



THE NATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION CASE DIGEST FEBRUARY 2017

The National Gay and Lesbian Human Rights Commission (NGLHRC) is 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. Founded in 2012, NGLHRC's mandate is 90% legal representation and documentation. We engage in strategic and incremental litigation to make the case that Kenya's 2010 Constitution, which transitioned Kenya into an open and democratic society based on human dignity, equality, equity and freedom, protects all citizens in Kenya regardless of their sexual orientation and gender identity. Through these and other efforts, we envision a Kenyan society with equal rights and opportunities for all.

The following is a Case Digest of all our constitutional litigation cases as of January 2017.

NON-GOVERNMENTAL ORGANISATIONS CO-ORDINATION BOARD v ERIC GITARI [2015]

Civil Appeal 145 of 2015

An appeal of the decision of The High Court of Kenya at Nairobi in Petition 440 of 2013,

Claimant: Eric Gitari

Respondents: Non-Governmental Organisations Co-ordination Board (1st Respondent)

Attorney General (2nd Respondent)

Interested Parties: Audrey Mbugua Ithibu (1st Interested Party)

Daniel Kandie (2nd Interested Party)

Kenyan Christian Professional (3rd Interested Party)

Katiba Institute (Amicus Curiae)

Presiding: Hon. Mr. Justice Isaac Lenaola
Hon. Lady Justice Mumbi Ngugi
Hon. Mr. Justice G.V. Odunga

***Case Digest prepared by [Human Dignity Trust](#)*

Constitutional law – Bill of Rights – Freedom of association – Whether LGBTIQ people have a right to form associations in accordance with law

Constitutional law – Bill of Rights – Freedom of association – Whether decision to refuse to register NGO on the basis of its name violated rights to freedom of association and freedom from discrimination

Constitutional law – Bill of Rights - Non-discrimination – Whether the Constitution protects against discrimination on grounds of sexual orientation

FACTS:

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

(b) In accordance with the requirements for the registration of a NGO, the claimant 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. (c) The claimant 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.

(d) The NGO Board wrote to the claimant'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”.

(e) After three attempts to register the proposed NGO the claimant scheduled a meeting with Mr. Mugo, a member of the Legal Department of the Board. According to the claimant, 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.

(f) The claimant 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.

(g) The respondents contended that the claimant’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.

REMEDIES SOUGHT:

- A judicial interpretation that the words ‘every person’ in Article 36 of the Constitution includes all persons living within the republic of Kenya regardless of their sexual orientation.
- A declaration that by failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice the respondents contravened the provisions of Article 36 of the Constitution.
- A declaration that the petitioner is entitled to exercise his constitutionally guaranteed freedom to associate by being able to form an association like any other Kenyan.
- An order of mandamus directing the 1st respondent to strictly comply with its constitutional duty under Articles 27 and 36 of the Constitution.
- A declaration that the failure by the respondents to comply with their constitutional duties under Article 36 infringes on:
 - The rights of marginalised and minority groups, such as gay and lesbian people,

in the Republic of Kenya.

- The right of gay and lesbian Kenyan citizens to have the Constitution fully implemented both in its letter as well as in spirit.
- The costs of the petition.

ISSUES:

- 1) Whether LGBTIQ people have a right to form associations in accordance with the law.
- 2) If the answer to issue (1) is in the affirmative, whether the decision of the NGO Board not to allow the registration of the proposed NGO because of the choice of name is a violation of the rights of the claimant under Articles 36 and 27 of the Constitution.

HELD:

1. YES. Article 36 of the Constitution grants “every person” the right to form an association “of any kind”. This right can only be limited in terms of law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. (72) An individual is a “person” for the purposes of the Constitution regardless of their gender or sexual orientation. (73) The Court is enjoined to apply the Constitution without prejudice, and must be able to distinguish between the right to assemble of those of a sexual orientation that is not socially accepted, and the homosexual acts that the respondents and the 3rd interested party argue are criminal acts prohibited by law. (98) The Penal Code does not criminalise homosexuality but rather certain sexual acts “against the order of nature” which is not defined. (114) Moreover, the Penal Code does not contain any provision that limits the freedom of association of individuals on the basis of their sexual orientation. (115) The NGO the claimant seeks to register aims to protect the human rights of those who belong to the LGBTIQ community. Whatever the views of the NGO Board are with regard to such people, it has a duty as a state entity to act in accordance with the Constitution. (99) Once it is recognised that LGBTIQ people are human beings, which the NGO Board expressly recognised in its submission, they must be accorded with their constitutionally guaranteed human rights, however reprehensible society may find their sexual orientation. (104) Moral or religious beliefs, no matter how

strongly held, cannot be a basis for limiting rights. (121) Freedom of religion encompasses the right not to have the religious beliefs of others imposed on one. (122) The Constitution protects those with unpopular views, minorities and rights that attach to human beings, regardless of the views of the majority. It is the duty of the Court to uphold the Constitution, not the views of the majority. (123)

