

**An Examination Of Legal Recognition Perspective On The Wellbeing Of Transgender Persons In Nairobi County, Kenya**

By

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**Abstract**

The aim of this study was to examine the influence of legal recognition perspective on the wellbeing of transgender persons in Nairobi County, Kenya. The study adopted intersectionality theory to explain the legal crossroads experienced by transgender persons where the legal framework is expressed in binary gender dichotomy. Mixed methodology and the concurrent triangulation design as well as phenomenological qualitative and descriptive quantitative designs were embraced in this study. Targeted population was 1,064 transgender persons residing in Nairobi County (NASCOP 2018) as the key informants who were crucial because they had information on their experiences in the course of interaction with the law. 60 of them were sampled by snowballing method. The study also targeted 96 legal practitioners in Nairobi County purposively sampled. This category of significant others was important to the study since they had information of what they had witnessed in the course of their career. The data collection was done using 5-likert scale questionnaires for transgender persons, and a separate one for legal practitioners. Each questionnaire had some open-ended questions to capture qualitative data. The data was analysed qualitatively and quantitatively through descriptive statistics and thematic analysis approach respectively. The hypothesis was tested through the Chi-square test to show relationship and direction between the variables. Descriptive statistical parameters included percentages, frequencies and counts. By a majority score the outcome indicated that there was an association between the variables. The Chi-square calculated value at Chi critical value of 0.05 which gave averages greater than the critical value therefore the null hypothesis was rejected. Thematic approach was used to analyse qualitative data and the results confirmed existence of significant relationships between the variables. The study came up with relevant recommendations to help in addressing the issues raised in the study and more so change in policy and laws. The creation of awareness among the legal practitioners about the unique legal circumstances of transgender persons was recommended. Further research in the Republic of Kenya was also a recommendation.

**Key Words:** Kenya, Nairobi, Examination, Influence, Legal recognition, Wellbeing of Transgender

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**1.0 Introduction and Background**

Transgender phenomenon is a global issue and concern and the African region is not an exception to this reality irrespective of the diverse cultural values, religion and legal representation. This study focused on the examination of the influence of legal recognition on the wellbeing of transgender persons in Nairobi county, Kenya. As the key informants the transgender persons provided information on their experiences and views in relation to their interaction with the existing legal framework. The study also examined the peculiar experiences witnessed by legal practitioners as they make decisions in the course of their duties in the enforcement, interpretation and making of the laws vis-a vis the transgender identity phenomenon.

A transgender person is someone who claims a gender different from the one assumed by their society during the time of birth (Glaad, 2017). The term was used in 1965 to describe persons who biologically belonged to a certain sex but portrayed gender characteristics socially expected in the opposite sex irrespective of their sexual orientation (Oliven, 1965). By the 1970s, the usage of the terminology was spread by several authors (Bevan, 2014) and by the 1980s, the term transgender was accepted as a new terminology (Richard & King, 2016). The depiction included those people who wished to undergo gender transition without necessarily going through the medical sex transition (Glickman, 2013). It has been argued that the terminology assists in normalizing the phenomena as a social gender categorization (Chrisler & McCreary, 2010).

Sexual orientation and gender identity are different concepts. The former refers to the sexual attraction to another person irrespective of sex while the latter is the psychological personal sense of identification with a gender different from the one assumed at birth. Sexual orientation of an individual is not determined by their gender identity and therefore, transgender individuals have more or less the same sexual orientation diversity as the cisgender persons. They become victims of social misfit syndrome due to the fact that they have issues with their gender identity (Blanchard, 1989).

Intersex is also different from gender identity in that it is a term used to describe individuals born with unclear reproductive organs (Webster, 2021) and therefore, unlike transgender, intersex is a biological description. Nevertheless, intersex can be one of the causes that can make one a transgender person. This is where an individual is not able to identify with the gender, they had assumed at birth based on the decision makers at the time of birth, and transition to their preferred gender later in life irrespective of their sexual orientation. Transgender phenomenon is not limited to any society, culture, time or country (Whittle, 2018). Different jurisdictions in the world have dealt with transgender existence differently depending on the uniqueness of their societies and overriding social circumstances. In the

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United Kingdom, the legal protection of transgender persons has progressed over the years although history indicates that initially this was not the case. For instance, in 1970, the UK court annulled a marriage on the grounds that, April Ashley was a transgender woman at the time the marriage was conducted (Corbett vs Corbett, 1970). The legal implication of this decision was that the transgender woman lost any matrimonial rights availed to a spouse. However, since the 1990s, law reforms in UK pertaining to gender recognition and non-discrimination against transgender persons have been pivotal in protecting the rights of transgender persons.

