

## POCKET PARALEGAL RESOURCE MANUAL

### KEY TERMS

**Crime-** an act committed or omitted, in violation of a public law, either forbidding or commanding it; a breach or violation of some public right or duty due to a whole community, considered as a community.

**Criminal Procedure Code-**An Act of Parliament outlining the procedure to be followed in criminal cases

**NGLHRC-** National Gay and Lesbian Human Rights Commission: a non-governmental organization fighting for the equal rights of all people, specifically, the recognition and protection of the human rights of sexual minorities in Kenya.

**LGBTIQ-** Lesbian, Gay, Bisexual, Transgender, Intersex, Queer or Questioning

**Paralegal-** An individual who is not a lawyer but who works in the legal profession and engages in various educative and supportive tasks such as training lay men in basic knowledge of the law, sometimes as a form of community based activism, and, assisting lawyers in all aspects of the practice of law.

**Paralegal Resource Manual-** A model booklet for reference for paralegals. A comprehensive simplified guiding framework that outlines the rights of the people, duties and responsibilities of the government, obligations of the community to the state, created to educate and thus empower LGBTIQSOGIE (queer) persons in Kenya. The Manual thus aims to bolster the educational and rights awareness mandate of the NGLHRC through empowerment by knowledge.

**Strategic Impact Litigation-** A method of securing rights for LGBTQI persons by applying current laws in Kenya that provide for the fundamental, inherent human rights of all people. By challenging human rights abuses and in particular, discrimination that the LGBTIQ community experience in different courts, the legal jurisprudence on queer human rights develops and grows

**The Bill of Rights-**a formal declaration of the legal and civil rights of the citizens of any state, country, federation, enshrined in the supreme law of the land

**The United Nations-** An intergovernmental organization founded in 1945 currently made up of 193 member states to maintain international peace and security, achieve international cooperation in solving international problems and in promoting, encourage respect for human rights and for fundamental freedoms for all without distinction and to be a centre for harmonizing the actions of nations in the attainment of these common ends.

**The United Nations General Assembly-** The main deliberative, policy making and representative organ of the UN; all member states are represented in the General Assembly

**The International Bill of Rights-** the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These treaties are widely recognised as delineating rights that cover and enlarge most of the rights

recognized under the UDHR and, thereby, protect nearly all the basic values cherished by all states and every human society.

**The Constitution-** the Supreme law of the land; the fundamental set of laws by which Kenya is governed.

**The Penal Code of Kenya-** A code outlining crimes, offences and their punishments

**The Sexual Offences Act-**An Act of Parliament to make provisions about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sex acts and for connected purposes.

**Offence-** An act, attempt or omission punishable by law.

**Offender-** A person who commits an illegal act.

**Precedents-** A previous case or legal decision that must be followed in subsequent similar cases.

**Prostitution-** The practice or occupation of engaging in sexual activity with someone for payment

**Human Rights-** Rights inherent to all human beings, that are absolute, universal and indivisible. They exist regardless of nationality, place of residence, sex, sexual orientation, national or ethnic origin, race, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated and interdependent.

**Civil and Political Rights-**civil rights are the rights that generally restrict the powers of the government in respect of actions affecting the individual and his/her autonomy such as the right to life and the right to privacy while political rights confer an opportunity upon people to contribute to the determination of laws and participate in government.

**Social, Economic and Cultural Rights** –are human rights concerning the basic social and economic conditions needed to live a life of dignity and freedom, relating to work and workers' rights, education, food and water, health, housing, healthy environment, social security and culture

**Arrest-** using legal authority to deprive a person of his or her freedom of movement.

**Arrest Warrant-** a document issued by a judge or magistrate that authorizes the police to take someone accused of a crime into custody.

**Miranda Warning-** Explanation of rights that must be given before any custodial interrogation, stemming largely from the Fifth Amendment privilege against self-incrimination. The person detained and interrogated must be made aware of the right to remain silent, the right to consult with an attorney and have the attorney present during questioning, and the right to have an attorney appointed if indigent.

**Bail-** An agreement between an accused person or his/her sureties and the court that the accused person will attend court when required, and that should the accused person abscond, in addition to the court issuing warrants of arrest, a sum of money or property directed by the court to be deposited, will be forfeited to the court.