2. YES. As illustrated by the letter from the NGO Board to the claimant's lawyers, and by the NGO Board's affidavit, they take issue with both the name and the object and purpose of the proposed NGO since they regard it as promoting illegal conduct. (106). The NGO Board's decision to reject the names submitted by the claimant was a rejection of his application for registration of his proposed NGO. The suggestion to use another name logically flows from a rejection of the name of the NGO, but cannot be divorced from the rejection of the objectives of the proposed NGO. (106)

a. The acts of the NGO Board in rejecting the claimant's name for the proposed NGO, and by extension its refusal to register the proposed NGO, is a limitation on the claimant's freedom of association under Article 36 which the NGO Board could not justify in accordance with the requirements of the Constitution.

b. Article 27 of the Constitution protects the right to equality and non-discrimination of "every person". (131) Although Article 27 (4) does not explicitly list sexual orientation as a prohibited ground of discrimination the grounds listed are not exhaustive, as is evident from the use of the word 'including'. (132) Allowing discrimination on the basis of sexual orientation would be counter to the constitutional principles of human rights, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. (137) The NGO Board violated the claimant's right to non-discrimination.

Claim upheld.

POINTS OF INTEREST

On enjoying rights regardless of sexual orientation:

At para 98: "...this Court is enjoined by the Constitution to apply the law without fear or favour. More particularly, it must do so without prejudice, and be able to distinguish between the right to assemble of those of a sexual orientation that is not socially accepted, and the homosexual acts that the respondents and the 3rd interested party argue are criminal acts prohibited by law. The duty of the Court is not to substitute these views and beliefs with constitutional provisions, but to examine the act of the Board which is the subject under challenge in this petition, and determine whether it accords with the Constitution, and if not, to uphold the Constitution."

At para 104: "As a society, once we recognise that persons who are gay, lesbian, bisexual, transgender or intersex are human beings...however reprehensible we may find their sexual orientation, we must accord them the human rights which are guaranteed by the Constitution to all persons, by virtue of their being human, in order to protect their dignity as human.."

On the claim that LGBT organisations promote illegal conduct where same-sex conduct is criminalised:

At para 114-115: "A reading of the above provisions indicates that the Penal Code does not criminalise homosexuality, or the state of being homosexual, but only certain sexual acts "against the order of nature.". That the State does not set out to prosecute people who confess to be lesbians and homosexuals in this country is a clear manifestation that such sexual orientation is not necessarily criminalised. What is deemed to be criminal under the above provision of the Penal Code is certain sexual conduct "against the order of nature", but the provision does not define what the "order of nature" is. More importantly, the Penal Code does not criminalise the right of association of people based on their sexual orientation, and does not contain any provision that limits the freedom of association of persons based on their sexual orientation."

On the claim that the NGO Board simply rejected 'the name' of the proposed NGO:

At para 107: “Whatever hue the Board wishes to place on its rejection of the name sought to be used by the petitioner, its effect is a rejection of his application to register an association to advocate for the rights of LGBTIQ. The petitioner simply cannot register an association for such purposes.”

On citing moral or religious beliefs to justify limitations on rights:

At para 121-122: “The Board and the Attorney General rely on their moral convictions and what they postulate to be the moral convictions of most Kenyans. They also rely on verses from the Bible, the Quran and various studies which they submit have been undertaken regarding homosexuality. We must emphasize, however, that no matter how strongly held moral and religious beliefs may be, they cannot be a basis for limiting rights: they are not laws as contemplated by the Constitution. Thus, neither the Penal Code, whose provisions we have set out above, which is the only legislation that the respondents rely on, nor the 6 religious tenets that the Board cites, meet the constitutional test for limitation of rights. To cite religious beliefs as a basis for imposing limitations on human rights would fly in the face of Article 32 of the Constitution. Freedom to profess religious beliefs, with due respect, encompasses freedom not to do so. Or, to put it differently, freedom of religion encompasses the right not to subscribe to any religious beliefs, and not to have the religious beliefs of others imposed on one.”

