdrawn.
9. Owing to the foregoing, the presiding magistrate felt pity for Richard and ordered that he should be remanded at Kitui police station where he remained through the period of the hearing and determination of the criminal case.
10. At the end of the trial, Richard was found guilty of the offence of Robbery with Violence and sentenced to hang. He is currently a convict on death row at Kamiti Main Prison, Nairobi.
11. Richard was physically examined by the Kamiti Prisons Medical Officers in compliance with rule 25(1) of the Prisons Rules who also confirmed that he was a Hermaphrodite.
12. Section 36 of the Prison Act provides that male and female prisoners should be confined in separate prisons or in separate parts of the same prison.
13. Richard cannot fit anywhere in the prisons as required by the foregoing provision of the law.

14. Rule 103(1)(a) of the Prison rules provides that a person on death row should be confined a part from other prisoners and should be under constant supervision of the prison officials.
15. Since Richard went to Kamiti, he has been placed and mixed with other inmates.
16. Kamiti Maximum Security Prison is a purely male prisoner detention facility.
17. Richard has been sharing cells, beddings and sanitary facilities with the male inmates and prison officials since he was arrested to date.
18. The Prisons Act is silent on where Hermaphrodites should be remanded or kept or handled.
19. Section 28 of the Prisons Act provides that a prison in which any female prisoner is imprisoned should have a woman prisons officer who should have the care and superintendence of the female prisoners for obvious reasons.
20. The Births and Deaths Registration Act has also failed to provide for people with gender like Richard's. Sections 2b as read with Section 7 as well as form 1 of the Schedule to the Act only refers to the male and female gender leaving out intersexuals like Richard.
21. Richard has since lost his dignity since his fundamental rights and freedoms as an individual have been grossly, constantly and continuously been abused by the police and prisons authorities.
22. Richard has been abused and exposed to mockery, ridicule, inhumane treatment and has been molested sexually by curious male inmates,
23. Richard believes that either way, he would be equally violated in the event that he was transferred to a female detention facility.

### Instructions:

- A. Richard instructs you to make an application under the constitution of the Republic of Kenya to seek substantive and interim reliefs for him against the relevant responsible officials of the Republic of Kenya. Prepare the appropriate court papers.
- B. The Republic of Kenya having been served by the papers filed and served upon Richard retains you to defend it in respect of this claim by Richard. Prepare the appropriate papers.
- C. Kituo cha Mashauri, a Non-Governmental Organization registered as such under the Non-Governmental Organizations Co-ordination Act instructs you to apply to court for its intervention as an Interested Party in these proceedings. Prepare the appropriate papers for the application for joinder and the appropriate papers in relation to the substantive applications by Richard.