National Gay and Lesbian Human Rights Commission
Equality. Dignity. Freedom

CASE BRIEF

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
(CORAM: WAKI, NAMBUYE, KOOME, MAKHANDIA & MUSINGA, JJ.A)
CIVIL APPEAL NO. 145 OF 2015

BETWEEN

NON-GOVERNMENTAL ORGANISATIONS COORDINATION BOARD.....APPELLANT

AND

ERIC GITARI.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT
AUDREY MBUGUA ITHIBU.....3RD RESPONDENT
DANIEL KANDIE.....4TH RESPONDENT
KENYA CHRISTIAN PROFESSIONAL FORUM.....5TH RESPONDENT
KATIBA INSTITUTE.....6TH RESPONDENT

FACTS

The 1st respondent, Mr. Eric Gitari, sought to register a non-governmental organization (NGO) with the appellant, the Non Governmental Organisations Coordination Board (NGO Board). The NGO would seek to address the violence and human rights abuses suffered by LGBTIQ people.

In accordance with the requirements for the registration of a NGO, the 1st respondent sought to reserve with the NGO Board the names Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy and Gay and Lesbian Human Rights Organization. He was advised by the Board that all the proposed names were unacceptable and should be reviewed.

The 1st respondent 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. He also sent a letter to the NGO Board asking why his application had been rejected.

The NGO Board wrote to the 1st respondent's lawyers, advising that under sections 162, 163 and 165 of the Penal Code, same-sex conduct is criminalised, and that this was the basis for rejection of the proposed names. The NGO Board relied on regulation 8 (3) (b) of the NGO Regulations of 1992, which provides that an application may be rejected if "such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable".

After three attempts to register the proposed NGO the 1st respondent scheduled a meeting with Mr. Mugo, a member of the Legal Department of the Board. According to the 1st respondent, Mr. Mugo

advised him that any association bearing the names gay and lesbian could not be registered by the NGO Board because the association furthered criminality and immoral affairs.

The 1st respondent commenced litigation proceedings on the grounds that his constitutional rights to freedom of association (Article 36) and freedom from discrimination (Article 27) had been violated.

The appellant contended that the 1st respondent's right to freedom of association had not been infringed and if it has been limited, such limitation can be justified on the basis of the criminalisation of same-sex conduct in the Penal Code. They argued that 'sexual orientation' is not a prohibited ground of discrimination under the Constitution.

The petition was canvassed in the High Court before Lenaola, J (as he then was), Ngugi and Odunga, JJ. The learned judges found that the petition raised three issues: first, whether the 1st respondent had exhausted internal remedies; second, whether persons who belong to LGBTIQ groups have a right to form associations in accordance with the law, and lastly, if the answer was in the affirmative; whether the decision of the appellant to decline the registration of the proposed NGO because of the choice of the name was in violation of the 1st respondent's rights to equality and freedom of association.

In their judgment delivered on 24th April 2015, the learned judges found that the 1st respondent did not have any other known remedy in law that he would have used to have his grievances addressed. On the second issue, the learned judges found that the acts of the appellant in rejecting the 1st respondent's names for the proposed NGO and by extension its refusal to register the proposed NGO amounted to a limitation of the 1st respondent's rights to freedom of association.It upheld article 36 of the Constitution finding that 'every person' did not exclude sexual minorities and that included associations and companies. On the last issue, the learned judges found that the appellant violated the 1st respondent's right to non-discrimination by refusing to accept the names proposed on the basis that the proposed NGO sought to advocate for the rights of persons who are not socially accepted. The court further rejected the argument of non-inclusion under article 27 finding that it did not allow the board to freely discriminate simply because sexual orientation was not expressly mentioned. The grounds as listed were not an exhaustive list. Additionally, the court separated the state of being a homosexual which was not criminalized in the penal code, from homosexual acts which was criminalized. The court thus ordered the Board to comply with its duties and register the NGO.

As a result of the aforesaid findings; the learned judges issued the following declarations and orders:

a) We hereby declare that the words 'every person' in Article 36 of the Constitution includes all persons living within the Republic of Kenya despite their sexual orientation.
b) We hereby declare that the respondents have contravened the provisions of Articles 36 of the Constitution in failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice.
c) We declare that the petitioner is entitled to exercise his constitutionally guaranteed freedom to associate by being able to form an association.

d) We hereby issue an order of mandamus directing the Board to strictly comply with its constitutional duty under Article 27 and 36 of the Constitution and the relevant provisions of the Non-Governmental Organizations Co-ordination Act.