The Equality Act of 2010 and Gender Recognition Act of 2004 were game changing legislations in this regard. In the Czech Republic, laws outlawing the maltreatment grounded on gender identity is available (Czech Republic Act No.198 of 2009). In France, the law was amended to guard unfair treatment pegged on gender non-conformity and especially in education sector (ILGA Europe, 2013). In Denmark, the law against unfair treatment based on gender identity exists. This is for instance the Danish Act on Prohibition of unequal treatment in the labour market of 1996. In the United States of America, legal protection of transgender rights is dependent on individual jurisdiction, thus, the level of legal recognition and protection varies from State to State. Nonetheless, injustice founded on gender identity can be said to be a general protection under the Constitution, 14<sup>th</sup> amendment (1868) which addresses equal protection for all USA occupants.

In South America, the legal framework pertaining to transgender rights provides a comprehensive gender identity recognition through the Gender Identity Law number 26.78 of 2012 while in Asia, the legal protection of transgender persons depends on individual countries. For instance, in Malaysia, Muslim and Christian transgender people are more vulnerable because of the religious laws (Human Rights Watch, 2016), while the Voodoo religious rules are more transgender friendly due to its traditional bias of being a home to marginalized communities (Associated Press, 2018 & Wire Reports, 2018). In Southern Asia, the history of the existence of the Hijras has made the possibility of acceptance of a third gender easier (Herdt, 2020).

In Africa, traditional gender roles pigeon-holing subdues the possibility of gender identity self-determination and as a result, transgender persons are at risk of being maligned as immoral or ungodly by the majority in their society (Katy, 2020). This is usually reflected in the existing African customary laws and by extension the written laws. This is worsened by lack of awareness of the difference between biological sex categorization, gender identity and sexual orientation. The South African constitution provides protection against discrimination and other inequalities. The transgender persons rely specifically on section 9, which states that nobody should be treated unfairly based on gender identity. For instance, as a result of such legal protection, there is no risk of dismissal from work by an employer. However, social ridicule could make a transgender person willingly quit the place of work (Samelius & Waiberg, 2020) or voluntarily discontinue education (Mavhandu & Sandy, 2020). In West Africa, Nigerian criminal law backed by religion in the northern part of Nigeria has harsh penalties against any binary gender non-conforming persons. Section 405 of the Penal Code of the law of Nigeria provides that any male charged with dressing in women clothes in public shall be imprisoned for two years or fined or both. This is a behaviour usually adopted by transgender women as they settle in their preferred gender identity dress code (Onwuegbuzie, 2018).

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In East Africa, the narrative on transgender identity like many regions in Africa is done within LGBT (Lesbian, Gay, Bisexual, Transgender). This renders the transgender issues construed with either sexual orientation or intersex depiction. Consequently, the actual uniqueness of their social and legal recognition become invisible. In Uganda, transgender persons face societal ridicule and physical violence (*Behind the Mask Magazine*, 2018). In Tanzania, the constitution does not have any provisions specifically prohibiting discrimination based on gender identity and consequently, the existing health policies for instance, deny healthcare services for all in the LGBT umbrella (Knight & Neela, 2016).

In Kenya, almost all literature related to transgender issues incorporates the other groups in the LGBT umbrella. In order to comprehend in depth, the unique legal recognition circumstances of transgender persons which may have an influence on their well being, there was a need to focus exclusively on the transgender entity. Transgender persons have unique circumstances away from the rest of the LGBT groups. This was because binary gender identity non-conformity affects access to services that others in the umbrella can access without any difficulties for example, healthcare, education, employment among others.

The few studies done on transgender issues in Kenya focused on healthcare and specifically exposure to HIV/AIDS. Harmful gender customary law values are said to be one of the transgender HIV/AIDS risks in Kenya as they expose them to violence and a decrease in services uptake (Human Rights Watch, 2016). International and domestic legal provisions prohibiting discrimination on the basis of gender are part of the existing legal framework in Kenya. For instance, article twenty-two of the International Covenant on Civil and Political Rights (ICCPR) whereby Kenya is a participant, provides that any limitations to the right to liberty of association must be extremely essential in any independent community practicing democracy. The Constitution of Kenya, 2010 vide article 27 demands for equality and non-discrimination on the basis of gender. Article 28 stipulates that every person has inherent dignity and the right to have dignity respected and protected.

