



**STATEMENT**  
**UPR PRE-SESSIONS ON KENYA**  
**GENEVA, FEBRUARY 2024**

**Delivered by: Sheila Lulu: National Gay and Lesbian Human Rights Commission**

This statement is delivered on behalf of the National Gay and Lesbian Human Rights Commission (NGLHRC), an independent human rights institution founded in 2013 working for legal and policy reforms towards equality and full inclusion of sexual and gender minorities in Kenya. NGLHRC has participated in UPR processes at the national level since 2014.

During Kenya's second Universal Periodic Review (UPR) by the Human Rights Council in 2015, the Government of Kenya accepted a recommendation by Sweden to "Adopt a comprehensive anti-discrimination law affording protection to all individuals, irrespective of their sexual orientation or gender identity."

The recommendation was further reiterated by the Committee on Elimination of All Forms of Discrimination Against Women (CEDAW), which in its Concluding Observation to Kenya during its review in 2017 called on Kenya to protect all women, including lesbian, bisexual, and transgender women and intersex persons, against discrimination by adopting comprehensive anti-discrimination legislation affording such protection. The committee further called on Kenya to include non-heteronormative sexual practices as a basis for protection against discrimination

Ten years later, Kenya has yet to deliver on its commitment allowing for a protection lacuna where discrimination and violence based on actual or perceived sexual orientation and gender identity remain rife.

The statement focuses on addressing the following issues: discrimination based on: criminalization of consensual adult same-sex/gender conduct, sexual orientation, gender identity, gender expression, and violence against sexual and discrimination against sexual and gender minorities Kenyans, refugees, and asylum seekers.

1. Criminalization of consensual adult same-sex conduct



The Constitution of Kenya Article 27(4) guarantees individuals the right not to be discriminated against, directly or indirectly, on any grounds. However, sexual and gender minorities still face discrimination and stigma from state and non-state actors, often materializing in various forms of violence. The Penal Code of Kenya sections 162(a) and (c), 163, and 165 criminalize consensual, adult, private same-gender sex between males with a penalty of up to fourteen years imprisonment. Approximately 4200+ cases of human rights violations have been received and responded to by the NGLHRC's legal aid clinic<sup>1</sup>, which has provided pro bono legal aid since 2013. In 2023 alone, the clinic received and responded to 1561 cases, the most ever recorded.

These cases of violence include but are not limited to murder, blackmail and extortion, physical assault, conversion practices, eviction, denial of services in hospitals, unlawful termination from employment, and family rejection, amongst others. Additionally, there's been reluctance by law enforcement to prosecute these cases, leading to little to no trust in the judicial system within sexual and gender minorities. Additionally, in Kenya, religious leaders often incite violence and moral panic within the pretext of culture, morality, and religion. Whereas the law only criminalizes same-sex conduct and identities, and prosecutions on the clause are low, the existence of the impugned sections in the law is used to justify the discrimination and harm to sexual and gender minorities. A parliamentary report in 2015 alleged that there had been 595 prosecutions under these sections in the preceding three years. In 2021, two men were charged with violations under Section 162(c) of the Penal Code; however, the charges were later dropped. In 2022, two trans women were reportedly tried for "indecent practices between males; the matter was concluded in 2023."

## 2. Discrimination based on Sexual Orientation, Gender Identity, Gender Expression and Characteristics

The 'Unnatural Offences' clause of the penal code, has been selectively applied to stigmatize, marginalize and harm sexual and gender minorities. Owing to its vague provisions and inconsistency with the spirit of the Constitution of Kenya 2010, the application of this law has ultimately resulted in the discrimination of sexual and

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<sup>1</sup> <https://nglhrc.com/legal-aid-centre/>



gender minorities as highlighted below.