**Bond-** An undertaking, with or without sureties or security, entered into by an accused person in custody under which he or she binds him or herself to comply with the conditions of the

undertaking and if in default of such compliance to pay the amount of bail or other sum fixed in the bond.

**Evidence-** That which is used to prove facts in a court of law. Can be oral, documentary or physical items such as a knife used in a crime

**Primary Evidence-** is the best available substantiation of the existence of an object because it is the actual item

**Secondary Evidence** – it is a copy of, or substitute for the original

**Pre-trial Detention-** The confinement of arrested and accused persons in custody pending the investigation, hearing and determination of their cases.

**Pre-trial Detainees-** Accused persons who have been formally charged and are awaiting the commencement of their trials; accused persons whose trials have begun but have yet to come to a conclusion; persons who have been convicted by a court of first instance but who have appealed against their sentences or are within the statutory limits of doing so.

**Remandee-** An accused person detained in a prison pending the determination of his or her case.

**Security-** A sum of money pledged in exchange for the release of an arrested or accused person as a guarantee of that person's appearance for trial.

**Surety-** A person who undertakes to ensure that an accused person will appear in court and abide by bail conditions. The surety puts up security, such as money or title to a property, which can be forfeited to the court if the accused person fails to appear in court.

**Writ of Habeus Corpus-** an order by the court to 'produce the body' to a person or agency holding someone in custody to bring the individual to the court and to show the reason for that persons detention

**Victim** – Is a person harmed by criminal acts or omission.

**Criminal intent** - The intent to commit a crime: malice, as evidenced by a criminal act

**The Superior courts-** these are the Supreme Court, Court of Appeal, High Court, an Employment and labour relations court and a court to hear matters concerning the environment, and the Use of, Occupation of and Title to Land

**The Inferior Courts-** These are the Magistrates' Court, Khadi's Courts, Court Martial and any other court or local Tribunal, established by an Act of Parliament

**Appeal-** to apply to a higher court for a reversal of the decision of the lower court

**Original Jurisdiction-** the power of a court to hear a case for the first time

**Appellate Jurisdiction-** the power of a higher court to review a lower court's decision and either reverse it or uphold it

**Quasi-Judicial body-** an entity such as an arbitrator or tribunal board, generally of a public administrative agency, which has powers and procedures resembling those of a court of law or judge and is obliged to investigate and ascertain facts and draw conclusions from them as the foundation for official actions

**Kenya National Commission on Human Rights** - a quasi-judicial body established by article 59 of the constitution that monitors government institutions, carries out investigations on alleged human rights violations and in appropriate cases provides redress, researches and monitors the compliance of human rights norms and standards, facilitates training, campaigns and advocacy on human rights as well as collaborates with other stakeholders in Kenya.

**Kenya National Gender and Equality Commission-** a quasi-judicial body established to promote gender equality and freedom from discrimination

## Q & A

### **WHAT DOES THE NGLHRC DO?**

NGLHRC's mandate is 90% legal representation and documentation – meaning it is an organization that aims to provide strategic impact litigation that is in the best interests of LGBTIQ persons around the country.

NGLHRC aims to challenge all the human rights abuses and in particular, discrimination that the LGBTIQ community experiences at different courts in order to develop the legal jurisprudence on queer human rights.

The ultimate goal is to pursue decriminalization of homosexuality and secure equal treatment of all persons as enshrined in Article 27 of the Constitution which provides that:

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
- (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.
- (7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

### **WHAT IS THE IMPORTANCE OF THE PARALEGAL RESOURCE GUIDE?**

To date, there remains a visible gap in the rights education of LGBTIQ persons within the different communities in Kenya. NGLHRC is limited in its capacity to cater to all queer persons seeking knowledge, protection and advice on various rights violations occasioned against them.