The Prisons Act Cap 90 of the laws of Kenya provides for segregation of prisoners based on sex while National Gender and Equality Commission Cap. 5C gives the Commission mandate to promote gender equality and freedom from discrimination. The Employment Act Cap 226, declares and defines the fundamental rights and freedoms of employees regardless of their gender whereas Health Act 2017, stipulates that every person has the right to the highest attainable standards of healthcare irrespective of gender. Nairobi County government is governed by among other laws the Constitution of Kenya 2010 and the County Governments Act No.12 of 2012. The two legal documents provides that while performing its functions, the county government shall do so for the wellbeing of all people in the county and promotion of gender equity. While the above legal provisions seem consistent in promoting human dignity for all irrespective of gender, the existing legal framework seems to be unaware of the existence of the transgender community.

Transgender persons have often sought the legal process to be heard and to demand for protection of their rights as human beings, and recognition of their preferred gender identities. In July 2014, High Court of Kenya ordered the Non-Governmental Organizations (NGOs) to register an organization known as Transgender Education Advocacy (TEA), whose vision was to educate the society on transgender issues as well as advocate for their rights as human beings. In

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its ruling, the court stated that the refusal to do so had no legal basis and was an abuse of power (JR Miscellaneous Application 308a, 2013).

The existence of a justifiable estimated number of transgender persons in Kenya was confirmed in a survey conducted in 2018 by National AIDS and STI Control Programme (NAS COP, 2018). The survey estimated that there was an average of 4,305 transgender persons in the 34 counties mapped, whereby Nairobi County contributed 1,064 transgender persons at the time. The county represented the highest estimated number of transgender persons with 25 % of the total estimated number in Kenya. This figure gave the current study statistical evidence that the transgender persons were numerous in the county and therefore, this was the best location to conduct the study.

Whereas the survey confirmed the existence of transgender persons in Nairobi County, it only focused on mapping the size population vulnerable to HIV/AIDS but did not interrogate the influence of legal recognition perspective on the well-being of transgender persons in the county. The prosperity of a person is anchored on inter alia, legal acceptance of the existence of an individual's gender identity. As stated above the discourse in Kenya has focused on transgender community as a part of the LGBT umbrella. This overshadows the unique circumstances faced by transgender persons in Nairobi County, which are different from the rest of the LGBT community. There was therefore, a need to do further investigations regarding the influence of legal perspective on the wellbeing of transgender persons in Nairobi county and come up with relevant recommendations. From the current study, it became clear that proper laws and policies have not been legislated to enable the transgender people enjoy lives like other members of the society. Additionally, the application of the existing laws is unfairly implemented against them. Moreover, majority of the legal practitioners supported that there was a need to create awareness among them as the enforcers, interpreters and makers of the law.

## **2.0 Statement of the Problem**

Article 27 (1) (2) of the Constitution of Kenya 2010 provides the highest legal protection for the human rights of all residents in the republic of Kenya including Nairobi county. This puts an obligation on all members of the society which includes the legal practitioners in Nairobi county to apply the constitutional protection provisions in safeguarding the wellbeing of all Nairobi residents. This obligation includes creation of a working legal framework and legal institutions in order to cultivate a conducive legal environment to enhance the wellbeing of every person including the transgender persons.

The reality is that in a society where the existing laws and related institutions largely operated within the binary gender dichotomy, transgender persons were prejudiced against and they encountered a violation of their inherent rights, thus, affecting their wellbeing. The existence of a justifiable estimated number of transgender persons in Nairobi county was confirmed in a survey conducted in 2018 by National AIDS and STI Control Programme. This had confirmed the magnitude and reality of the problem which could not be ignored.

Moreover, transgender persons had often invoked the legal processes to demand the legal protection of their rights as human beings, and legal recognition of their preferred gender identities. For instance, in 2013 a transgender woman invoked the court judicial review process to compel the Kenya National Examination Council to affect a name change and edit the gender

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mark to fit her preferred gender identity status (JR. case no.147 of 2013). This was an indication that the existing laws and policies were not wake to transgender persons predicament. The situation needed to be addressed otherwise such individuals would continue to suffer discriminatory legislation application, discriminatory legal protection, legal exclusion incidences and inaccessibility to legal justice. For these reasons, the study was crucial in order to examine the influence of legal recognition perspective on the wellbeing of transgender persons in Nairobi County, Kenya.

### **3.0 Research Objectives:**

#### **3.1 The main research objective was:**

To examine the influence of legal recognition perspective on the wellbeing of transgender persons in Nairobi County, Kenya

#### **3.2 The Specific objectives were:**

- i To examine the influence of discriminatory legislation application tendencies on the wellbeing of transgender persons in Nairobi County, Kenya
- ii To determine the influence discriminatory legal protection occurrences on the wellbeing of transgender persons in Nairobi County, Kenya
- iii To assess the influence of legal exclusion incidences of on the wellbeing of transgender persons in Nairobi County, Kenya
- iv To establish the influence of inaccessibility to legal justice occurrences on the wellbeing of transgender persons in Nairobi County, Kenya

### **4.0 Research Question**

The research question which guided the study was:

In what ways does legal recognition perspective influence the wellbeing of transgender persons in Nairobi County, Kenya?