Domestic decisions referenced:

Karua vs. Radio Africa Limited T/A Kiss Fm Station and Others Nairobi Hccc No. 288 Of 2004 [2006] 2 EA 117; [2006] 2 KLR 375; *John Harun Mwau & 3 Others v Attorney General & 2 Others* Petition No 65 of 2011 [Consolidated with] Petitions No’s 123 of 2011 and 185 of 2011[2012]; *The Matter of an Application for Judicial Review Orders between the Republic and Transgender Education and Advocacy*, MiscAppl 308A of 2013.

Decisions from courts in other jurisdictions referenced:

Kivumbi vs. Attorney-General [2008] 1 EA 174; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6; *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; *West Virginia State Board of Education v Barnette* 319 U.S 624 (1943); *Lyomoki and Others vs. Attorney General* [2005] 2 EA 127; *Kasha Jacqueline and Others v Rolling Stone Limited and Another* No 163 of 2010; *Kanane v State* 2003 (2) BLR 67 (CA).

Decisions of international courts and bodies referenced:

Jawara vs The Gambia (2000) AHRLR 107 (ACHPR 2000); *Amnesty International vs Zambia* (2000) AHRLR 325 (ACHPR 1999), *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000); Sudan: *Law Office of Ghazi Suleiman v Sudan* (II) (2003) AHRLR 144 (ACHPR 2003); *Civil Liberties Organisation v Nigeria*, Communication No 101/93; *Patrick Reyes v The Queen Privy Council* Appeal No. 64 of 2001.

Treaties, resolutions and declarations referenced:

Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; The African Charter on Human and Peoples' Rights; The African Commission on Human and Peoples' Rights Resolution on the Right to Freedom of Association; "The rights to freedom of peaceful assembly and of association", United Nations Human Rights Council Resolution A/HRC/RES/15/21 (6th October 2010); "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" United Nations General Assembly Resolution A/RES/53/144 (8th March 1999)

In its submissions the NGO Board relied on the UN Human Rights Committee case of *Joslin v New Zealand* (Communication No. 902/1999) (17th July 2002).

GROUND FOR APPEAL

The Appellants case is grounded on the following:

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
9. registration of proposed associations of persons such as the 1st Respondent

CASE UPDATE

The hearing date for the Petition is on the 28th of February, 2017

COL & ANOTHER V RESIDENT MAGISTRATE- KWALE COURT & 4 OTHERS (2016)

Civil Appeal 56 of 2016, The High Court of Kenya at Mombasa

Claimants: COL (1st Petitioner)

GMN (2nd Petitioner)

Respondents: Resident Magistrate Kwale Courts (1st Respondent)
DCIO Msabweni Police Division (2nd Respondent)
Coast Provincial General Hospital (3rd Respondent)
Director of Public Prosecutions (4th Respondent)
Cabinet Secretary Ministry of Health (5th Respondent)

Presiding: Hon. Mr. Justice Anyara Emukule

***Case Digest prepared by NGLHRC*

POINTS OF LAW:

Constitutional law - Bill of Rights - Rights of arrested persons - Whether the petitioners right to refuse to give self-incriminating evidence was violated in accordance with the law

Constitutional law - Bill of Rights - Rights of arrested persons - Whether evidence obtained from the petitioners (through non-consensual anal examination, HIV testing and Hepatitis B testing) was collected in a manner that violated their fundamental freedoms and thus should be excluded in accordance with the law

Constitutional law - Bill of Rights - Right to privacy - Whether means through which evidence was obtained from petitioners violated their right to privacy in accordance with the law

Constitutional law - Bill of Rights - Right to dignity - Whether means through which evidence was obtained from petitioners violated their right to have their dignity respected and protected in accordance with the laws

FACTS:

- a) The petitioners, COL and GMN, were arrested on suspicion of being homosexuals. Under investigations, the petitioners refused to undergo medical tests. However after being charged before the Kwale Principal Magistrate's Court, they were ordered to undergo medical examination including anal check-up, HIV and Hepatitis B testing.
- b) The petitioners were charged in Kwale Principal Magistrate's Court, Criminal Case No. 209 of 2015 with the offence of;
 - i) COUNT I- Practising unnatural offence contrary to section 162 (a) as read with

section 162 (c) of the penal Code (Cap 63, Laws of Kenya).