The resource guide applies a grassroots approach by utilizing community based activists, training them as paralegals and having them disseminate the much needed information and educate the queer persons in their communities so as to improve the quality of life of the community and expand their knowledge thereof. At present, NGLHRC has trained almost 280 paralegal around the country

## **WHAT IS THE ROLE OF A PARALEGAL?**

The role of a paralegal includes but is not limited to:-

- a) Give free legal advice.
- b) Educate people about their legal rights and how to enforce them.
- c) Refer people to NGLHRC when the issue is complicated and requires a lawyer's indulgence
- d) Help prepare people for formal legal procedures, such as what to expect in a court case.
- e) Act as a link between communities and lawyers, and assist with taking statements, interpreting and following up cases.
- f) Help sort out problems in a community, and problems with authorities through mediation and negotiation.
- g) Provide court support for people taking on formal legal challenges.
- h) Mobilize and advise members of the community for collective action to solve the problems that they are faced with.

## **WHAT IS THE LEGAL FRAMEWORK THAT OUTLINES MY RIGHTS?**

Human rights are provided for both in international human rights law, regional and national, Kenyan law. They are used in creating and defining the standards of human dignity and equality in treatment that we must adhere to and that we are entitled to, in our everyday lives. Hierarchically speaking, the Constitution is the supreme law of the land and before courts, the national laws of Kenya take precedence over regional or international instruments. However, these instruments may be cited to support arguments and before international or regional courts, they are relied on primarily.

### **International Framework**

International law finds legitimacy as applicable law in Kenya under article 2 of the constitution which provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

The International Bill of Rights is the legal framework that covers and expands on human rights in the international sphere. It is comprised of:

The Universal Declaration of Human Rights- A non-binding statement proclaimed by the United Nations General Assembly that recognizes the rights that nations must aspire to have their citizens realize. It was created as a common standard following the atrocities of the Second World War and the need to not have history repeat itself.

The rights which were enshrined in the Declaration were transformed into legally binding obligations through the negotiation of multiple treaties. These primarily are:

The International Covenant for Civil and Political Rights (ICCPR) - states that it is the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms. These rights include the right to life, prohibition of torture, cruel, inhuman or degrading treatment or punishment or medical/scientific experimentation without consent, freedom from slavery, the right to liberty and security of the

person (as such no one shall be subjected to arbitrary arrest and detention), the right to a fair and public hearing by a competent, independent and impartial tribunal, right to recognition before the law, the right to privacy, the right to freedom of religion, conscience and thought, the right to peaceful assembly, freedom of association, protection of the family and equality of all persons before the law entitled without any discrimination to the equal protection of the law. The International Covenant on Economic, Social and Cultural Rights (ICESCR) which commits its parties to work toward the granting of economic, social and cultural rights (ESCR) to the non-self-governing and Trust territories and individuals, including labour rights such as the right to work, the right to health, education and an adequate standard of living. Regional charters to which Kenya is a signatory also form binding law. Such treaties include the African Charter on Human and People's rights.

## **National framework**

The Bill of Rights is enshrined under part 4 of the constitution of Kenya.

It recognizes and protects human rights and fundamental freedoms for the purpose of the preservation of dignity of individuals and communities as well as the promotion of social justice and the realization of the potential of all human beings.

Under article 21 of the Constitution the state has an obligation to protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

The Bill of rights is enforced through the right of every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

## **WHAT ARE MY RIGHTS AS GUARANTEED IN THE LAW?**

### **1. The Right to Life**

Article 26 of the Constitution

Article 6 of the ICCPR

Article 4 of the African Charter on Human and People's Rights

A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law. Crimes that are punishable by death are capital crimes which include treason and murder.

### **2. Equality and Freedom of Discrimination**

Article 27 of the constitution

Article 26 of the ICCPR

Article 2 of the African Charter on Human and People's Rights

Every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Neither the ICCPR nor the Constitution expressly mention sexual orientation as a protected category from discrimination. However, sex has been interpreted in previous cases to expand to sexual orientation in several cases before the international courts such as the European Court of Human Rights in the landmark case of *Dudgeon v UK*. Here, the European Court of Human

Rights ruled that it was a violation of human rights to discriminate based on sexual orientation and, therefore, was against the European Convention on Human Rights under article 14 on prohibition from discrimination despite not expressly mentioning sexual minorities as a protected class.

