

The Human Rights Situation, Case Law, and Research on Protections on Grounds of Sexual Orientation, Gender Identity, and Expression in the Republic of Kenya

Submitted to the Office of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

Submitted by:

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Introduction

In response to the Call for Inputs issued by the Office of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, this submission outlines the human rights situation of members of the lesbian, gay, bisexual, transgender, and intersex community in the Republic of Kenya (Kenya). In particular, this submission discusses the following underpinnings: i) decriminalisation of consensual same-sex relations; ii) effective anti-discrimination measures; iii) legal recognition of gender identity; iv) destigmatization linked with depathologisation; and v) socio-cultural inclusion. In line with the guidelines of the Call for Inputs, this submission includes information on the current LGBTI rights situation in Kenya, key laws and policies, as well as relevant statistics (annexed). Included in this report are also best practice recommendations for promoting human rights protections on grounds of sexual orientation, gender identity and expression.

This submission has been compiled by the Kenya Human Rights Commission, the National Gay and Lesbian Human Rights Commission, the Network for Adolescent and Youth of Africa, the Gay and Lesbian Coalition of Kenya, and the East Africa Trans Health & Advocacy Network.

Observations

- 1) Decriminalisation of consensual same-sex relations

Consensual, adult, and private sexual conduct between persons of the same sex are a crime under Section 162 (a) and (c), Section 163, and Section 165 of the Kenya Penal Code.

Section 162 (a) and (c) states that:

162. Unnatural offences

Any person who—

(a) has carnal knowledge of any person against the order of nature; or

(c) 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:

Section 163 states that:

163. Attempt to commit unnatural offences

Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years.

Section 165 states that:

165. Indecent practices between males

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

Although rarely enforced, Section 162 (a) and (c), Section 163, and Section 165 of the Kenya Penal Code create a climate of fear among members of the lesbian, gay, and bisexual community. Lesbian, gay, and bisexual persons fear arrest and possible convictions for engaging in consensual, adult, and private sexual conduct. In addition, the criminalisation of same-sex conduct contributes significantly to the stigma associated with being lesbian, gay, and bisexual, leading to violence and discrimination against members of this group.¹

In 2015, two male persons were charged under Section 162 (a) and (c) in Kwale County, in the coast of Kenya (*Republic v COI & GMN*). During investigations into the alleged crime, the defendants underwent forced anal examination, HIV, and Hepatitis B tests. Forced anal examinations are considered unscientific and a form of torture or cruel, inhuman, and

¹ See 'The Outlawed Amongst Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya, 2011, Kenya Human Rights Commission

(Nairobi).

degrading treatment and punishment.² Within the context of *Republic v COI & GMN*, where the accused were arrested in a public place with no probable cause that they were engaging in sexual conduct, the exams were a worrying case of government overreach in the prosecution of Section 162 (a) and (c). More worryingly, the Kenyan High Court subsequently ruled that forced examinations were an appropriate method of gathering evidence to prove that a criminal offence contrary to Section 162 (a) and (c) had occurred.

2) Effective anti-discrimination measures

Article 27 (4) of the Constitution of Kenya (2010) states that:

(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.

Although Article 27 (4) does not explicitly mention *sexual orientation*, case law has interpreted the provision to include the two categories, thus offering legal protection from discrimination for members of the lesbian, gay, bisexual, transgender, and intersex community.

In *Eric Gitari v NGO Board & 4 Others [2015], Petition 440 of 2013*, the High Court held that Article 27 of the Constitution protected ‘every person’ regardless of their sexual orientation. The Court further held that permitting discrimination on grounds of sexual orientation would be against constitutional provisions of equality and non-discrimination.

In the case of Petition 440 of 2013, the Government of Kenya through the Office of the Attorney General immediately lodged an appeal to the decision, preventing the implementation of this positive ruling.

During Kenya’s most recent Universal Periodic Review by the Human Rights Council in 2015, the Government of Kenya accepted a recommendation by Kingdom of Sweden to “Adopt a comprehensive anti-discrimination law affording protection to all individuals, irrespective of their sexual orientation or gender identity.”