ISSUE

The above mentioned findings and orders precipitated this appeal. In the Memorandum of Appeal dated 10 June 2015, the appellant tasked the bench with determining the following issues:

1. Whether the Learned judges erred in law and fact by identifying lesbian, gay, bisexual, transgender and queer as innate attributes of various persons without any or insufficient evidence in support.
2. Whether the refusal to register the 1st Respondent's proposed NGO was a decision contemplated under section 19 of the NGO Act for which an appeal lies with the Minister.
3. Who enjoys the right of association and whether there are limits to this right as guided by Article 24 of the Constitution of Kenya, 2010.
4. Whether the right of association extends to the proposed NGO of the 1st Respondent
5. Whether the Learned Judges erred in law by adopting and applying ratio from South Africa and whether religious preference in the Constitution of Kenya 2010 should have been regarded whilst making the judgment
6. Whether the provisions of the Penal Code that outlaw homosexual behaviour were upheld
7. Whether the constitution's non-discrimination clause includes or can reasonably be inferred as including the ground of sexual orientation
8. Whether moral purpose and public policy have a role in determining whether to accept registration of proposed associations of persons such as the 1st Respondent

The appeal was canvassed through written submissions as well as oral highlights.
Both parties having tendered submissions on the above, the bench retired to consider the arguments put forward. However, the 1st respondent sought to reopen the hearing of the appeal following the decision of the the Indian Supreme court to strike out s377 of the Penal code that criminalized consensual same sex relations between adults. The significance of the Indian Supreme Court decision was highlighted by the 1st respondent, with India being the first British Colony to have British sodomy laws imported into local laws. The 1st respondent submitted that the laws of other British colonies, Kenya included, were thereafter closely modelled after the Indian Penal code's provisions on sodomy.

HOLDING

Hon. Lady Justice Martha Koome

The learned Justice Koome in her judgment noted that the issues raised from the FOA case before them ranged from morality, institution of family, religion, culture various studies and researches carried out on whether homosexuality is genetic or acquired behavior, to the law, constitutionality of gay and lesbians to international law and jurisprudence. The appeal also raised questions on whether sections 162, 163 & 165

of the Penal Code limit the article 36 and 24 of the constitution as a limited right for LGBTIQ individuals to register NGOs. According to her, the right to associate by LGBTIQ persons and whether freedom of association as it relates to them is limited because of the Penal Code. Morality is as spelt out by Article 10 of the constitution on national values and principles of governance – human dignity, equality, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

Hon. Justice Koome established that arguments presented by the applicant's counsel based on the bible are one sided quoting article 32 of the constitution which gives everybody freedom of conscience, religion, belief and opinion. Article 259 of the constitution demands that the Constitution should be interpreted in a manner that promotes the constitution's purposes, values and principles; advances the rule of law, human rights and fundamental freedoms in the bill of rights; permits the development of the law and contributes to good governance. It also demands that every provision of the constitution shall be construed according to the doctrine of interpretation that the law is always seeking.

The issue on appeal to the minister, she quoted, was on refusal of registration of an NGO and not for refusal to reserve a name that statute had not prescribed internal remedy or mechanism for refusal to approve a name and the fact that the NGO Board did not advice the respondent to appeal and appeared to hold the view that the matter of the registration of the NGO should be resolved by the court. Hon. Lady Justice Koome established that the NGO Act and regulations have not provided an internal appeal mechanism for applicants to follow when a name is refused for reservation to register as an NGO. She agreed with the High Court's findings that the courts are the ultimate bastion and custodian of the Constitution.