### **3. Human Dignity**

Article 28 of the Constitution

Article 5 of the African Charter on Human and People's rights

Preamble of the ICCPR, article 10

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

### **4. Freedom and Security of the Person**

Article 29 of the Constitution

Article 6 of the African Charter on Human and People's rights

Article 9 of the ICCPR

Every person has the right to freedom and security of the person, which includes the right not to be

- (a) deprived of freedom arbitrarily or without just cause
- (b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58
- (c) subjected to any form of violence from either public or private sources
- (d) subjected to torture in any manner, whether physical or psychological
- (e) subjected to corporal punishment

Treated or punished in a cruel, inhuman or degrading manner.

### **5. Prohibition of Slavery, Servitude and forced labour**

Article 30 of the constitution

Article 8 of the ICCPR

A person shall not be held in slavery or servitude. A person shall not be required to perform forced labour.

### **6. The Right to Privacy**

Article 31 of the Constitution

Article 17 of the ICCPR

Every person has the right to privacy, which includes the right not to have their person, home or property searched, their possessions seized, information relating to their family or private affairs unnecessarily required or revealed and or the privacy of their communications infringed. The Right of Privacy has been successfully used to argue against interference in the lives of LGBT persons.

In *Toonen v Australia*, the United Nations Human Rights Committee ruled that the criminalization of same sex relations in Tasmania, Australia, violated the ICCPR's article 17 on the right to privacy.

### **7. Freedom of conscience, religion, belief and opinion**

Article 32 of the Constitution

Article 18 of the ICCPR

## Article 8 of the African Charter on Human and People's Rights

Every person has the right to freedom of conscience, religion, thought, belief and opinion. Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.

A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.

### **8. Freedom of expression**

Article 33 of the Constitution

Article 19 (2) of the ICCPR

Every person has the right to freedom of expression, which includes:-

- (a) freedom to seek, receive or impart information or ideas
- (b) freedom of artistic creativity;
- (c) Academic freedom and freedom of scientific research.

The right to freedom of expression does not extend to propaganda for war, incitement to violence, hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on any ground of discrimination specified or contemplated in Article 27 (4).

In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

### **9. Freedom of the media**

Article 34 of the Constitution of Kenya

Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2)

### **10. Freedom of association**

Article 36 of the Constitution of Kenya

Article 22 of the ICCPR

Article 10 of the African Charter on Human and People's Rights

Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. A person shall not be compelled to join an association of any kind.

Any legislation that requires registration of an association of any kind shall provide that

- (a) registration may not be withheld or withdrawn unreasonably
- (b) There shall be a right to have a fair hearing before a registration is cancelled

### **Key Case Law**

*Eric Gitari v Non- Governmental Organisations Co-ordination Board & 4 others [2015] eKLR*

In accordance with the requirements for registration of a non-governmental organization, on or about 2<sup>nd</sup> April, 2013, the petitioner sought to reserve with the Board for the purposes of registration of a non-governmental organization, the names Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observatory and Gay and Lesbian Human Rights

Organization. He was advised by the Board that all the proposed names were unacceptable and should be reviewed. On March 19, 2013, the petitioner then lodged the names Gay and Lesbian Human Rights Commission; Gay and Lesbian Human Rights Council and Gay and Lesbian Human Rights Collective for reservation. Together with the names, the petitioner sent a letter to the Board dated March 19, 2013 demanding to know why his application had been rejected. By a letter dated March 25, 2013, the Board wrote to the petitioner's Advocates advising that sections 162, 163 and 165 of the Penal Code criminalizes Gay and Lesbian liaisons, and that this was the basis for rejection of the proposed names for the NGO. The Board relied on regulation 8(3)(b) of the NGO Regulations of 1992 as the basis for rejecting the request. The regulation provides that the Director of the Board can reject applications if "**such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable**".

The court held that "*the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings... The Board and this Court are constitutionally mandated, when applying the Constitution, to give effect to the non-discrimination provisions in Article 27 and the national values and principles set out in Article 10, which include, at Article 10(2), "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized."* An interpretation of non-discrimination which excludes people based on their sexual orientation would be in conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination. To put it another way, to allow discrimination based on sexual orientation would be counter to these constitutional principles." The court ruled that the petitioner was allowed to register the organization.