### **5.0 Research Hypothesis**

The research hypothesis tested in this study was:

*There is no significant relationship between legal recognition perspective and the wellbeing of transgender persons in Nairobi County, Kenya.*

### **6.0 Significance of the Study**

The findings of this study might profit the law and policy makers, law and policy interpreters, and enforcers to understand the actual unique legal circumstances of transgender persons. There existed a knowledge gap since not much had been done in this area of study. The key beneficiaries of the findings of this study might be the transgender people. Since the law and policy makers and implementors might be enlightened on who the transgender persons are away from the sexual orientation narrative, and their unique circumstances, the level of adherence to legal rights and legal provision will be increased, thus increasing the opportunity for a healthy wellbeing. The findings of this research might also open ways for more scientifically controlled

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studies hence producing additional scholarly contribution. Researchers in this field of study might benefit as the study added literature in the field of research.

## **7.0 Reviewed Literature**

Legal recognition is the formal acknowledgment that a certain status exists and therefore should be availed protection by the law (Black's Law Dictionary, 1999). Such acknowledgment is crucial to the enjoyment of human rights in any community. Lack of legal recognition for transgender persons in various jurisdictions has the effect of denying human rights to transgender persons. The situation becomes more complicated when the physical appearance does not match the details on the identity documents, for instance travel or academic documents (Human Rights Watch, 2016).

Furthermore, the movement of transgender persons from one point to another might be difficult and disgracing as their travelling documents might not match their identity legally. The accusations range from fraud, impersonation and other humiliating accusations (Human Rights Watch, 2016). Globally, various countries in the world have made legislations by passing laws whose effect is to legally allow the law full existence of another gender, that is, transgender. The 2002 UK case of *Goodwin vs United Kingdom* laid a foundation for legal reform related to gender identity in UK. In this case, a transgender woman had taken the government to the European Court of Human Rights, citing discrimination regarding her pension. She argued that her pension should have been dealt with based on terms laid out for women and therefore more favourable, but instead the government had used the male criteria based on her birth certificate. Although she did not win the case, the UK government was obliged by the court to amend its laws and accommodate transgender persons. This caused the United Kingdom to pass laws such that the transgender persons could legally alter gender mark in their documents.

The UK Gender Recognition Act, 2004 allows transgender people to change gender marks on their legal documents to reflect their preferred gender, while the UK Partnerships Act, 2004 assists them to enter into lawful partnerships without the rigidity of other laws. The Ireland Gender Recognition Act, 2015 makes an allowance for adult transgender people to insert their preferred gender identity mark in legal documents without going through any prior medical or psychiatric clearance. Malta state enacted a similar law cited as Maltese Gender identity, Gender expression and Sex Characteristics Act, 2015. The legislation recognizes a citizen's right to the recognition of their preferred gender and development in accordance to their gender identity. In 2014 in India, the Supreme court made a declaration that transgender status should be recognized as a third gender (*National Legal Services Authority V. Union of India*, 2013). The plaintiff had sought the prayer for this declaration in this suit citing the painful experiences the transgender community had undergone in the country.

In Malaysia, Justice James Foong Jnr. ordered the registration authority to amend the legal documents of a transsexual woman. She had undergone sex reassignment procedure in Thailand. Her petition relied on the fifth article of the Malaysian Constitution, which protected personal liberty rights (*Re JG, JG v Pengarah* 2016). In South America, Argentina has legal protection of the transgender persons (Pitchon, 2018). The Gender Identity Law No. 26.78 provides for the legal protection of a person's preferred gender identity and legal provision for the registration of their documents with the preferred gender mark. In United States of America,

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a federal legal development was the enactment of the Shepard and Byrd Hate Crimes Prevention Act of 2009. The federal definition of a hatred crime has put transgender victims in its protection. Furthermore, some states already have in place legal framework recognizing non-binary status. A case in point is Oregon, which did so in 2016 (Hart, 2016).