On the issue of article 36 on freedom of association, she noted that all counsels were in agreement that it is not an offence for one to be gay or lesbian. What was detested and an offence is engaging in carnal knowledge against the order of nature. *"In other words, if someone stood on a high platform and declared that he or she is gay or lesbian without more, they will have not committed an offence under sections 162-165"* Justice Koome further posed the question, *"Can heterosexuals commit the same offences? Who supervises consenting adults including heterosexuals on how they go about such personal matters as sexual intercourse? Moreover one has to commit the offences prohibited in the Penal Code so as to be regarded a criminal. If the offence is carnal knowledge against the order of nature, is it only committed by homosexuals? Nay! Anybody is capable of committing those offences, they could be gays, lesbians call them LGBTIQ and even heterosexuals. Reported cases abound where persons who are not LGBTIQ have been charged and convicted of heinous offences of rape, defilement and other sexual offences including beastiality. I would wish some research could be carried out to find out from the convicted offenders, how many are LGBTIQ. It is not fair in my view to generalize and stigmatize LGBTIQ persons as the only ones who are prone or predisposed to commit the above offences. Let every offender be dwelt with as an individual. If a homosexual person commits an offence, he will be arrested and dealt with according to the law, so is a heterosexual. For these reasons I am not persuaded the said provisions of the Penal Code were enacted to criminalize homosexuality, or the state of being homosexual otherwise it would have stated so. As detailed above, those offences in the Penal Code can be*

committed by anybody their sexual orientation notwithstanding and to say it is only gays and lesbians who commit them is to subject them to differential treatment."

Justice Koome further noted that it is not homosexuals who are capable of breaking the law; this denying them the full enjoyment of their rights as enjoyed by the public opinion that detests gays and lesbians is outright discrimination. She went on to say, *"I understand the Board to be saying that gays and lesbians will corrupt and endanger the society especially the hallowed institution of family. Nonetheless the Board did not present any evidence to demonstrate that the evil that abound in the society today, from corruption, to murders, rapes including within the families are brought about by LGBTIQ. Nor did they provide evidence to show persons who commit offences under Sections 162, 163, and 165 of the Penal Code are LGBTIQ. Counsel for the appellant and even the Attorney General isolated the family as one institution whose 'human survival would be threatened if the proposed NGO was registered. My humble view of the matter is that the institution of marriage cannot be threatened by an association of LGBTIQ; others enter marriage and choose not to procreate and others do not enter marriage at all and they are not LGBTIQ. There are people who are heterosexuals and they do not engage in sex of any kind out of choice, it is also possible there are homosexuals or LGBTIQ people who do not engage in sex also out of choice"*

The 1st respondent has a right as stated in the UN Declaration on Human Rights Defenders and in accordance to the Constitution to form, join and participate in non-governmental organizations, associations or groups. "*The only limitation is as expressed in the constitution is that the activities of the association must be in accordance with the law. If they are not, then the proposed NGO would not be protected by the Constitution and the law would take its cause. It is arbitrary to speculate and categorize LGBTIQ as persons who have the propensity to destroy a society by contravening the provisions of the Constitution or the Penal Code, or as a group bent on ruining the institution of marriage or culture."* The learned Lady Justice Martha Koome dismissed the appeal.

Hon. Justice Daniel Kiio Musinga

The honorable judge summarized the main issues for determination into three points;

a) Whether the NGO Coordination Board(the appellant) breached the provisions of **Article 27 and 36 of the Constitution** by rejecting the proposed names of the intended NGO;
b) Whether the petition before the high court was premature; and
c) Whether "every person" in **Article 36 of the Constitution** includes all persons living in Kenya despite their sexual orientation, character or otherwise.

He addressed himself first on the issue of the petition before the high court. The NGO Coordination Board argued that the high court lacked jurisdiction on the matter as all dispute resolution mechanisms had not been exhausted. **Section 19 (1) of the NGOs Act** states that; any organization aggrieved by a decision of the board may appeal to the Minister. The learned judge stated on this issue;
'To the extent that the 1st Respondent was well aware of, but did not comply with the provisions of ***Section 19(1) of the NGOs Act*** *which required him to appeal the Board's decision to the Minister, whose decision was then appealable to the High Court as stipulated under* ***Section 19(3) of the Act****,*

the High Court should have directed the applicant to first exhaust the statutory remedy; see ***Section 9(3) of the Fair Administrative Actions Act****. In that regard, the High Court had no jurisdiction to entertain the petition. A decision arrived at by a court that lacks jurisdiction is a nullity, even if the court would have arrived at the same decision had it determined the dispute procedurally and at the right time. I would for that reason allow the appeal.'*

Justice Musinga then addressed the question on violations under **Article 27 and 36 of the Constitution**. Article 27 provides for equality and freedom from discrimination while Article 36 addresses freedom of association. The Direct or of the NGO Board has powers as under **Regulation 8(3) (b) (ii)** to reject a name of a proposed NGO for the reason that it is repugnant to or inconsistent with any law or is otherwise undesirable. The appellant rejected the names because they had the words 'Gay and Lesbian' in them. They cited **Sections 162, 163 and 165 of the Penal Code** as the reason for rejection as they criminalize gay lesbian liaisons. The learned judge agreed that the proposed names were inconsistent with written law as argued by the appellant. The learned judge acknowledged the petition challenging the constitutionality of the aforementioned sections of the Penal Code. He was however of the opinion that until they are determined to be unconstitutional, they remain a part of our laws and must be observed accordingly.