- ii) COUNT II- (COMMITTING) an INDECENT ACT with an Adult contrary to Section 11 A of the Sexual Offences Act 2006 (No. 3 of 2006).
 - iii) COUNT III – trafficking in obscene literature (publications) Contrary to section 181(1) of the Penal Code (Cap 63, Laws of Kenya).
- c) The petitioners signed Post Rape Case Forms and were made to lie with their legs up and metal spatulas were inserted and torches were shone into their anuses to see any abnormalities, in the presence of police officers.
 - d) The petitioners commenced litigation proceedings on the grounds that their rights were violated contrary to Article 22(1) of the Constitution. That the medical examination violated the petitioners’ rights under Article 29 (f) of the Constitution which prohibits cruel and degrading treatment, interfered with the petitioners’ privacy, and was a violation of Article 28 of the Constitution, and Article 10 of the International Covenant on Civil and Political Rights, and Articles of the African Charter on Human and Peoples Rights.
 - e) Counsel contended that the signing of Post Rape Case Forms by the Petitioners did not constitute consent and that consent is fundamental to invasion of a person’s body. To do so, without such consent, is an assault or torture. Further, consent is not required where an order of the court is made under section 36 (1) of the Sexual Offences Act. Counsel also contended that the tests for Hepatitis “B” was unnecessary and taking of blood was contrary to Article 31 of the Constitution. Counsel contended that the purpose of the medical examination was to aid the court to find the petitioners guilty, and that such evidence must be excluded from the Court record. Further, that it was an abuse of Court process and therefore unconstitutional since the offence created under section 162 of the Penal Code (Cap 63 Laws of Kenya), criminalizes anal acts against the order of nature, and that there was no anal act, the petitioners were arrested out of suspicion merely.
 - f) The first, third and fifth respondents submitted that the issues raised by the petition related to the fact that the petitioners have been charged in Kwale Principal Magistrate’s Court under the Sexual Offences Act and had no claim in this Court. That actions of the Respondents were not in breach of any provision of the Constitution, and referred to section 36 of the Sexual Offences Act which grants the Court jurisdiction to order the taking of samples from any accused and section 36 (7), which immunizes the respondents from any liability in respect of any action relating to taking of samples under section 36 (1). In addition, Counsel submitted that Regulations 5 of the Sexual Offences Medical Treatment Regulations 2012, allows the collections of samples, and no consent is required under the Sexual Offences Act. Further that consent did not amount to obtaining incriminating evidence against the petitioners.
 - g) The second and fourth respondents submitted that subjection to medical examination was normal practice and that Section 36 (7) of the Sexual Offences Act immunizes officers

from liability in the absence of evidence of any fraud or bad faith for the respondents to be made liable at all. Further, that the petitioners are adults who consented both in court and in the Hospital's testing clinic to the medical examination and that their claim is an afterthought to deny consent as defined by section 42 of the Sexual Offences Act. Counsel submitted that cases cited from outside Kenya were only relevant where there was a lacuna in Kenya law.

REMEDIES SOUGHT:

- (1) A declaration that the manner in which the first Respondent acquired evidence from the Petitioners herein was unconstitutional and go against the tenets of a fair trial and the right of an accused person not to incriminate themselves in line with the provisions of Articles 49 (d) and 50 of the Constitution;
- (2) That upon granting prayer (a) above, a declaration that the criminal proceedings in the lower court are unconstitutional and be terminated;
- (3) A declaration that the act of forced examination of the Petitioners by way of nonconsensual anal examination, HIV testing and Hepatitis B testing by the 3rd Respondent through the directive of the First and Second Respondents amounted to a violation of the human and constitutional rights of the Petitioners as outlined in the Petition;
- (4) A declaration that forced anal examination amounts to degrading treatment as it violated human dignity and the violation therein has a disparate impact on members of sexual minorities;
- (5) A declaration that non-consensual medical examination of the nature herein or of any form are a violation of the right to privacy and of the right to health as provided for under the Constitution.
- (6) An order for general and exemplary damages on an aggravated scale to the Petitioners herein for the physical and psychological suffering occasioned by the unlawful acts of the Respondents.
- (7) Such other orders as the Court shall deem fit to make under the circumstances.