3) Legal recognition of gender identity

Persons whose gender identity does not conform to the sex they were assigned at birth face significant challenges when it comes to the legal recognition of their gender identity. In Kenya, policy gaps exist in the areas of equality and non-discrimination, documentation and legal status, as well as appropriate and affirming health care for transgender, intersex, and gender non-conforming individuals.

² UN General Assembly, “Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment,” A/56/156, July 3, 2001, <http://www.un.org/documents/ga/docs/56/a56156.pdf> (accessed June 4 2017)

The Births and Deaths Registration Act, the Registration of Persons Act, and the Citizenship and Immigration Act, key legislation that provide for the issuance of birth certificates, fails to adequately provide for intersex persons as well as person who wish to change their gender marker in government issued documentation.

In *Richard Muasya v the Hon. Attorney General [2010], Petition 705 of 2007* (Richard Muasya Case), the Court addressed the legal recognition of intersex persons for the first time. In this case, the Court rejected the claim by the Petitioner that he had suffered lack of legal recognition on account of having not been registered under the Births and Deaths Registration Act. The Court argued that intersex persons could be categorised as either male or female by relying on their dominant sex characteristics. Further, the Court rejected the petitioners claim that the meaning of ‘sex’ under the Constitution of Kenya included ‘intersex’, restricting itself to a strict gender/sex binary.

In *Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR* (Baby ‘A’ Case), the High Court ruled that the petitioner, an infant who had been found to have both male and female genitalia, had suffered from the lack of legal recognition and that differential treatment was not on account of discrimination. However, the Court made rulings which have a positive bearing on the rights of intersex persons. First, the Court determined that the petitioner was an intersex person, thus recognising that such a category of individuals existed, contrary to the finding in the Richard Muasya case. Second, the Court went on to order ‘appropriate relief’ for the petitioner by compelling the Attorney General to file a report identifying the status of a statute addressing intersex persons as well as guidelines and regulations on ‘corrective surgery’ for this group. On May 26, 2017, the Government of Kenya gazetted a taskforce on policy, legal, institutional and administrative reforms regarding intersex persons in Kenya in an effort to implement the decision in the Baby ‘A’ Case.³

In *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR* (Audrey Mbugua Case), the High Court held that a transgender person had the right to government issued documentation that bore their desired name (in the case where a person had legally changed their name) and with the gender marker removed. In coming to this decision, the Court considered Article 10 of the Constitution that enumerates Kenya’s National Values and Principles as well as Article 28 on the Right to Dignity.

Although Article 27 (4) of the Constitution of Kenya (2010) does not explicitly mention gender identity as a protected category, the precedent set in the Audrey Mbugua Case may be construed to mean that transgender, intersex, and gender non-conforming individuals are entitled to human rights protections that are specific to their lived experience. However, lack of clear policies relating to non-discrimination on grounds of gender identity open transgender, intersex, gender non-conforming persons to differential treatment.

³ The Kenya Gazette, Vol. CXIX—No. 67, May 26 2017

Identity documentation in Kenyan society forms an important element of public life and key determinant of access: persons without valid identification may face arbitrary arrest and detention by law enforcement; withholding of services such as healthcare, banking, education, employment, and travel. Persons wishing to have their gender marker amended in identity documents or other documents conferring legal status face hardship arising from lack of policies to govern this process. Although the Audrey Mbugua Case set a major precedent in allowing for the alteration of gender markers in government issued documents, the legal grounding was limited to instances where the law did not explicitly provide for the requirement that a gender marker be included in the document (in this case, Ms Audrey Mbugua's academic certificate). In cases where the law requires a gender marker in a document (such as a birth certificate⁴, passport⁵, or national identity card⁶), persons wishing to have their gender marker amended have few, if any, options. Transgender persons in Kenya also face challenges when seeking to legally change their name, even though this process is governed by law.⁷