**Access to sexual and reproductive health (SRH) services for Key Populations and SOGIESC minorities** in Kenya remains severely restricted, as criminalization prevents individuals from these groups from seeking necessary SRH services. There are limited interventions targeted to the needs of same-sex couples, transgender and intersex persons, further excluding them from accessing gender-affirming care and other essential services. Evidence from Human Rights Watch (2023), among other reports, shows that fear of legal repercussions and discriminatory attitudes within healthcare settings leads to a lack of access to appropriate care, exacerbating health disparities.

While Kenya has made strides in expanding healthcare services, including the development of policies aimed at improving UHC, significant gaps remain in addressing the specific needs of KPs and SOGIESC minorities. Progress is hindered by the absence of comprehensive training for healthcare providers, financial barriers, and the exclusion of SRH services such as hormone therapy and other gender-affirming treatments from healthcare packages.

**Discrimination in access to education** remains a major challenge, with several government directives targeting learners that are presumed to be sexual and gender minorities. In December 2021 and February 2022, the Cabinet Secretary of Education in Kenya made public discriminatory remarks calling for learners perceived to be LGBTIQ+ persons to be arbitrarily moved from boarding schools, a move aimed to “curb homosexuality in schools”. The remarks, unfortunately, recorded a spark increase in cases of stark discrimination in learning in schools of learners who are prejudicially perceived to be of diverse sexual orientations and gender identities. A 2019 study by the University of CapeTown and various civil society organizations in Kenya, found that 59% of participants had experienced verbal harassment due to their sexual orientation and/or gender identity or expression at some point in their life, and 39% in the previous year. Institutes of education had been identified as one of the sites of this type of violence with This gender minority participants being most affected at 71%.

**Forced anal testing on presumed gay, transgender persons and men who have sex**



**with men**, although banned, continues to be used as a threat by law enforcement officers while targeting sexual and gender minorities.

3. Discrimination against sexual and gender minorities Kenyans, refugees, and asylum seekers.

While sections 162(a), (c), 163, and 165 of the Penal Code criminalize consensual, adult, private same-sex/gender conduct with a penalty of up to fourteen years, it does not criminalize the existence of sexual and gender minorities. The vagueness of the law creates a glaring loophole in its interpretation and application, which is often abused by state actors categorically against sexual and gender minorities in Kenya: targeting, persecuting, extorting, and using these sections as a threat.

Regionally, Kenya has been the safe hub for refugees and asylum seekers fleeing their countries due to fear of persecution based on their real or perceived SOGIE-SC. “Just like any other person”, a report by Amnesty International and NGLHRC reveals that refugees and asylum seekers suffer violent attacks, threats or intimidation, individually or as a group. According to a 2021 report by the Organization for Refuge, Asylum & Migration (ORAM) and Rainbow Railroad, 83% of refugees interviewed at the Kakuma refugee camp said they had been physically assaulted, and 26% said they had been sexually assaulted. Refugees and asylum seekers are additionally subjected to arbitrary arrests, malicious prosecution, denial of services like registration as an asylum seeker, which violates the principle of non-refoulement, and lack of access to housing, food, and other necessities.

### **Conclusion and Recommendations**

It's crucial for there to be systemic changes to ensure that everyone, regardless of their sexual orientation or gender identity, can live without fear of violence or discrimination. Following the spirit of the 2010 Kenyan Constitution, we strongly encourage the Government of Kenya to accept and implement the recommendations below.

- Repeal Sections 162, 163, and 165 of the Penal Code decriminalizing consensual same-sex conduct between adults
- Adopt evidence-based laws, policies, and measures to combat violence and discrimination on the grounds of sexual orientation and gender identity and



expression in line with Resolution 275 of the ACHPR.

- Enact comprehensive anti-discrimination laws that explicitly protect LGBTQ individuals from discrimination in employment, education, healthcare and other facets of life.
- Uphold the rule of law by investigating and holding perpetrators of violence, including law enforcement, accountable for instigating any forms of violence and human rights violations against sexual and gender minorities.
- Collaborate with international partners, organizations, and human rights bodies to adopt best practices and receive technical assistance in protecting the rights of vulnerable communities.

Thank you for your attention.