

## **UPR 2<sup>ND</sup> Cycle Shadow Report on Sexual & Gender Minorities in Kenya**

### **Introduction**

This report has been drafted and submitted by 10 organizations working on Sexual Orientation and Gender Identities (SOGIE) and human rights in Kenya. They include PITCH Alliance; Trans Alliance; KELIN; JINSIANGU; KESWA; Gay and Lesbian Coalition of Kenya (GALCK); NYARWEK; KP Consortium; National Gay and Lesbian Human Rights Commission (NGLHRC); ISHTAR MSM;

### **ISSUE 1: DECRIMINALIZATION OF CONSENSUAL SAME SEX SEXUAL CONDUCT BETWEEN ADULTS**

1. In the last 2 UPR sessions, the Government of Kenya has persistently noted recommendations seeking to decriminalize consensual same sex sexual conduct among adults citing popular cultural, moral and religious and legal reasons. Lesbian, Gay, Bisexual, Transgender, Queer and Gender Non-conforming persons are targeted by the state under Section 162(a), (c) and 165 of the Penal Code of Kenya. These sections of the law are used by enforcement agencies to arrest and charge persons who are lesbian, gay, bisexual, transgender, queer or gender non-conforming (LGBTQ+) or are perceived to be LGBTQ+. These sections were incorporated into law during Kenya's colonial era and have since never been repealed from Statute.
2. The National Gay and Lesbian Human Rights Commission has documented over 1,500 cases of violence meted against Kenyan citizens on the basis of their real or perceived sexual orientation, gender identity and expression.<sup>i</sup> These reported incidences are associated with blackmail and extortion, violence in both state and non-state institutions, sexual assault, physical assault, verbal abuse, threats to violence, murder, cyber bullying, denial of health services, denial from accessing premises, disinheritance, disownment, eviction from rental property, dismissal from employment, expulsion from school, targeted criminal prosecutions, forced migration and forced internal relocation.
3. Efforts to seek justice and prosecute perpetrators have been futile as the Government has not yet institutionalized a reporting mechanism that recognizes human rights violations against people who are Lesbian, Gay, Bisexual, Transgender, Queer and Gender Non-conforming.

4. In 2016, the National Gay and Lesbian Human Rights Commission; The Gay and Lesbian Coalition of Kenya; and The Nyanza Western and Rift Valley Network filed a petition challenging the constitutionality of Sections 162(a), (c) and 165 of the Penal Code of Kenya.<sup>ii</sup> The final determination of this case was made on 24<sup>th</sup> May, 2019 where the High Court of Kenya ruled that the laws in question were not vague, uncertain or in violation of the Constitutional rights of Kenyans who identify as LGBTQ+. Further, the Courts on behalf of the State distanced themselves from delivering justice in cases where there have been reports of stigma and discrimination on grounds of a person's real or perceived sexual orientation, gender identity or expression.<sup>iii</sup>
5. The right to form associations and freedom of assembly as enshrined in Chapter 4 of the Constitution of Kenya has been limited in organizations promoting the rights of LGBTQ+ Kenyans. The NGO Coordination board denied the National Gay and Lesbian Human Rights Commission (NGLHRC) as a non-profit organization promoting the rights of LGBTQ+ persons in Kenya. Following a petition filed by NGLHRC challenging this violation in 2014, a three-judge bench of the Constitutional Division of the High Court in Nairobi unanimously ruled that the Government agency had no authentic reason to deny NGLHRC official registration status as an NGO. The NGO Coordination Board immediately appealed the ruling which has since been dismissed by the Court of Appeal.<sup>iv</sup>

## **RECOMMENDATIONS**

6. **The Government of Kenya should bring national legislation into conformity with its international human rights obligations by repealing all provisions which criminalise consensual same sex sexual conduct between adults.**
7. **The Government of Kenya should align the Penal Code with the Constitution of Kenya, 2010.**
8. **Government and social institutions should uphold Constitutional values in their service delivery and relations with all citizens regardless of perceived or real sexual orientation, gender identity and expression.**
9. **The State should maintain an inclusive position on matters related to sexual and reproductive health rights and ensure public education of State and Non-State Actors on Fundamental and Basic Human Rights of citizens based on the Constitution of Kenya, 2010.**