'As long as sections of our penal code outlaw homosexuality and lesbianism, I think it would be unlawful to promote and give succor to any process or registration of any organization that may undermine the law. That was the mindset of the Director in rejecting the proposed names. The law grants discretionary power to the director to accept or reject a proposed name. In my view, it was not demonstrated that the Director exercised that jurisdiction in an injudicious manner. Whether sodomy and lesbianism should be decriminalized or not is a very emotive issue that conjures deep seated constitutional, moral and religious ideologies. There are issues that at best, ought to be left to the people to decide, either directly through a referendum or through their elected representatives in Parliament, which manifests the diversity of the nation and represents the will of the people and exercises the sovereignty.'

The learned judge was of the opinion that the NGO Board did not violate the right to association under Article 36 reasoning that the right is not absolute and may be limited by a provision of the law. The learned judge was satisfied that Sections 162,163 and 165 of the Penal code were sufficient in this instant to limit this right. He further stated that Article 27 of the constitution did not recognize sexual orientation as a ground for discrimination. The judge compared the proposed names to a proposition by Pedophiles to register an association to protect their rights which he would not expect the NGO Board to register. *'Likewise, the freedom of association of gays and lesbians in Kenya may lawfully be limited by rejecting registration of a proposed NGO, as long as the country's laws do not permit their sexual practices.'*

On the interpretation of Article 36 to include every person in Kenya, the learned judge was of the opinion that; *'It cannot be right that "every person", including persons whose practices are not permitted by our laws, have unbridled right to form an association of whatever nature. The words must be taken in the proper context to mean the right of any sane, law- abiding adult to form, join or*

participate in the activities of a lawful association that accords with the country's Constitution and other laws. The appellant was not obliged to accept a name that it truly believed was repugnant and contrary to existing law.'

In conclusion, the judge emphasized that the constitution protects family and culture and was of the opinion that there was a lot of internal and external pressure to disregard some constitutional, moral, religious and cultural values and embrace practices that are seen as 'more trendy, progressive and modern.' Values and principles espoused by the constitution must be respected.
For these reasons, he allowed the appeal by the appellant, setting aside the High Court Judgment and Decree given on 24th April 2015.

Hon. Justice Asike Makhandia

The honorable judge began by stating that Article 1 of the Universal Declaration of Human Rights (UDHR) was in the context of this case apt, and that it neatly summed up what lay at the core of this appeal. *"This article recognizes that all human beings are born free and equal in dignity. Thus, strip someone of their dignity and you strip off their essence of being a human being. Dignity since the beginning of the era of human rights has become the foundation of all other rights. It amounts to the recognition that the sole purpose for protecting, promoting and fulfilling human rights is the acknowledgement that all human beings must be accorded respect… It is the quest for dignity, equality and equal recognition and protection before the law that made the 1st respondent in this appeal file the petition subject of this appeal in the High Court"*

The honorable justice then went on to clarify what, in his view, the appeal was all about: *"It was correctly in my view observed by the High Court that this case is not about marriage or morals. The facts of the case as pleaded by the 1 respondent demonstrate that the case concerns the enforcement of the rights of association, non-discrimination and equality before the law with regard to persons who identify themselves as LGBTIQ. Having said that, it is also clear to me that the case is not about legalization of the same sex relations and the constitutionality of sections 162 and 165 of the Penal Code."* The learned judge acknowledged that counsel for the appellant correctly pointed out that there is a substantive case, being PT 150 and 234 of 2016 pending in the High Court that seeks to challenge the constitutionality of the provisions of section 162 and 165 of the Penal Code. He went on to assert that, *"The High Court is therefore best placed to determine the issue. I will therefore not delve into the matter."*

The learned judge then highlighted two core issues for determination in the case:

1. Whether the 1st respondent had recourse with the courts and not appeal with the Minister as the appellant claimed
2. Whether the use of 'person' as used to outline the freedom of association provided for by the Constitution includes a company or association or body of persons whether incorporated or unincorporated. The appellant contended that the "that the High Court erred by failing to recognize that the right of association is enjoyed by persons qua persons and not based on any

attribute that persons may determine for themselves." It was the appellant's submission that sexual preference is not innate and thus is a preference made by an individual.