4) Destigmatization linked with depathologization

In keeping with constitutional principles of equality and non-discrimination, the Kenya Health Policy stresses the importance of inclusiveness, non-discrimination, social accountability, and gender equality in provision of health services.⁸ However, members of the LGBTI community still face hurdles to enjoying their constitutional right to the highest attainable standard of healthcare. According to a report by UHAI – the East African Sexual Health and Rights Initiative⁹, about 4 out of 10 LGBTI persons in East Africa responded that they were denied health services on account of their gender identity with 46% responding

⁴ Under Section 2 of the Births and Deaths Registration Act, the *prescribed particulars* of a birth certificate means - “as to any birth, the name, sex, date and place of birth, and the names, residence, occupations and nationality of the parents.”

Under Rule 13 (d) of the Kenya Citizenship and Immigration Regulations, 2012, all passports issued under the authority of the Government of Kenya must bear the sex of the passport holder.

Under Section 5 (1) of the Registration of Persons Act, the Principal Registrar is mandated

to maintain a register of all registered persons and to record the particulars in respect of such persons which include the sex of the person.

In February 2017, the High Court ordered the Principal Registrar of Persons to effect name

changes in five transgender individuals after a protracted legal battle. In Kenya, persons may apply for a change of name via Deed Poll, a process governed by Section 9 of the Registration of Persons Rules (Subsidiary Regulations to the Registration of Persons Act, Chapter 107, Laws of Kenya). ‘Court orders state to alter names in IDs for five transgender Kenyans,’ Justice Now (Vincent Agoya), February 15 2017, <http://justicenow.co.ke/2017/02/15/court-orders-state-to-alter-names-in-ids-for-five-transgender-kenyans/> (Accessed June 4, 2017)

Kenya Health Policy 2014 - 2030: Towards Attaining the Highest Standards of

Health,

(2014) Government of Kenya, https://www.afidep.org/?wpfb_dl=80 (accessed June 5, 2017)⁹ ‘Why must I cry? Sadness and laughter of the LGBTI community in East Africa,’ (2013), UHA: East African Sexual and Health Rights Initiative (Nairobi)

that they were denied services due to their sexual orientation. Further, about 4 out of 10 respondents (37.44%) confirmed staying away from health services due to their sexual orientation.

In response to the challenges facing LGBTI persons wishing to access healthcare, especially in relation to HIV/AIDS and Sexually Transmitted Infections (STIs), the National AIDS Control Council has called on the Government of Kenya to implement human rights based approaches to facilitate access to health services particular to the prevention, treatment, and care for HIV/AIDS.¹⁰ In particular, the NACC recommends policy interventions aimed at removal of barriers to access to information and services in public and private entities, improving access to legal and social justice and protection from stigma and discrimination in the public and private sector, and using human rights approaches to assist programs to pursue a zero tolerance to stigma and discrimination.

In Kenya, transgender and gender non-conforming persons face violence and discrimination when accessing health care services, violations that partly arise from the pathologization of gender identities and expression that do not conform to gender norms in Kenyan society.

Transgender, intersex, and gender non-conforming persons face a disproportionate lack of appropriate and affirming health care. In particular, persons wishing to undergo medical procedures aimed at conforming their physical characteristics with their gender identity face a legal and policy environment that does not take their needs into consideration. Currently, there exist no guidelines on the diagnosis and treatment of gender identity disorders (GID). The lack of clear policies and guidelines is both a cause and effect of the violence and discrimination that transgender and intersex persons experience. For instance, court records in Audrey Mbugua Case reveal that the applicant had been required to produce documentation showing that they had been diagnosed with gender identity disorder before the gender marker in the academic certificate could be changed. However, without clear guidelines on the diagnosis of gender identity disorder, this could not have been effected and, if it had been, such a diagnosis could have had questionable legal merit.

As a testament to the urgent need for guidelines on the diagnosis and treatment of gender identity disorder, Transgender Education and Advocacy (TEA) in 2014 sued the Government of Kenya to compel it to draft, table, and implement rules concerning GID.¹¹ Although the case was dismissed, it set a precedent that could be used to advocate for comprehensive health rights for transgender, intersex, and gender non-conforming persons.