The above are a few of examples of best practice in the progress of recognizing transgender as a legal gender identity. However, literature shows that the African region has barely followed suit. South Africa is one country in Africa which has advanced in her legal protection of preferred gender identity. The passing of the South African Alteration of Sex Status and Sex Descriptor Act 49 of 2003 which provided for sex change was a legal jump for transgender people willing to go through sex reassignment. Nevertheless, the law can only be gainful where social attitudes are supportive of the enforcement of such laws. In South Africa, social discrimination may be a cause for the transgender peoples' ill being especially in employment (Samelius & Waiberg, 2020) and in education progress (Mavhandu & Sandy, 2015) rather than lack of legal recognition.

In Kenya, social structures and legal framework are a reflection of religious and cultural values which acknowledge only a binary gender categorization. This became evident in the national population census conducted by the Kenya National Bureau (KNBS) of Statistics in 2019 whereby in the classification of gender, transgender category was not recognized as a gender entity. Statistics Act of 2006 provides for the establishment of KNBS as the core agency of the government of Kenya, mandated to gather and analyze demographic statistical data. This information guides the government in the social, economic and political planning. This means that any data acknowledged by KNBS becomes official information which can be used by the government to make decisions for instance national and county governments' gender policies. It is also relied on by government agencies to take necessary actions.

For instance, the Law Reform Commission as provided for by the Law Reform Commission Act, has the responsibility of advising on necessary legal reform in Kenya. The commission may not be in a position to advise on any law reform for the benefit of the transgender persons if there is no official statistical data available. The legal basis for the protection against discrimination on the basis of gender is article 27 of the Constitution of Kenya 2010. However, the article has not expressly given legal recognition to transgender status, thus, the interpretation is often done to mean men or women. According to a report by the Minority Women in Action, AFRA-Kenya, Kenya Campus Lasses Association and the National Gay and Lesbian Human Rights Commission in 2015, the law in Kenya especially the Penal Code criminalizes anything associated with gender non conformity. Such laws are relied on in prohibiting advocacy and programming of transgender issues in Kenya as well as justifying discrimination and violence.

The limiting legal framework increases the vulnerability of transgender persons as it lacks explicit legal protection for this population. This therefore acquiesces violence and perpetuates stigma and ignorance around transgender persons. The constitution which is superior law provides for protection of public and peoples' rights. Although transgender individuals are not directly stated, the constitution provides that the nationwide standards and ideologies of governing include among others, peoples' self-respect, fairness, societal fairness, peoples' rights and fortification of the downgraded population (articles 2 & 10). Further, article 19, says that the



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objective of identifying and defending peoples' rights and basic liberties is to uphold the self-respect of persons and societies and to enhance societal fairness and the understanding of the potential of all people.

The inadequacy of legal recognition in Kenya hinders accessibility to remedy against criminalities, which is a substantial issue for a people prone to astonishingly high rate of hostility. Having identity that does not reflect their physical appearance can mean that the abuse is worse when trying to report the crime to the authorities (Human Rights Watch (2016). In regard to prison and police custody, the law in Kenya is explicit that men and women must be segregated (Prisons Act Cap 90 and National Service Act). The main objective of the law is to provide security and privacy of inmates, and thus, respect for human dignity as provided by the constitution of Kenya 2010. However, the law does not take cognizance of the existence of transgender category in this protection, yet, they are prone to arrest due to discrepancies on their identity documents viz-a-viz their physical appearance. Instead, the segregation is based on sex.

The National Gender and Equality Commission is established under CAP 5C of the laws of Kenya, to promote gender equality and freedom from discrimination in order to actualize article 27 of the constitution. However, the definition of its gender scope is explicitly men and women and no room for the transgender community. As a result of this non-legal recognition by the said Act of parliament, the transgender community may not benefit from this law. This is irrespective of the fact that section 2 of the statute provides that marginalized gender categories include groups who are disadvantaged by discrimination on one or more of the grounds in Article 27 of the constitution. (Divan, Cortez, *et al.* 2016) notes that human rights of transgender people may be protected by a variety of worldwide and local machineries. The Registration of Births and Deaths Act Cap 149 of the laws of Kenya is limited in scope and does not allow for any amendment for anyone suffering gender identity conflict later on in life (Wamaita, 2017). This meant that the identity documents of transgender persons usually do not match their physical appearance and therefore they are exposed to police harassment.

## **8.0 Theoretical framework**

### **8.1 Intersectionality Theory**

Intersectionality theory is a legal theory based on the feminist work of Kimberly Crenshaw in the year 1989 (Crenshaw, 1989). She used the theory to critically analyse the oppression of black women arguing that they suffered discrimination within an intersection of two realities that is as women as well as black women. She was of the opinion that the existing law protecting women against oppression and discrimination was race neutral yet, black women suffered unique form of discrimination by the virtue of their colour. Although the theory was used to interrogate race-based gender discrimination, it is able to anchor the legal component of the independent variable in this study. Law generally categorises gender realities and problems in a dichotomous manner. Consequently, laws that outlaw discrimination on the basis of gender end up offering significant protection to the binary gender.