#### **11. Freedom of Assembly, demonstration, picketing and petition.**

Article 37 of the Constitution

Article 21 of the ICCPR

Every person has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.

#### **12. Freedom of movement and residence.**

Article 39 of the Constitution

Article 12 of the ICCPR

Article 12 of the African Charter on Human and People's Rights

Every person has the right to freedom of movement. Every person has the right to leave Kenya. Every citizen has the right to enter, remain in and reside anywhere in Kenya.

#### **13. Labor relations.**

Article 41 of the Constitution

Article 7 of the International Covenant on Social, Economic and Cultural Rights

Every person has the right to fair labour practices. Every worker has the right to fair remuneration, to reasonable working conditions, to form, join or participate in the activities and programmes of a trade union and to go on strike.

#### **14. Economic and social rights.**

Article 43 of the Constitution

Article 1 and 2 of the International Covenant on Economic, Social and Cultural rights, Article 9 (Social Security)

Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care

Every person has the right to accessible and adequate housing, and to reasonable standards of sanitation, to be free from hunger, and to have adequate food of acceptable quality, to clean and safe water in adequate quantities, to social security and to education.

### **15. Access to justice**

Article 48 of the Constitution

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

### **16. Fair hearing.**

Article 50 of the Constitution

Article 14 of the ICCPR

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Every accused person has the right to a fair trial, which includes the right:-

- (a) to be presumed innocent until the contrary is proved
- (b) to be informed of the charge, with sufficient detail to answer it
- (c) to have adequate time and facilities to prepare a defence
- (d) to a public trial before a court established under this Constitution
- (e) to have the trial begin and conclude without unreasonable delay
- (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed
- (g) to choose, and be represented by, an advocate, and to be informed of this right promptly
- (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly
- (i) to remain silent, and not to testify during the proceedings
- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence
- (k) to adduce and challenge evidence
- (l) to refuse to give self-incriminating evidence
- (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial
- (n) not to be convicted for an act or omission that at the time it was committed or omitted was not
  - a. an offence in Kenya
  - b. crime under international law;
- (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

## **WHAT ARE SOME OF THE IMPORTANT RULES OF EVIDENCE?**

To begin with, evidence in any proof legally presented at trial as allowed by the judge, intended to convince the judge or jury of alleged facts material to the case.

Article 50 expounds on the rights of a person during trial as regards evidence

- (a) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence
- (b) to adduce and challenge evidence
- (c) to refuse to give self-incriminating evidence

In the event that evidence is obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

An accused person charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request and has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

A person who is convicted of a criminal offence may petition the High Court for a new trial if the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal and when new and compelling evidence has become available. In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

## **WHAT ARE SOME OF THE CRIMES THAT I, AS A SEXUAL MINORITY, SHOULD BE AWARE OF?**

Crimes, together with their corresponding punishments, are listed in the Penal Code of Kenya. They include but are not limited to Murder, Treason (both capital crimes punishable by death), Robbery with Violence, Rape, Defilement and Prostitution.

Sexual rights are directly related to sexual offences. Homosexuality is criminalized in Kenya. Described as **Unnatural Offences**, the Penal Code under sections 162 and 163 outline the offence and penalty. The code states that, any person who permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years. Further, any person who attempts to have carnal knowledge of him or her against the order of nature guilty of a felony and is liable to imprisonment for seven years. In *John Onzere Kambi v Republic [2013] eKLR*, the particulars of the charge were that the appellant; *“Unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ (anus) of”* the complainant. The assailant had committed an offence of sodomy against the complainant who was a minor. Section 5 of the Sexual Offences Act, which defines the offence known as **“Sexual Assault”** incorporates such offences as sodomy, rape and defilement. That section reads that *“any person who unlawfully penetrates the genital organs of another person with Any part of the body of another or that person; is guilty of an offence termed as sexual assault.”*

Prostitution is also uniquely linked to LGBTIQ persons as those engaging in sex work are especially vulnerable.