Intersex persons also suffer from the lack of clear guidelines on appropriate health care, including sex reassignment surgery. In effect, many intersex persons are at risk of

¹⁰ Kenya AIDS Strategic Framework: 2014/2015 - 2018/2019, National AIDS Control Council (2014)

¹¹ Republic v Cabinet Secretary Ministry of Health & 2 others Ex-Parte Transgender Education and Advocacy (Suing Through Its Officials) Audrey Mbugua Ithibu (Chairperson) & 2 others [2015] eKLR

inappropriate and invasive medical procedures that constitute torture and other cruel, inhuman and degrading treatment and punishment.¹²

5) Socio-cultural inclusion

Kenyan society continues to grapple with the issue of sexual and gender diversity with data suggesting that many Kenyans are opposed to human rights protections on grounds of sexual orientation and gender identity and expression. A Pew Research Survey from 2013 noted that 90% of respondents from Kenya answered in the negative to the question “Should Society Accept Homosexuality?”¹³

Many factors contribute to opposition to LGBTI rights including conservative religious teachings, colonial legacies, the taboo on sex related issues, strict adherence to a gender binary and gender norms, as well as a lack of understanding of sexual and gender diversity. In addition, prominent individuals including religious and political leaders routinely make negative statements targeting the LGBTI community. For instance, on separate occasions on May and June, 2015, William Ruto, Kenya’s Deputy President stated that “homosexuals have no place in Kenya”¹⁴ and that “Kenya will not allow homosexuality.”¹⁵ In November 2010, Raila Odinga, then Kenya’s Prime Minister, called for the mass arrests and jailing of persons found engaging in homosexuality and ‘lesbianism.’¹⁶

On a positive note however, the President of the Republic of Kenya, H.E. Uhuru Kenyatta, stated in October 2015 that his administration would not “allow people to take the law into their own hands and harass [LGBTI persons]” stating further that a Kenyan society that

¹² See, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/22/53, February 1, 2013. Also see, "Pathologization - Being lesbian, gay, bisexual and/or trans is not an illness" For International Day against Homophobia, Transphobia and Biphobia, Office of the High Commissioner for Human Rights, 17 May 2016 <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19956#sthash.Ac6sSgk.dpuf> (accessed June 5, 2017)

¹³ The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries, *Pew Research Center*, <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/> (Accessed on June 2, 2017)

¹⁴ Kenya will not allow homosexuality, says DP Ruto, Standard Digital, May 3, 2015, <http://www.standardmedia.co.ke/article/2000160893/kenya-will-not-allow-homosexuality-says-dp-ruto> (Accessed on June 2, 2017)

¹⁵ DP William Ruto: Homosexuals have no place in Kenya, Standard Digital, July 5, 2015, <https://www.standardmedia.co.ke/article/2000168074/dp-william-ruto-homosexuals-have-no-place-in-kenya> (Accessed on June 2, 2017)

¹⁶ Odinga Remarks Spark Persecution Fears for Kenya's Gay Community, Voice of America,

November 29, 2010, <https://www.voanews.com/a/odinga-remarks-spark-persecution-fears-for-kenyas-gay-community-111057574/156941.html> (Accessed June 2, 2017)

respects human rights protections on grounds of sexual orientation and gender identity would ‘take time.’¹⁷

Negative comments targeting members of the LGBTI community in Kenya have in the past been linked with increased violence and discrimination on grounds of sexual orientation and gender identity.¹⁸

International Best Practices Recommendations to the Government of Kenya

Based on the above findings and analysis, we make the following recommendations to the Government of Kenya:

- a) To immediately repeal Section 162 (a) and (c) and Section 165 of the Penal Code.
- b) To immediately pass and implement a law enforcing Article 27 (4) of the Constitution, with provisions outlawing discrimination on grounds of sexual orientation, gender identity, and expression in line with the Government of Kenya’s commitment during the Universal Periodic Review in 2015.
- c) To immediately pass and implement laws affirming the rights of transgender and intersex persons, especially on the right to have one’s gender marker changed in all government-issued documentation. Further, to ensure that such laws are in line with international best practices that aim to depathologize the legal status of transgender, intersex, and gender non-conforming individuals.
- d) To immediately implement recommendations by the National AIDS Control Council aimed at integrating human rights based approaches to facilitate access to health services particular to the prevention, treatment, and care for HIV/AIDS.
- e) To immediately pass and implement laws affirming the right to the highest attainable standards of health as they pertain to transgender, intersex, and gender non-conforming individuals including gender reassignment surgery, HIV/AIDS programming, and mental healthcare.
- f) To introduce legislation criminalise hate speech and incitement to violence on grounds of sexual orientation and gender identity, and expression.
- g) To withdraw all appeals to cases in which the High Court ruled in favour of LGBTI rights.
- h) To withdraw all criminal cases against persons charged under Section 162 (a) and (c) and Section 165 of the Penal Code or, more generally, for persons prosecuted for engaging in adult, consensual, and private same-sex conduct.

¹⁷ ‘President Kenyatta on gay rights,’ CNN Press Room, October 15, 2015, <http://cnnpressroom.blogs.cnn.com/2015/10/18/president-kenyatta-on-gay-rights-in-kenya/> (accessed June 5, 2017)

¹⁸ For instance, rumors of a gay wedding in Mtwapa town in Kilifi County in 2014 was linked with increased attacks on the local gay community, many members of whom fled the town as a result. Number of gays drops in Mtwapa as they move to other towns over security, The Star, December 11, 2014, <http://www.the-star.co.ke/news/2014/12/11/number-of-gays->

[drops-in-mtwapa-as-they-move-to-other-towns-over_c1051907](#) (Accessed June 2, 2017)

- i) To immediately ban forced anal examinations as a means of collecting evidence against persons accused of engaging in adult, consensual, and private same-sex conduct.
- j) To prosecute to the full extent of the law all persons suspected of committing acts of violence, including incitement to violence, on grounds of sexual orientation, gender identity, and expression.



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Legal Aid Report

2016 January -

December 2016

About Us

The National Gay and Lesbian Human Rights Commission (NGLHRC) is an independent human rights institution that exists to realize legal and policy reforms towards equality and full inclusion of sexual and gender minorities in Kenya. The bastion of our work is providing daily free legal aid to ensure access to justice for sexual and gender minorities in Kenya. This legal aid is supported by training of paralegals and first responders, civic education, monitoring and documentation of violations, strategic litigation, lobbying and public education programs.

We are a dedicated team of lawyers and justice defenders whose mission is to promote and protect the equality and inclusion of LGBTIQ persons and communities in Kenya, and advance their meaningful participation in Society. We envision a Kenyan society with equal rights and opportunities for all.

Executive Summary

The NGLHRC legal aid center responds to and seeks redress to violations against all persons on ground of their sexual orientation and/or gender identity whether real or imputed. NGLHRC provides free legal aid, referrals, documentation, intervention, alternative dispute resolution and direct legal representation.

We also provide bail and bond for our clients based on a (most at) need analysis. We also provide urgent response and fact finding in some cases and engage in strategic litigation toward equality and justice for LGBTIQ persons in Kenya.

In 2016, NGLHRC received 193 reports of violations through its legal aid clinic and 78 cases through its allies and referral mechanisms. 207 of these violations were reported in and around Nairobi. Violations were reported from out of town and the NGLHRC was able to intervene through phone conversations, referrals, activating trained paralegals in the locale as well as relying on the goodwill of the partnerships that have been cultivated with the judiciary and police in different counties. These cases were attended to in Kwale, Nyeri, Eldoret, Nakuru, Lamu, Kisumu, Kisii, Malindi, Mombasa and Kiambu.