For instance, Article 27 of the Constitution of Kenya and related implementation statutes provides for non-discrimination on the basis of sex. Furthermore, the legal framework in Kenya definition of gender is binary approach, that is, man and woman which is a dichotomous in nature. However, it is likely that a person may belong to a particular sex but due to binary gender

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identity disorder/incongruence, identifies with a socially non-conforming gender identity as envisaged by the Kenya legal framework. In the process, such a person is caught in a legal intersection of sex identity and gender identity and consequently does not benefit from the protection and enforcement of the law. The transgender people's gender identity challenge therefore emerges from their intersecting realities and lived experiences. In addition, they also experience any other legal discrimination which is likely to be experienced by all individuals in their preferred gender. As argued by (Carastathis, 2014), the nature of oppression and discrimination is multi-layered and legal doctrines should not address the element of gender-based discrimination using a cast on stone approach.

Accordingly, intersectionality added theoretical value to the analysis of transgender oppression and discrimination by focusing the study to diverse ways and means through which the injustice could be generated and sustained. Intersectionality theory attempted to bring out visible phenomenological experiences of transgender people as a result of multiple crossings between the law and transgender gender identity realities. The intersectionality theory therefore, anchored the legal component of the independent variable.

## **9.0 Research Methodology**

The research methodology was mixed methodology approach. Numerical and non-numerical data were collected simultaneously. Mixed study is where researchers put quantitative and qualitative approaches concurrently in one study (Johnson *et al.*, 2007). The study adopted *concurrent triangulation design* using i) phenomenology qualitative design and ii) descriptive quantitative design. The concurrent triangulation design was necessary to compare and contrast both numerical and non-numerical facts; triangulation enabled the mixing of data. The research was conducted in Nairobi County, Kenya. The choice of location was justified by the existence of estimated number of 1,064 transgender persons in in the county as per the survey conducted in 2018.

The study targeted transgender persons in Nairobi County (NAS COP SURVEY, 2018) who were the key informants of the study. Other study respondents were significant-others study population which had crucial information to the study and therefore they added value to the research. They included legal practitioners based in Nairobi county. This category was necessary since the respondents had information on legal recognition perspective regarding transgender persons.

The researcher sampled sixty (60) transgender persons living in Nairobi County using the snowballing method. This sampling method was preferred due to the hidden nature of this population and the scarcity of information about them. The sample size for snowballing was guided by data saturation (Fusch & Ness, 2015) and the criterion of informational redundancy (Guba, & Lincoln, 1985). Furthermore, in phenomenology studies the recommended sample size is between 50-60 (Britten, 1995) thus, justifying the choice of 60 sampled key informants. The study sampled 96 legal practitioners in Nairobi county using purposive sampling method. This method was preferred because the participants were easily identifiable but were not found in the same place.

The study adopted 5-Likert scale questionnaires for transgender persons. The questionnaire was designed to gather information of the experiences of the key informants in

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regard to how they had experienced legal perspective in Nairobi county and whether there was a need to address any issues . In regard to the legal practitioners, the questionnaire was designed to gather information on whether the respondents had knowledge on the legal recognition perspective being experienced by transgender persons in the course of interaction with the legal framework and what was their position regarding the perspective. The data gathered was analysed quantitatively and qualitatively. The quantitative data analysis was done using descriptive statistics which included frequency distribution, counts and percentages. Inferential statistics was used to test the study hypothesis using Chi-square test based on critical value of 0.05. Qualitative data was analysed using thematic analysis approach.

### **10.0 Research Findings**

The data was analyzed at three levels namely: descriptive, inferential (Chi-square) statistics and thematic analysis. Subsequently, there was the mixing and explanation of the data collected and analyzed from these three levels for better understanding of the problem under investigation. Out of the 60 key informants sampled,42 responded to the questionnaire, On the other hand,66 out of the possible 96 practitioners responded to the questionnaire.

#### **10.1 Descriptive Statistical analysis for Transgender Person**

The research findings in regard to the first specific objective indicated that there was a high degree of discriminatory legislation and application. The respondents who agreed were 41 (97.62 %) and only one was undecided 1(2.38 %) In regard to the second specific objective, the respondents who agreed that they had experienced discriminatory legal protection were 39 (92.86 %). The undecided respondents and those who disagreed attracted only 3 (7.14 %) which was an insignificant figure. This was an indication that the majority of the respondents accepted with a strong majority that they had at one time experienced unfair and discriminatory legal protection due to their gender identity status.