**Prostitution** – This is the practice or occupation of engaging in sexual activity with someone for payment. The Penal Code under section 153 and 154 establishes that every male person who knowingly lives wholly or in part on the earnings of prostitution; or in any public place persistently solicits or importunes for immoral purposes, is guilty of a felony. Where a male person is proved to live with or to be habitually in the company of a prostitute or is proved to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting or compelling her prostitution with any other person, or generally, he shall unless he satisfies the court to the contrary be deemed to be knowingly living on the earnings of prostitution.

Every woman who knowingly lives wholly or in part on the earnings of prostitution, or who is proved to have, for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution with any person, or generally, is guilty of a felony.

**Rape** – As defined in the Sexual Offences Act, a person commits the offence termed rape if he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs and the other person does not consent to the penetration; or the consent is obtained by force or by means of threats or intimidation of any kind.

A person guilty of an offence of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

**Defilement** - A person who commits an act which causes penetration with a child is guilty of an offence termed defilement. The Sexual Offences Act section 8 establishes that a person who commits an offence of defilement with a child aged:-

- a) Eleven years or less shall upon conviction be sentenced to imprisonment for life.
- b) Twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
- c) Sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

The common charges that homosexuals frequently find themselves up against are, Prostitution, Loitering with the intent to solicit, unnatural offences, sexual assault and defilement in the case of penetration with minors

## **WHAT ARE THE RIGHTS OF AN ARRESTED PERSON? WHAT ARE THE PRINCIPLES AND PROBABLE CAUSES OF ARREST?**

An arrest is generally made with an arrest warrant. An arrest may be made without a warrant if probable cause and exigent circumstances are presented at the time of the arrest.

Probable cause is a reasonable belief of the police officer in the guilt of the suspect, based on the facts and information prior to the arrest.

Article 49 of the constitution of Kenya that an arrested person has the right

- a) to be informed promptly, in language that the person understands, of
  - i. the reason for the arrest
  - ii. the right to remain silent
  - iii. the consequences of not remaining silent
- b) to remain silent
- c) to communicate with an advocate, and other persons whose assistance is necessary
- d) not to be compelled to make any confession or admission that could be used in evidence against the person
- e) to be held separately from persons who are serving a sentence
- f) to be brought before a court as soon as reasonably possible, but not later than

- i. twenty-four hours after being arrested; or
  - ii. if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;
- g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released
  - h) To be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons.

There are several instances where a police officer may, without a warrant/order from a magistrate arrest a person. These include any person who: the officer suspects on reasonable grounds of having committed an offence, the officer finds in a highway, yard, or other place at night during the night and suspects of having committed or being about to commit a felony, commits a breach of peace in his presence, obstructs an officer while executing his duty/has escaped or attempted to escape lawful custody, is suspected to be a deserter of the armed forces, has possession without lawful excuse, housebreaking implements, he has reasonable cause to believe a warrant of arrest has been issued.

Most relevant to arrest of LGBT persons is the provision for arrest without warrant in the instance where the officer finds any person in a street or public place in the hours of darkness and whom he suspects of being there for an illegal or disorderly purpose or who is unable to give a satisfactory account of himself. In most instances, arrests without warrant are made under the charge of solicitation or loitering with the intent to solicit. Gay men in Kenya have often been unfairly arrested on the above grounds.

## **WHAT ARE THE GENERAL PRINCIPLES OF BAIL AND BOND?**

Article 49(1) (h) of the Constitution of Kenya gives an arrested person the right “*to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.*”

Further, Article 49(2) of the Constitution provides that “*A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months...*”

Bail may be granted by either a police officer (in the case of minor offences, on the security of cash bail) or, as is more common, the courts set bail especially in the instance of serious offences such as murder and robbery with violence. The Primary factor considered by the courts is whether the accused will appear for trial if granted bail. Bail and Bond decision making is guided by the following principles:

- The right of an accused person to be presumed innocent until proven guilty; the presumption of innocence dictates that accused persons should be released on bail or bond whenever possible.
- Segregation of accused persons from convicts
- Accused person’s right to liberty
- Accused person’s obligation to attend trial
- The Right to reasonable Bail and Bond terms
- Bail determination must balance the rights of the accused and the interests of justice, protecting the integrity of the criminal justice and only denying bail where there are compelling reasons not to.