3. Whether the decision of the appellant violated the 1st respondent's freedom of association

On the first issue, the judge reasoned as follows: *"The 1st respondent did not get an opportunity to make an application for registration of his proposed NGO to the board. All he did was to apply to reserve the name of his proposed NGO."* Therefore, Section 19 of the NGO Coordination Act, which is to be applied where a party is dissatisfied with the decision of the board, was not applicable in this instance. He further explained that, *"In this appeal, the appellant was not dealing with the registration of the proposed NGO but the question as to whether or not the proposed names that the 1 respondent sought to reserve for the registration of the proposed NGO were acceptable. To that extent, the applicable provision was Regulation 8 as opposed to Part III of the Act that deals with the process and requirements for registration of NGOs."* Moreover, "there is nothing in the Regulations that provides an aggrieved applicant a right to appeal a decision made in terms of regulation 8(3)(b)(ii) for refusal of a name by which an organization can be registered. Section 19 of the Act applies to substantive decisions concerning the actual registration or refusal for registration. Section 19 is invoked once the Board has made a decision in regard to the actual registration. After three attempts to register the proposed NGO - each with different variations in the names; and receiving the same response that the names were unacceptable; it is on record that the Board urged the 1st respondent to review the proposed name and provide eh Board with the objects of the proposed NGO. The facts demonstrate that a decision had not been made in respect to the registration of I™ respondent proposed NGO. The mechanism provided for in section 19 was therefore not applicable in the circumstances of the case." He therefore found the 1st respondent's case to be allowable before the High Court.

On the second issue, the honorable clarified that as he understood it, *"this appeal or even the petition at the High Court was not about sexual orientation and whether or not sexual orientation is innate or not. In the High Court, the appellant alleged that special rights do not accrue to persons who have made conscious decision to be gay or lesbian because homosexual lifestyle is an acquired behavior that has nothing to do with genetic makeup. The court treated this submission as a matter of opinion that had not been established. Indeed, and correctly so, the High Court did not get into that arena of determining whether or not being LGBTIQ is an innate attribute. I do not propose to get in there as well."* He further agreed with the High Court that *"the 1st respondent is entitled to fundamental rights and freedoms provided for in the constitution by virtue of him being a human being irrespective of his sexual orientation. His rights and freedoms can only be curtailed in accordance with the law."*

On the third and final issue as to the legality of the decision of the appellant to refuse to register the high court, the judge stated that by refusing to accept the names for the proposed NGO, the appellant violated the 1st respondent's freedom of association. *"It matters not the views of the appellant that the name of the association was not desirable. In a society as diverse as Kenya, there is need for tolerance. I say so well aware of the preambular provisions in the Constitution that acknowledge the supremacy of the Almighty God of all creation. Further, the constitution recognizes the right of persons to profess religious beliefs and to articulate such beliefs including the belief that homosexuality is a taboo that violates the religious teachings. However, the Constitution does not permit the people who hold such*

beliefs to trod on those who do not or subscribe to a different way of life. They too have the right not to hold such religious beliefs. It cannot therefore be proper to limit the freedom of association on the basis of popular opinion based on certain religious beliefs that the Board believes amounts to moral and religious convictions of most Kenyans.I do not see how the Bible and Quran verses as well as the studies on homosexuality relied on by the appellant would help its case. Religious texts are neither a source of law in Kenya nor form the basis for denying fundamental rights and obligations."

He further unequivocally stated that "morality and religion are irrelevant considerations." He further noted that the decision of the appellant to refuse to accept the proposed names of the NGO amounted more to a statement of dislike and disapproval of homosexuals rather than a tool to further any substantial public interest. Additionally, that while a Constitution is to some extent founded on morals and convictions of a people, it is not true that a constitution is not founded on division and exclusion.