10. **Government to institute a mechanism around to collect data and/or reports of human rights violations against Kenyan citizens on the basis of their real or perceived sexual orientation, gender identity and expression.**
11. **The Government of Kenya should uphold the Court of Appeal decision regarding the registration of non-profit organization promoting the rights of LGBTQ+ persons.**

## **ISSUE 2: FAILURE BY THE GOVERNMENT TO ENACT OR ADOPT A COMPREHENSIVE ANTI-DISCRIMINATION LAW OR POLICY**

12. The Constitution of Kenya, 2010 under the Bill of Rights, guarantees every citizen Equality and Freedom from Discrimination under Article 27(4)<sup>v</sup> and Freedom of Association under Article 36. During the last review, the Government of Kenya agreed to adopt a comprehensive anti-discrimination law affording protection to all individuals irrespective of their sexual orientation or gender identity in conformity with international standards.<sup>vi</sup>
13. In its 2<sup>nd</sup> UPR Cycle Implementation Matrix, the Government of Kenya committed to do so by enacting a law and adopting a policy in accordance with Article 27 of the Constitution of Kenya, 2010. The Government of Kenya went ahead to analyse legislation that are inconsistent with the said provision and to this end, one of the things that was done was that the Chief Justice gazetted a Taskforce on the Decriminalization and Re-classification of Petty Offences which found that various Sections of the Penal Code were widely discriminatory of sexual and gender minorities amongst other groups. However, the process remains incomplete and has failed to espouse meaningful participation and engagement of all stakeholders.
14. This state of affairs constrained sexual and gender minorities to file several cases in Court<sup>vii</sup> on the issue of freedom of association, right to dignity and equality and non-discrimination for gender and sexual minorities but despite progressive pronouncements by the Courts, there is still unwillingness to fully enforce the judgements.
15. The only intervention of note since then has been the fact that the Attorney-General constituted a Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya.<sup>ix</sup>
16. There have been many reported cases of stigma and discrimination in the provision of sexual and reproductive rights in Kenya targeting persons identifying as or perceived to be lesbian, gay or bisexual. According to the KNCHR report titled '*Realising Sexual and Reproductive Health Rights in Kenya: A Myth or Reality?*', Sexual Minorities (Gay, Lesbian, Bisexual,

Transgender, Intersex Persons and Sex Workers) and marginalized and vulnerable groups (People with Disabilities, People Living with HIV and AIDS, Adolescents and Youth, Internally Displaced Persons and Refugees) are the most vulnerable to stigma and discrimination<sup>x</sup> especially when it comes to accessing basic but vital services such as health services; SRH Services; legal service.

17. The National Gay and Lesbian Human Rights Commission Legal AID Clinic Report, 2017 stated that the absence of explicit and robust stigma and discrimination laws impacts the ability of a given individual from seeking justice.<sup>xi</sup> This may be attributed to the lack of a framework to combat this form of prejudice on the part of service providers.

### **RECOMMENDATIONS**

18. **The State should adopt a comprehensive and inclusive equality and non-discrimination laws that afford protection to all Kenyans regardless of their real or perceived sexual orientation, gender identity or expression.**
19. **The Government of Kenya should bring national legislation into conformity with its international human rights obligations by repealing all provisions which criminalise consensual same sex conduct for adults.**
20. **The Government of Kenya should align the Penal Code with the Constitution of Kenya, 2010.**
21. **The State should align health policies with the Constitution of Kenya, 2010 so as to include Sexual Orientation and Gender Identity Minorities' Rights in the access to comprehensive healthcare.**

### **ISSUE 3: FAILURE BY THE GOVERNMENT TO ESTABLISH A LEGAL AND POLICY FRAMEWORK TO SUPPORT TRANSGENDER PERSONS**

22. Transgender and gender non-conforming persons in Kenya face immense challenge. According to the report by FHI 360 titled '*Linkages Kenya Gender Analysis report*'<sup>xii</sup> the challenges include societal and medical barriers which tend to increase their exposure to violence; suicide; low uptake and access to comprehensive prevention care and treatment interventions all of which give rise to a perpetuating cycle of risk exposure, stigmatization,

prejudice, and eventually poor health outcomes for transgender and gender non-conforming persons. They are perceived to be in violation of Kenya's personation laws especially the Penal Code<sup>xiii</sup>. Indeed, they face stigma and discrimination which is perpetuated through the Penal Code and the Sexual Offences Act.