ISSUES:

- 1) Whether the medical examination was a violation of the Petitioners rights to privacy and non-discrimination, torture and cruel, inhuman or degrading treatment or punishment, to human dignity and security of the person;
- (2) Whether the right not to be compelled to make any confessions or admissions that would be used in evidence against the accused person.

HELD:

1. NO: Section 36 of the Sexual Offences Act provides for collection of evidence of

medical, forensic and scientific nature, “where a person is charged with committing an offence under the Act, the court may direct that an appropriate sample or samples be taken from the accused person at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing including DNA test, in order to gather evidence and to ascertain whether or not the accused committed an offence.” On matters of consent Section 42 of the Sexual Offences Act provides that a person consents if he or she agrees by choice and has the capacity to make that choice, and where a sample or samples are taken, any medical officer or other designated person are immune from any action in respect of any injury or loss caused by or in connection with the taking of an appropriate sample in terms of sub-section (5) except where the taking of the sample was unreasonable or done in bad faith or the person who took the sample(s) was culpably ignorant and negligent. In addition, Regulation 5 of the Sexual Offences (Medical Treatment) Regulations 2012, provides that a court may order the collection from such person charged with a sexual offence at such place and subject to such conditions that the court may specify. Regulation 6(3) states that the medical practitioner may conduct examination and treatment on the person who is suspected to have committed a sexual offence. Where an accused person declines to a voluntary medical examination, the prosecution has an option to seek a court order under Section 36 (1) of the Sexual Offences Act. An appropriate sample or samples taken may consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence. Further, that petitioners willingly and voluntarily consented to the medical examination under the representation of their counsel. A record of proceedings is instructive in this regard wherein counsel for the Petitioners at the hearing said:- “We do not oppose the prosecution’s application and the same be done immediately to avoid holding accused indefinitely. We can come back on 23/02/2015.

2. NO: The right to fair trial guaranteed under Article 50 (2) (d) of the Constitution, does not, extend to excluding an accused from medical examination. Citing **REPUBLIC Vs. JOHN KITHYULU** [2013]eKLR, where the court held that an an accused person’s right against self-incrimination constitutes giving oral or documentary testimony against himself, and does not extend to taking of blood samples to prove a particular fact; and **Pennyslanaca Vs. Nunity** 4966 US 582, wherein the United States Supreme Court held that, “The privilege against self-incrimination protects an accused from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature but not from being compelled by the state to produce “real or physical evidence,” there is no guarantee that the results of the analysis of the petitioners blood would prove exculpatory or inculpatory until such test was done. Further, that

presence or adequacy of evidence against the petitioners is a matter for the trial court and not the constitutional court.

Petition dismissed.

POINTS OF INTEREST

On removal of consent under the Sexual Offences Act:

At para 36: "...Regulation 5 of the Sexual Offences (Medical Treatment) Regulations 2012, provides that a court may order the collection from such person charged with a sexual offence at such place and subject to such conditions that the court may specify. Regulation 6(3) states that the medical practitioner may conduct examination and treatment on the person who is suspected to have committed a sexual offence."

At para 37: "...where an accused person declines to a voluntary medical examination, the prosecution has an option to seek a court order under Section 36 (1) of the Sexual Offences Act. An appropriate sample or samples taken may consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in ascertaining whether or not the accused person committed an offence, and in the case of blood or tissue sample, may be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with the accepted medical practice."

On forced medical examination constituting an affront to human dignity, cruel, inhumane and degrading treatment:

At para 47-48: "That to my understanding means that neither the mouth nor the anus is a sexual organ. However if modern man and woman have discovered that these orifices may be employed or substituted for sexual organs, then medical science or the purveyors of this new knowledge will have to discover or invent new methods of accessing those other parts of the human body even if not for purposes of medical forensic evidence, but also curative medical examination. Until such discoveries are made and approved for use, medical examination under the Sexual Offences Act, the Narcotics, Drugs and Psychotropic Substances Act, and similar statutes where parts of the human anatomy are ordinarily repositories of bacteria harmful to the health of the person, medical examination under these statutes will, of necessity be intrusive, in the same way as medical practitioners will examine the labia and vagina of a victim of defilement or rape to establish whether there was penetration. That too is intrusive. That too is an intimate part of the victim's body."