The honorable judge therefore concluded that, *"Article 36 of the constitution extends to every person's right to form an association of any kind. This right can only be limited in terms of law to the extent that the limitation is reasonable and justifiable in an open and democratic society as provided for in Article 24(1) of the Constitution. Subject to the limitations, a person's rights under Article 36 extends to all human beings without discrimination, whatever their ethnicity, religion, sex, place of origin or any other status such as age, disability, health status, sexual orientation or gender identity. I agree with the High Court's finding that Article 36 extends to all individuals and juristic persons and that sexual orientation does not in any way bar an individual from exercising his right under Article 36 of the constitution."*

Hon. Lady Justice Nambuye

Hon. Justice Lady Nambuye noted that there were two issues for determination:-

1. Want of jurisdiction
2. Whether the applicable provisions of the constitution were properly construed to crystalize the right of association

<u>Jurisdiction</u>

The learned judge found that the 1st Respondent's petition was purely administrative action executed by the Director on behalf of the NGO Board declining the 1st Respondent's proposed NGO. It was amenable to section 19 of the Act procedures ought to have been exhausted before seeking the court's intervention. The judges in the high court in her view should have *"...downed their tools on account of the petition being premature, rerouted the 1st respondent to exhaust the provisions under section 19 before seeking judicial pronouncement on constitutional issues in the petition..."*

<u>Right to association</u>

Hon. Nambuye noted that the High Court judges ought to have made a definitive determination as to whether the provisions of the proposed NGO fell within the sexual orientation category as it had been borne throughout the proceedings in the High Court and Court of Appeal. She pointed out that, enjoyment of article 27(4), is such enjoyment has to be within the limits of the law. *"Meaning that non-discrimination on account of sexual orientation can only be accorded and enjoyed on condition*

that what "sexual orientation" means and what people who believe in it, practice, does not fall within prohibited acts in sections 162, 163 and 165 of the Penal Code." "...enjoyment of the right of non-discrimination on account of sexual orientation would only be dependent on a clear definition as to whether sexual orientation falls into category of conduct "against the order of nature" legislated against in the Penal Code"

Justice Philip Waki

Honorable Justice Waki, the presiding judge, begins his judgment contemplating some verses of the Bible, the same source of resistance used in majority of the appellant's case. He discusses the story of the prostitute who was about to be stoned and was spared because Jesus asked he who had not committed sin to throw the first stone. He states that this is a similar matter, that no one is without sin and it would be unfair to judge a specific group based on morals when in reality, if the laws of the Bible were applied evenly, half the population would ' most likely be stoned to death'.

The learned judge notes that after reading his colleagues' judgments, he bears the duty of breaking the tie. He believes that minus the claims of the appellants and their supporters on what would happen if the appeal is not allowed such as: *"homosexuality will be legalised', 'decadence, immorality and disease will strike our nation'; 'same sex marriages will be the order of the day'; 'sexual abuse of young people will dramatically increase', 'murderers and other miscreants in society will be at liberty to register Associations', 'floodgates will be opened for paedophiles', 'Christian and Islamic values will be obliterated', 'societal moral values will be shredded'; 'cultural rights will be trampled upon'; 'there is an international conspiracy to promote gay rights'*; he believes that the appeal is really about the place of the constitution in our lives.

The honorable judge continues to explain that after considering the judicial interpretations sought in the petition to the High Court; ' *I am persuaded by the argument that the matter before us is not about the family unit, marriage or morals, legalization of same sex relationships, or the constitutionality of* ***sections 162, 163 and 165 of the Penal Code****. Indeed, the latter issue is pending determination before the High Court, and the less said about it the better. The matter then boils down to consideration of* ***Articles 27 and 36 of the Constitution*** *which were specifically invoked for interpretation with regard to LGBTIQ persons.*'

He explains that the constitution stipulates how interpretation is to be done. That after the declaration of supremacy in **Article 2,** *' the Constitution proceeds in* ***Article 10*** *to bind everyone who has to apply and interpret it or any other law, or makes public policy, to the national values spelt out therein including: human dignity, equity, social Justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. Equally binding are the principles of the rule of law, participation of the people, equity, inclusiveness, equality, human rights, transparency and accountability.'* The courts shall be guided not just by the constitution but also international instruments and treaties such as the International Covenant on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights which Kenya has signed and ratified. In addition, the constitution has an extensive Bill of Rights and that aims at protecting and promoting

equality and human rights. **Articles 20 (3) and (4)** decree that in the application of the Bill of Rights, the courts shall; 'develop *the law where it does not give effect to a right; adopt the interpretation that most favours the enforcement of a right or fundamental freedom; and promote the values that underlie an open and democratic society based on human dignity, equality, equity, freedom and the spirit, purport and objects of the Bill of Rights.*'

Furthermore, he explains, **Article 259** of the constitution provides more direction on interpretation and application, that is shall be in 'a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance'. The Supreme Court in addressing matters of interpretation of the constitution has favoured a holistic approach, to advance the spirit and purpose of the constitution. He declares that he shall be guided by these principles of interpretation in the delivery of his ruling.