23. In a 2011 report by the Kenya Human Rights Commission titled *'The Outlawed Amongst Us'*, it was found that both State and Non-State Actors often use Sections 162(A)<sup>xiv</sup>, (C) and 165 of the Penal Code to validate the stigma, discrimination and violence towards individuals who do not conform to the society's expectations of gender identity, gender expression or sexual orientation. These laws negate the existence of transgender people by criminalizing gender identity expression that does not match a person's sex assigned at birth.
24. The failure to do so has among other things led to the filing of a plethora of cases by Sexual Orientation, Gender Identity and Expression Human Rights Organizations in Kenya challenging sections of the Penal Code that go against various section of the Bill of Rights including Article 27. The Kenyan Judiciary has made immense progress in recognizing the rights of Transgender persons to effect name change as was seen in the *J.R. Case No 147 of 2013 Republic Vs. Kenya National Examinations Council and Attorney General, Ex-Parte Audrey Mbugua Ithibu*.<sup>xv</sup> However, the Government has failed to put in place policies for the same.
25. The existence of laws criminalizing sex work, consensual same sex sexual conduct among adults, indecency among males, impersonation and cross-dressing **continue to** negate the existence of transgender people by criminalizing gender expression that does not match a person's sex assigned at birth. Such use of criminal laws upholds fixed, binary concepts of gender based on moral or religious beliefs about strict gender roles for women and men that are determined by a person's sex assigned at birth. Freedom of expression, including gender expression, is a universal human right, whether or not it is reflected in a specific country's laws. While in custody, transgender women engaged in sex work have widely reported mistreatment because of their gender identity. The police repeatedly and systematically target transgender women, resulting in repeated arrests, fines and concomitant harassment. While falsification of documents for Transgender people may be necessary to protect their health and well-being yet because of it, trans people have been prosecuted for fraud, 'falsification of documents' and other charges for using such documents.

## **RECOMMENDATIONS**

26. **The State should put in place policies to comply with the ruling of the Court of Appeal ruling in the *J.R. Case No 147 of 2013 Republic Vs. Kenya National Examinations Council and Attorney General, Ex-Parte Audrey Mbugua Ithibu*.**
27. **The State should adhere to and implement all court decisions issued on protection of the Bill of Rights under the Constitution of Kenya, 2010.**
28. **Kenya should adopt a comprehensive and inclusive equality and non-discrimination law, affording protections to all Kenyans regardless of their real or perceived sexual orientation, gender identity or expression as guaranteed under Article 27(4) of the Constitution of Kenya, 2010.**
29. **The Government of Kenya should enhance the knowledge and understanding of State and Non-state actors around transgender issues and persons and adopt and enact a Transgender Gender Affirming Healthcare Policy domesticating Transgender Implementation Toolkit (TRANSIT) and Standards of Care (SoC) as best practise standards for replication in healthcare systems.**
30. **The Government of Kenya should put in place a comprehensive legal and policy framework to protect transgender persons and also to enable them effect name change.**

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<sup>i</sup> <https://static1.squarespace.com/static/581a19852994ca08211faca4/t/5b73f628cd8366c5496aed6d/1534326313804/Legal+Aid+Report+2017+.pdf>

<sup>ii</sup> <https://www.galck.org/pepal162/>

<sup>iii</sup> <http://kenyalaw.org/caselaw/cases/view/173946/>

<sup>iv</sup> <https://www.the-star.co.ke/news/2019-03-22-win-for-gays-as-court-upholds-their-right-to-form-organisation/>

<sup>v</sup> Article 27(4) of the Constitution of Kenya provides that “*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.*”