- Consideration for the rights of victims- for their safety, right to be informed of applications and grants of bail to accused persons and bail conditions particularly those designed to protect victims and their families

Violation of bail or bond terms such as failure to appear in court may result in the following:

- Issue of an arrest warrant for the accused; arrest and being brought to court
- Forfeiture of cash bail or retention on court deposit until such time as the accused appears

It should be noted that the Police Standing Orders are categorical that a person who is released from custody on either bail or bond can only be required to appear before a magistrate on a specified date, and that *“Under no circumstances will a prisoner who is released on bond be required to appear at a police station or other place”*

In practice, police action on bail and bond has been unpredictable.

- They often deny bail as a form of punishment
- They often deny bail even in the instance of petty offences
- They typically do not inform accused persons of their right to bail, preferring instead to extract bribes from them

Within the courts, bail decision making has been faced with numerous challenges as well.

- Lack of uniformity in how the courts determine whether or not to grant accused persons bail both procedurally and in substance
- Lack of a procedure of applying for bail
- Determination of bail by magistrates without establishing from the accused person whether the terms are reasonable
- Conversely, bail in the high court cannot be considered without an application being made for it

The courts tend to consider factors such as the nature of the offence, character and antecedents of the accused, previous conduct as regards bail, the strength of the prosecution’s case, whether the accused is gainfully employed, if he is gainfully employed, protection of the victim (especially in the instance of minors) and the accused’s likelihood of interfering with witnesses.

## **WHAT ARE THE KEY INSTITUTIONS IN THE JUDICIAL PROCESS?**

The Judiciary is one of the three arms of the Government established under chapter 10 of the Constitution of Kenya 2010. It is independent from other government functions and provides a forum for the just resolution of disputes in order to preserve the rule of law and to protect the rights and liberties guaranteed by the Constitution of Kenya.

The Judiciary is headed by the Chief Justice and divided into two units: the **technical unit**, comprised of the courts, and the **administrative unit**, which consists of departments for administration, personnel, accounts, procurement, planning, library services, ICT and the National Council for Law Reporting (NCLR).

The mandate of the Judiciary is the administration of justice and judicial matters. The functions of the Judiciary include:

- hearing and determination of criminal and civil disputes
- constitutional interpretation and protection of rights and liberties for all
- probate and administration
- formulation and implementation of judicial policies

- Compilation and dissemination of legal information for effective administration of justice. The Judiciary undertakes its functions through the Supreme Court, Court of Appeal, High Court, Magistrates' Courts, Kadhis' Courts, Judicial Service Commission and National Council for Law Reporting.

### THE HIERARCHY OF THE COURTS



The Supreme Court is the senior-most court and has original jurisdiction to hear and determine disputes relating to the elections of the President of Kenya and appellate jurisdiction on appeal cases from the court of appeal. All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

The Court of Appeal is a superior court of record therefore it sets precedents. It has limited original jurisdiction. It was created to hear appeals from the High court. The only moment the

Court Appeal can have original jurisdiction is in punishment for contempt of court, and when stating execution of orders of the High Court.

The High Court has original jurisdiction in criminal and civil matters; jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; jurisdiction to hear appeals from tribunals appointed for removal of a person from office; and jurisdiction to hear any question respecting the interpretation of the Constitution. The court also has supervisory jurisdiction in any civil and criminal proceedings before subordinate courts and may make such orders, issue such writs and give such directions as may consider appropriate for the purpose of ensuring that justice is duly administered by such courts. These orders include certiorari, Mandamus, prohibition and writ of habeas corpus. The Magistrate's courts handle civil and criminal matters depending on the rank of the magistrate.

Other specialized courts include the Kadhis courts to deal with specific matters under Sharia law and special tribunals such as the Rent Restriction tribunal, Industrial Court and Land Disputes tribunal.

Relevant Quasi-Judicial bodies such as the Kenya National Human Rights Commission and the Kenya National Gender and Equality Commission, with the core mandate of furthering the promotion and protection of human rights and gender equality respectively, in Kenya, form the supportive framework of the judicial system.