Similarly, legal exclusion occurrences were experienced by a high number of the respondents, thereby, resulting to denial of their legal rights and provision. The respondents who agreed were 42 (100 %) being a hundred percent of the responses. The study established that the responses from the respondents indicated that transgender persons had experienced incidents of failure to access legal justice. This was detrimental to their legal rights and justice administration. To support the above, according to the outcome of the analysis related to the fourth specific objective, 42 (100 %) agreed scoring a hundred percent

#### **10.2 Descriptive Statistical analysis for the legal practitioners**

Majority of the respondents indicated that they had witnessed a high degree of discriminatory legislation and application amongst the transgender persons which was likely to reduce the level of increased adherence to their legal rights and provision. In support of this view, 44(66.67%) agreed that they had witnessed discriminatory legislation and application in the course of their duties. The total number of those who disagreed plus those undecideds was 22(33.33).The latter could not be ignored since it was a significant finding and the respondents had something valuable to communicate.

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The findings of the data collected on the second specific objective indicated by a majority that they had witnessed discriminatory legal protection against transgender persons because of their transgender identity. Out of the total respondents interviewed, 46(69.70%) supported this view. However the total undecided and disagreed was 20(30.30%). The latter could not be ignored being over thirty percent of the legal practitioners

Similarly, the legal practitioners had witnessed discriminatory legal exclusion incidents against transgender persons. In support of these sentiments, 48 (72.73 %) of the respondents agreed, while the total number who disagreed and were undecided was 18 (9 (27.73%). The latter two categories combined was more than twenty seven percent which was a significant figure. The results from the analysis of the data collected in regard to the fourth objective indicated that in the view of the legal practitioners, the transgender persons faced problems in accessing legal justice. This influenced the level of increased adherence to legal rights and provision . Those who agreed were 40 (60.61%), while those who had a dissenting response plus the respondents who were undecided were 26(39.39%). The combination of the last two categories was very close to forty percent of the respondents, thus a significant outcome and could not be ignored.

### **10.3 Inferential Statistics analysis**

The researcher conducted Chi-square test to test the hypothesis in order to determine whether there was any significant relationship between the variables . The average result was 0.9276. This outcome was greater than  $\alpha$  value which was **0.05**. The null hypothesis was therefore rejected. The Chi-square test showed that there was a significant association between legal recognition perspective and the wellbeing of transgender persons.

### **10.4 Thematic Analysis**

Legal practitioners and the key informants responded to the open-ended questions. This assisted the study to collect qualitative data. The first question was seeking detailed explanations to the responses that generated the quantitative data analysed above. The key informants explained that the reasons for their responses was because they had experienced injustice in the administration of the existing laws and policies which were binary gendered without special attention to their predicament as a result of their unique gender identity status. Those who decided to transition to their preferred gender after years of living in the gender assumed at birth had a complicated time in doing so. Some had acquired their preferred names and gender prefix and consequently this had created a discrepancy in their documents. Their physical appearance also did not reflect the one captured in the documents acquired before transition. They lamented that there was still no law or policy to guide gender transition. The intersex transgender respondents were in particular bitter with the situation. They argued that it is the society that had assumed the wrong gender for them at birth yet the same society was unwilling to come up with laws and policies to help them to revert to the correct gender identity and rectify the wrong committed against them. One transgender person said,

...do not expect legal protection for the transgenders from the legal system we have in this country today...

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The legal practitioners' responses indicated that some of them were aware that the existing legal framework was prejudicial against transgender persons. According to their sentiments, discrimination in legal matters was also evident. The respondents dealt with the wellbeing of the community including the transgender persons and at times they had dilemma on how to deal with transgender persons because of their what they termed as "conflicting or unclear gender identity". One legal practitioner said:

...I have been dealing with the welfare of all members of this community. I have come across very few individuals who are known to be transgenders in this community that I serve. It is true that there is no law that I know of that favours the transgenders adequately. Indeed, nobody thinks of them in terms of what normal people enjoy in legal justice. The question has been, are we dealing with a man or a woman? The laws we have in this community I am working in deal with men and women. The transgenders are not included since they do not belong to either gender. We do not seem to have specific laws which deal with the transgenders at the moment...

Some of the legal practitioners were of the view that there was no legal protection on the part of transgender persons. Since the laws did not specifically provide for the possibility of a third gender, it was difficult for them to make clear decisions when in the course of their duties they had to deal with such an individual under the realm of the current legal provisions. One legal practitioner confirmed this notion by asking:

...once the law demand that such a person need to be put into custody, do you place them in a men or women cell, or for that matter which prison since the law in this country segregates these facilities based on males or females...