<sup>vi</sup> Recommendation 142.41

<sup>vii</sup> Refer to *Constitutional Petition 440/2013 Eric Gitari v NGO Coordination Board and 5 others, Constitution Petition 150/2016 Eric Gitari v The Attorney General* which ruled that Article 36 of the Kenyan Constitution guarantees the right to freedom of association for all persons. This includes members of the LGBTI community. By not allowing an NGO focused on protecting the rights of the LGBTI community, the Non-Governmental Organizations Coordination Board (the Board) violated that organization’s constitutional right to association. Accordingly, the Board’s decision was overturned, and they were directed to allow to the NGO to register. Accessed on <https://globalfreedomofexpression.columbia.edu/cases/gitari-v-non-governmental-organisations-co-ordination-board/>

<sup>viii</sup> Refer to *J.R. Misc. Application No. 308A of 2013. Republic Vs. NGO Co-ordination Board & The Attorney General and Transgender Education and Advocacy (Suing Through Its Officials) Audrey Mbugua Ithibu, Maureen Muia and Annet Jennifer Muthoni Thiaya* where the Court stated that after the Governmental Organizations Co-Ordination Board (Board) failed to register Transgender Education and Advocacy (TEA) as a Non-Governmental Organisations (NGOs), TEA filed an ex parte application before the High Court of Kenya. The Board claimed that

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the application was not processed because the names of some of the officials did not match the names listed on the application; this discrepancy existed because these officials were in the process of transitioning their gender. The High Court found that the Board did not give a “valid ground or explanation” justifying its refusal, and the Court compelled the Board to register TEA as an NGO. Accessed on <https://globalfreedomofexpression.columbia.edu/cases/republic-v-non-governmental-organizations-co-ordination-board/>

<sup>ix</sup> Gazette Notice No. 4904. Vol. CXIX-No. 67 Published on 26.05.2017 Accessed on 25.08.2018

<sup>x</sup> Realising Sexual and Reproductive Health Rights in Kenya: A myth or reality? [http://www.knchr.org/Portals/0/Reports/Reproductive\\_health\\_report.pdf](http://www.knchr.org/Portals/0/Reports/Reproductive_health_report.pdf)

<sup>xi</sup> <https://static1.squarespace.com/static/581a19852994ca08211faca4/t/5b73f628cd8366c5496aed6d/1534326313804/Legal+Aid+Report+2017+.pdf>

<sup>xii</sup> <https://www.fhi360.org/sites/default/files/media/documents/resource-linkages-kenya-tg-gender-analysis-2016.pdf>

<sup>xiii</sup> Section 382(1) of the Penal Code states that ‘Any person who, with intent to defraud any person, falsely represents himself to be some other person, living or dead, is guilty of a misdemeanour’

<sup>xiv</sup> Section 162(A) of the Penal Code deals with unnatural offences and it states that ‘Any person who has carnal knowledge of any person against the order of nature’...or Section 162(C) ‘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

<sup>xv</sup> Refer to *High Court of Kenya at Nairobi Judicial Review Division J.R. Case No 147 of 2013 Republic Vs. Kenya National Examinations Council and Attorney General, Ex-Parte Audrey Mbugua Ithibu*. Audrey Mbugua Ithibu is a Kenyan trans-woman who was awarded a Certificate of Secondary Education in 2001. Upon obtaining the award, Audrey went through hormonal treatment. Then in 2010, she requested the Kenya National Examinations Council to change her name on the certificate from her former name Andrew to Audrey and to remove the male designation reflected on the certificate. The Council refused to make his requested changes, citing, *inter alia*, its inability to authenticate awards by allowing former candidates to change their records, as well as its limited financial resources to implement a policy of name change on certificates. In a significant ruling for the transgender community in Kenya, the High Court of Kenya in Nairobi in an *ex parte* decision issued an order of mandamus compelling the Council to change her name and remove the existing gender mark. The Court reasoned that the governing law of the Council does not expressly prohibit name change on issued certificates, nor does it require gender to appear on awards. The Court also based its ruling on Articles 10 and 28 of Kenyan Constitution on respecting and promoting human dignity. Accessed on <https://globalfreedomofexpression.columbia.edu/cases/republic-v-kenya-national-examinations-council/>