At para 51: "... to repeat on matters of sodomy or acts against the order of nature as is envisaged in Section 162 of the Penal Code, rectal or anal examination is according to current medical science, and constitution of the human anatomy, the only way of examination to show whether the anus is dry or has been subjected to application of medical lubricants for ease of anal penetration. The anus, unlike the vagina has no natural lubrication. There is no other part of the human body upon which to carry out the medical examination."

Domestic decisions referenced:

Republic Vs. John Kithyulu [2016]; *Richard Dickson Ogendo & Others Vs. Attorney General & 5 Others* [2014]

In their submissions, second and fourth respondents also relied on *Davis Gitau Njau & 9 Others Vs. The Hon. Attorney General* [2013]

Decisions from courts in other jurisdictions referenced:

Muranda Vs. Arizona, US 4336 [1996]; *Scmerer Vs. California*, 389, US 757 [1966]; *Pennyslanaca Vs. Nunity* 4966 US 582

GROUNDS FOR APPEAL

The Appellants case is grounded on the following:

1. That the Learned Judge erred in law by concluding that the Petitioners consented to undergo anal examinations. The Learned Judge failed to consider the legal quality of the Petitioners' assent, and had no regard to the coerced nature of any purported consent into undergoing the examinations, that a Court order for examination had been made (so illustrating the absence of any genuine consent and/or rendering any consent an irrelevance)
2. That the Learned Judge erred in law by holding consent capable of justifying the infringement of Constitutional rights.
3. That in any event, the Learned Judge erred in law in his construction of the Sexual Offences Act 2006
4. That the Learned Judge, having erroneously concluded that the Petitioners' case failed on the basis of the flawed conclusions listed above, erred in law by failing to address *at all* the scope of the Constitutional rights which the Petitioners claimed had been violated by the Respondents' conduct
5. That the Learned Judge erred in both fact and law by placing emphasis on his personal

understanding of the medical utility of anal examinations as a method of collecting evidence of conduct contrary to section 162 of the Penal Code. The Learned Judge should have had no regard to those views, lacking, as they did, any adequate evidential foundation particularly in circumstances where they were contradicted by a range of international expert information that for the purpose of purporting to prove homosexuality such exams are both worthless and, consequently, carrying them out for such purposes constitutes ill-treatment.

6. That the Learned Judge erred in concluding that it was necessary to conclude that the Penal Code and the Sexual Offences Act were, more broadly, unconstitutional in order for the petitioners to succeed. Even if the constitutional status of underlying legislation is not directly in issue that cannot open the door to methods of evidence gathering which themselves involve breaches of fundamental rights protected by the Constitution.

CASE UPDATE:

The case was mentioned on 13th February 2017 and set for hearing on 29th March, 2017

ERIC GITARI V ATTORNEY GENERAL & ANOTHER [2016]

Petition 150 of 2016, The High Court of Kenya at Nairobi

Claimants: Eric Gitari

Respondents: The Honorable Attorney General

Interested Parties: Kenya Christian Professionals Forum

Presiding: Hon. Mr. Justice Isaac Lenaola

***Case Digest prepared by NGLHRC*

POINTS OF LAW

Constitutional Law- Sections 162, 163 and 165 of the Penal Code contravene the following articles of the Constitution: Article 27 on equality and freedom from discrimination; Article 28 on human dignity; Article 29 on freedom and security of the person; Article 31 on privacy; and Article 43 on economic and social rights, specifically the right to health. Alternatively, they contravene common law and constitutional principles (including Articles 10 and 50 of the Constitution) relating to legal certainty, on account of their vagueness and uncertainty and consequently cannot operate to create criminal penalties.

FACTS:

- a) The petitioner, Mr. Eric Gitari, sought orders to have Section 162 of the Penal Code, CAP 63 and Section 165 of the Penal Code, CAP 63 declared invalid and struck down based on Article 2 (4) of the Constitution which provides that “Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”
- b) The petitioner premised his claims on grounds that the disputed provisions taken individually and / or cumulatively contravene various provisions of the Constitution, specifically: Article 27 on equality and freedom from discrimination; Article 28 on human dignity; Article 29 on freedom and security of the person; Article 31 on privacy; and Article 43 on economic and social rights, specifically the right to health. Alternatively, they contravene common law and constitutional principles (including Articles 10 and 50 of the Constitution) relating to legal certainty, on account of their vagueness and uncertainty and consequently cannot operate to create criminal penalties.
- c) Petitioner requested an interpretation whether the existence of the impugned provisions without exclusive interpretation directly violates the rights of the Petitioner and other members of the public who form part of the Lesbian, Gay, Bi-sexual, Transgender, Intersex and Queer (LGBTIQ) community; and are a marginalised group requiring special protection of the Court in accordance with Article 260 of the Constitution as LGBTIQ persons in Kenya are perpetually exposed to risk of arrest, prosecution, denial of liberty, intimidation and mistreatment.
- d) Respondent submitted that the Petition raises substantial questions of law as contemplated under Articles 165 (4), and 165 (3) (d) of the Constitution and therefore justifies the empanelling of a bench of an uneven number of Judges of the Court by the Chief Justice, to hear and determine the Petition.

REMEDIES SOUGHT:

- 1) That the Chief Justice constitute a bench to hear and determine the petition in accordance with Article 165 (4) of the Constitution which states that, “Any matter certified by the

court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”

ISSUES:

- 1) Whether the Petitioner and the Respondents, as parties to this matter, demonstrated that a substantial question of law arises from the Petition in order to allow a referral to the Chief Justice in terms of Article 165 (4) of the Constitution.

HELD:

1. YES: The petition presents weighty issues which have not been determined by any other Court in Kenya as this unique aspect of LGBTIQ issues is not one that has been broached by the Courts in the past, especially in light of the previous constitutional dispensation and there are therefore no ready and available answers thereto. Further that the matter affects more than the Petitioner. The entire LGBTIQ community would be affected by the decision and this, considering the discussion above on the status of the members of this community in the Republic, is no small exploit. In addition, the emotive nature of the issue is also bound impact on varied actions assumed subsequent to determination of the matter, adding to the delicate and complex nature of the issues involved. They deserve therefore, the constitution of a bench of Judges for hearing and determination.

POINTS OF INTEREST:

On discrimination of the LGBTQI community by state & non-state actors;

At para 28: “... on the subject of delivery of public services I am aware that the Kenyan Government has reiterated that it does not support discrimination against the LGBTIQ community...”

At para 29: “There is however huge debate in the public domain with civil society and others arguing that Kenya's laws that discriminate against LGBTIQ persons and their intimate activities based on the grounds of their sexual orientation are unconstitutional are therefore void. The basis of this has been the evolution of thinking around human rights, so that human rights are now considered to include LGBTIQ rights and that human rights cannot be implemented selectively.”

At para 30: “...the reality that the LGBTIQ community is hardly a popular or accepted group in the Kenyan society. This in turn makes the LGBTIQ community subject to physical and sexual harassment by the police and members of the public, extortion and blackmail etc.”

Domestic decisions referenced:

Martin Nyaga and Others v Speaker County Assembly of Embu and 4 Others and Amicus [2014]

Okiya Omtatah Okiiti v Independent Electoral and Boundaries Commission & 3 others [2016]

Amos Kiumo & 2 others v Cabinet Secretary Ministry of Interior & Coordination of National Government & 3 others [2014]

Del Monte Kenya Limited v County Government of Muranga & 2 others [2016]

Kalpana H Rawal v Judicial Service Commission & 3 Others [2015]

Decisions from courts in other jurisdictions referenced:

Sir Chunilal V. Mehta and Sons Ltd v Century Spinning and Manufacturing Co Ltd 1962 SC 1314; Supreme Court of India

PRAYERS SOUGHT BY THE APPELLANT:

In the latest petition to the court on the matter, the following prayers were sought by the appellant:

1. A declaratory order that Sections 162 (a) and (c) and 165 of the Penal Code are contrary to the provisions of Articles 27 (4), 28, 29, 31, 43 and 50 of the Constitution and are therefore null and void
2. A declaratory order that sexual and gender minorities are entitled to the right to the highest attainable standard of health including the right to health care services as guaranteed in Article 43 of the Constitution
3. An order directing the State to develop policies and adopt practices prohibiting discrimination on grounds of sexual orientation and gender identity or expression in the health sector

CASE UPDATE:

No direction from the court as yet. The petition should have been heard on December 6th, 2016 but the Honourable Justice Isaac Lenaola received a promotion to the Supreme Court and we await reconstitution of the bench.