Some of the notable spikes in this analysis are the increased number of violations against transgender and gender non-conforming persons as well as targeting of ITGNC organizing. Additionally, there is a steady increase of reports from our lesbian, bisexual and queer constituency. One of the more notable constants in this analysis is the high number of male gay/bisexual identified clients as compared with other sexual and gender identities. Similarly there is still a very low reporting rate by complaints denoting the lack of the trust in the police and judiciary by the LGBTIQ constituency in Kenya.

In cases where the violations are actually reported, there are very little prospects of completing investigations, arrests and arraignment in court. Even in the rare cases where the trial process is begun, there is a large likelihood of interference by both state and non-state actors leading to withdrawal of the matter. This is also reinforced by the general lack of goodwill within the justice system to pursue redress for LGBTIQ complainants.

**2016 Legal Aid Report
Figures**

Series	Nature of incidence	No. of Incidences	No. reported to the	Status of case	Perpetrator	Notes
1.0	Blackmail and Extortion	38	14	9 cases under investigation 3 arrests 1. perpetrator charged with theft 2. cases not issued with	State: 6 Non-state: 31	36 of the complainants were male 1 female client Reports of police working with blackmailers to detain and threaten clients
2.0	Violence					
2.1	Physical assault	31	6	2 arrests Charges dropped before arraignment in court	State: 9 Non-state: 22	1 report of castration where a client was attacked assaulted so badly he lost use of one of his testicles 7 reports of intimate partner violence
2.2	Verbal assault	33	2	No arrests		1 report of repeated verbal abuse by a senior manager at client's place of work upon discovery of their sexual orientation. Client unwilling to report to police or pursue

Series	Nature of incidence	No. of Incidences	No. reported to the	Status of case	Perpetrator	Notes
2.3	Sexual violence	11	3	2 arrests	Non-state	Report of assailant taking and distributing pictures of the unconscious victim within the college campus they both attend
2.4	Threats of violence	18	1	No arrests	Non-state	2 clients reported threats from intimate partners on matters related to HIV status Reports of assailants brandishing a gun at clients and threatening
3.0	Cyber bullying	47	1	Perpetrator summoned to the police station. Matter resolved and charges dropped	State: (state officer) 4 Non-state: 13	Reports of high ranking state officers trolling LGBTIQ persons engaging them on social media
4.1	Murder	1	1	No arrests	Unknown	Matter featured on mainstream media highlighting CCTV footage showing the alleged perpetrators. No follow up
4.2	Suicide/ Attempts	2	0		N/A	Referrals for psycho-social made

Series	Nature of incidence	No. of Incidences	No. reported to the	Status of case	Perpetrator	Notes
5.1	Eviction from rental property	18	0	No arrests	Non-state	A large number of reports made by refugees and asylum seekers within urban
5.2	Dismissal emnlovme	2	0	No arrests	Non-state	One client in alternative resolution as been contract
5.3	Expulsion school	2	2	N/A	Non-state	Both students been attacked seriously fellow students before the intervention of school No action was taken against the
6.1	Unlawful arrest and	19	3 reports to IPOA	No response from IPOA	State	Complaints forwarded to the office of the
6.2	Targeted criminal prosecution	2	0	1 charge dropped 1 client acquitted	State	Charges dropped when the law on which the prosecution relied was deemed
7.0	Forced Relocat					
7.1	Internal Relocation	3	3	Clients referred to allied organizations	Non-state	Internal relocation has proved in some cases to only

Series	Nature of incidence	No. of Incidences	No. reported to the	Status of case	Perpetrator	Notes
7.2	Refugee/Asylum	Cumulative Data Unavailable Only 9 reports received by				
8.0	Social exclus					
8.1	Denial of services	6	0	2 clients complained to senior management in	1 state (institution)	
8.2	Denial of access	24	0	10 clients complained to	Non-state	
8.3	Disinheritance / disowning	3	0	1 ADR intervention	Non-state	NGLHRC facilitated dialogue between client and family and
9.1	Custody of children	2	1	No action taken by police	Non-state	Clients complained of families/spouses denying the access to/ custody of their children upon discovery of their