The second question sought the information on whether there were any recommendations to improve on the situation. The majority of the key informants were of the view that there was need for law reform. Some legal practitioners who agreed with the key informants were of the view that there was an urgent need for law and policy reform which had gender flexibility. They concurred with the key informants that from their experience, the matters related to law and transgender persons was very complicated and that most probably something should be done. One of the legal practitioners lamented,

...I have a case whereby a young man in this community married a girl through a customary law ceremony where no documents were produced. During the honey moon, the man discovered that the "bride" was actually a transgender woman but had not disclosed to the man during their relationship. The couple separated the same day. The groom asked me for legal advice on the status of the marriage and unfortunately, I had to tell him the truth that in law, the marriage vows are not legally binding and. therefore no legal rights were accrued. That since the

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ceremony had been conducted in the church, nullification of the union could only be sought in a court of law which requires money. In my career as a civil servant, I have come across several transgender persons due to the nature of my work. However, I have not been able to apply any law when dealing with such people. The legal system in this country has no place for the transgenders...

It became evident that there was a need for legal reform intervention to improve on justice administration pertaining the transgender community. However, some legal practitioners were hesitant to agree with this direction. They felt that this might not be possible unless there was a change in the society mindset about the issues of gender identity away from the issues of other LGBT categories. They felt that because of the societal belief that the transgender persons are same as the gays, lesbians and bisexuals, it was difficult to even suggest any law reform without a harsh reaction against the lawmakers or judiciary. In this regard one of the legal practitioners said,

...our African culture does not believe, acknowledge or even understand this gender identity madness. Many of us in society just know “ni mambo ya mashoga”(homosexuality things”. Some of us in politics or judiciary can suffer a harsh backlash from the society. As you are aware, politicians will only support what the people want and it doesn't matter what your personal thoughts are. So my suggestion is that society be sensitised on these things...

The thematic analysis done indicated respondents in both categories were aware that there existed a legal gap in legislation and application of existing laws. They also appreciated the harsh realities of any attempt on law reform in favour of transgender persons.

### **11.0 Research Findings Discussions**

The outcome of the descriptive analysis of the responses of the key informants indicated that the respondents agreed to all the legal recognition perspective indicators with an overwhelming majority of an average of 97.25%. Being the key informants, the information from them was deemed as valid and weighty as they admitted to have experienced the indicators as transgender persons. This position was further confirmed by the legal practitioners who were the significant others in the study by a majority average of 67.42%. Their views were crucial in that they are the law makers, interpreters of existing laws and policies and or enforcers of laws and policies. In these capacities they had interacted with the legal framework and its impact on the transgender persons and consequently they added value to the study. However, it was noted that the rate of agreement was weak since it was further tainted by a significant number of the respondents who either negated or did not give opinion on the various indicators. Nevertheless, this could have been occasioned by lack of information on the actual transgender identity or they might have not come across transgender cases in their legal career. Nevertheless, the views of the key informants backed by a majority of the significant others was sufficient enough to conclude that there was an association between legal recognition perspective and the well-being of the transgender persons. Moreover, the rejection of the null hypothesis acknowledged this

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relationship. The thematic approach analysis further produced in depth views by both the key informants and the significant others. The reported views and observations explained in details that there existed legal gaps.

The findings had been echoed by other scholarly writing on legal recognition perspective. For instance, it was argued that the law related to registration of births and deaths in Kenya is quite rigid (Wamaitha, 2017)

### **12.0 Conclusion of the Study**

The conclusions of the study were based on the findings of the study in regard to the influence of legal recognition perspective on the wellbeing of transgender persons. The study concluded that discriminatory legislation and application, legal exclusion, failure to have access of legal justice, lack of legal protection and provisions all existed to the detriment of the wellbeing of transgender persons. This called for some intervention by relevant stake holders.

### **13.0 Recommendations**

Grounded on the study results, recommendations were done as follows:-

- a) Recommendations for purpose of practice:  
The government and non-governmental organizations should come up with strategies for educating law makers, law enforcers and judiciary officers on the actual legal circumstances faced by the transgender persons which are different from the rest of the LGBT spectrum
- b) Recommendations for Policy:  
Legal practitioners should address the existing law and policy gaps to address the unique circumstances of transgender community and especially in regard to their gender identity legal recognition
- c) Recommendation for further research:
  - i. Since the study measured views from particular participants, another study should be conducted using different participants
  - ii. An examination of the legal issues which have influence on the wellbeing of transgender persons in the republic of Kenya should be conducted in order to get an actual national outcome

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