He notes that there are many issues which have been invoked in the matter, in his opinion however, there are two main issues to be determined;

a) The jurisdiction of the High Court in light of arguments that all dispute resolution mechanisms were not exhausted.
b) The interpretation and alleged violation of freedom of association under Article 36 of the Constitution.

It was the learned judge's opinion that the main question under the first issue was whether there was an application as under Part III of the NGOs Act which would have given rise to the need to appeal to the Minister. He responds in the negative. There was no assembly of the Board as registration had not commenced under Part III, the main issue in his opinion was an administrative one that would have been dispensed with before the registration. '*The application for approval of a name is made to the Director and it is the Director who makes the decision to reserve or not to reserve it. The Board has nothing to do with that process and the rules do not provide for an appeal to the Board. The Board as seen earlier comes in under Part III of the Act which is covered in Regulation 9. And without a decision of the Board, there can be no appeal to the Minister. So, where does one go when an application for approval of a name is rejected?'* The learned judge agreed with the determination by the High Court that this matter was not one that would have required the application of appeal to the Minister and it is for this reason that he refused the jurisdictional challenges brought forward.

The second issue in the learned judge's opinion was whether in rejecting the reservation of the names, the appellant had violated Article 36 of the constitution on freedom of association. Before addressing the violation, the judge addresses himself on the scope of the words 'every person' as under Article 36. He states; '*There is no contestation from any side that the people in this country who answer to any of the descriptions in the acronym LBGTIQ, are 'persons'. I find it uncontroverted, therefore, that Article 36 covers the persons in that group. Like everyone else, they have a right to freedom of association which includes the right to form an association of any kind. That is the literal wording of Article 36 (1) which, in my view, has no hidden meaning. Article 260 provides further clarity to the definition of*

'person'. In my view, construing 'person' to refer only to the sane and law abiding people would be unduly stretching the ordinary meaning of the words used in the Constitution.'

He clarifies that the Penal Code does not criminalize the persons answering to the description LBGTIQ but criminalizes specific offences; 'unnatural offences', 'attempts to commit unnatural offences', and 'indecent practices between males'. Those are sections 162, 163 and 165 of the Penal Code, respectively. He recognizes that LBGTIQ persons are subject to the law just as everyone is and will be subjected to its sanctions if they contravene it. However, he finds issue with convicting such persons before they contravene the law. He finds such application to be retrogressive. '*As it is, according to their stated objectives, they intended to register the NGO to, among other things, conduct accurate fact finding, urgent action, research and documentation, impartial reporting, effective use of the media, strategic litigation and targeted advocacy in partnership with local human rights groups on human rights issues relevant to the gay and lesbian communities living in Kenya. On the face of it, there is nothing unlawful or criminal about such objectives. But they never reached the stage of proper consideration by the Board because the main gate to the boardroom was locked.*'
The learned judge denied the appeal and upheld the ruling by the High Court.

CONCLUSION

As an **obiter dicta** statement, Justice Waki concludes; '*The issue of persons in our society who answer to the description lesbian, bisexual, gay, transsexual, intersex and queer (LBGTIQ) is rarely discussed in public. The reasons for such coyness vary. But it cannot be doubted that it is an emotive issue. The extensive and passionate submissions made in this matter before the High Court, and before us, is testimony to the deep rooted emotions that the issue can easily arouse. It is possible for the country to close its eyes and — and pretend that it has no significant share of the people described as LGBTIQ. But that would be living in denial. We are no longer a closed society, but fast moving towards the 'open and democratic society based on human dignity, equality, equity, and freedom' which our Constitution envisages. We must therefore, as a nation, look at ourselves in the mirror. It will then become apparent that the time has come for the peoples' representatives in Parliament, the Executive, County Assemblies, Religious Organizations, the media, and the general populace, to engage in honest and open discussions over these human beings. In the meantime, I will not "be the first to throw a stone at her [LGBTIQ]".*'

Three out of five judges dismissed the appeal by the NGO coordination Board thus upholding the High Court judgement that the actions by the Board were discriminatory.