

JUSTICE DENIED: NO TO #REPEAL162

An explanation of the Kenya High Court judgment on the constitutionality of same-sex sexual conduct. The Court's decision impacts LGBT persons' rights, the rights of men who have sex with men, and the HIV response in Kenya.

Introduction

On 24 May 2019, three High Court (Justices Aburili, Mwita and Mavito) gave a unanimous judgment that the law that criminalises same-sex sexual conduct is not in violation of the Constitution, in the case of *EG & 7 Others v the Attorney General; DKM & 9 Others v the Attorney General* (Petition 150 & 234 of 2016)



The Court combined two petitions against section 162(a) & (c) and section 165 of the Penal Code.

What was the case about?

The Petitioners' case was that these crimes are unconstitutional because they are **vague and ambiguous** and because they violate the **constitutional rights** of lesbian, gay, bisexual and transgender (LGBT) persons in Kenya.

Section 162

Section 162(a) and (c) of the Penal Code says that it is a felony for any person to have "carnal knowledge of any other person against the order of nature" or to permit "a male person to have carnal knowledge of him or her against the order of nature." This is punishable by 14 years' imprisonment.

Section 165

Section 165 of the Penal Code says it is a felony for a male person to commit "any act of gross indecency with another male person", whether in public or in private. This is punishable by five years' imprisonment.

Who were the parties in the case?

- A number of individuals were **Petitioners** in the case. They included gay men, a lesbian woman, a parent of a gay man, and a priest who witnessed human rights violations against LGBT persons in his community. In addition, three organisations were Petitioners: the Gay & Lesbian Coalition of Kenya, the Nyanza Western & Rift Valley Network, and the Kenya Human Rights Commission.
- Seven **interested parties** joined the case in support of the Petitioners. The 1st-6th interested parties were individuals who advocate for the rights of LGBT persons and men who have sex with men (MSM). The 8th interested party, the Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN), is an organization that works to promote access to equitable healthcare and HIV services for all Kenyans.
- Two **friends of the court** (*amici curiae*) made legal arguments: the Katiba Institute and the Kenya National Commission on Human Rights.

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- The **Attorney General** opposed the Petitioners' case on behalf of the Kenyan State.
- Three **interested parties** supported the State's case: the Kenya Christian Professional Forum, Irungu Kangata and the Ummah Foundation.

Evidence



A significant amount of evidence was filed to support the Petitioners' case. The evidence showed how the law negatively affects the lives, well-being, health and human rights of LGBT persons in Kenya.



- Petitioners testified to severe **violence** on the basis of their sexual orientations, including rape and physical assault by members of their communities and the police.
- They described **stigma and discrimination** under the law on the basis of their sexual orientation: being denied services, kicked out of their homes, losing jobs, receiving death threats, and being ridiculed.



- One of the petitioners and an interested party described being arbitrarily **arrested** repeatedly. The Petitioners said they **live in fear** and hiding, constantly at risk of arrest and persecution, just because of who they are.



- Witnesses confirmed these experiences, including family members, a priest and organisations that have worked for decades in human rights, health and LGBT persons' rights.

- Highly qualified experts (like Prof Lukoye Atwoli and Prof Dinesh Bhugra) explained the negative **mental and physical health** impacts of the law. They told the Court that **sexual orientation is an innate and fundamental part of a person's personality**, not a disorder that can be changed, but a form of diversity which requires respect.



- World-renowned HIV experts (including Prof Anand Grover and Prof Chris Beyrer) explained to the Court how laws criminalizing same-sex sexual practices are a public health **barrier to HIV prevention, treatment and care** and that these laws heighten the vulnerability of LGBT persons and MSM to HIV.

- KELIN placed in evidence **government policies that admit this law is a health rights violation and a barrier to MSM accessing HIV services**. They pointed the Court to how the State has put in place programmes and sought funding from organisations like PEPFAR and the Global Fund to Fight AIDS Tuberculosis and Malaria to remove legal barriers to Kenya's HIV response, including these very criminal provisions.

Legal arguments

The Petitioners asked the Court to declare sections 162 and 165 of the Penal Code unconstitutional and invalid.

- They argued the law **degrades people's inherent dignity and right to privacy** by criminalising their most private and intimate means of sexual self-expression. This colonially-imposed law punishes a fundamental part of the human experience for LGBT persons and the expression of relationships, love and sexual intimacy. By doing so, the law violates constitutionally-protected rights.
- The Petitioners also argued that the sections 162 and 165 are **vague and uncertain**. The rule of law and the constitutional principle of legality requires that laws are clearly defined so that ordinary citizens can understand what the law says and how to avoid criminal behavior. Sections 162 and 165 lack clarity.
- The Petitioners argued that their case was not about same sex marriage but only about the criminalisation and severe punishment of same sex sexual intimacy through a law that **discriminates directly and indirectly** against LGBT persons.

- The 1st-6th interested parties argued that the criminal law violates the **privacy and freedom of expression** of LGBTQ persons.
- The 8th interested party, KELIN, argued that through retaining the law, the State is violating the **right to the highest attainable standard of health** guaranteed under the Constitution to all persons without discrimination.

Violations of constitutional rights

The Petitioners argued that the law violates the following articles of the Bill of Rights in the Constitution:

27

The right to equality and freedom from discrimination

43

The right to health

28

Human dignity

2

Rights under international law including the African Charter on Human & Peoples' Rights.

29

Freedom and security of the person

31

The right to privacy

10

50

The requirement that laws are certain and in line with the principle of legality and the rule of law.

What was the State's case?

Evidence

The State denied the Petitioners' facts. In addition, an obstetrician-gynaecologist and a psychiatrist (on behalf of the 7th interested party, the Kenya Christian Professional Forum) and the 9th interested party, a politician (Irungu Kangata) gave their opinions.

- Dr Wahome Ngare claimed that homosexuality is the result of children being sexually abused by adults and that people who experience this abuse are more likely to abuse children. He argued that people are not "born gay".
- Dr Johnson Kilonzo Mutiso told the Court that people are not "born gay" and that sexual orientation can be "unlearned" through "gender reparative therapy." He argued that MSM's vulnerability to HIV is a reason to continue to criminalise same sex sexual conduct.
- Mr Irungu Kangata said that Kenyan society and culture has historically punished homosexuality through ostracisation and death. He said that homosexuality is "against procreation" and claimed that people choose to be lesbian or gay.

Legal arguments

The State argued that the Petitioners had failed to prove that sections 162 and 165 are unconstitutional and asked the Court not to declare the provisions invalid.

- The State argued that declaring this law unconstitutional would have a drastic impact on cultural, religious, social policy and legislative functions in Kenya, describing homosexuality as “despicable and insulting to traditional morality”.
- The State argued that its decision to keep these laws is based on the Constitution’s recognition of “God who is the objective moral law giver” and the Constitution’s protection, in article 45, of the right to marry of two consenting adults of the opposite sex.
- The State also argued that the law was sufficiently clear and that the offences apply to both heterosexuals and homosexuals and is therefore not discriminatory.
- The 7th interested party, KCPF, argued that the criminal law appropriately regulates conduct that is “wrong” and “immoral” and which offends the common good and “traditional values”. KCPF told the Court that the discrimination and stigma LGBT people face is not because of the law and merely the community’s reaction to behavior the society deems harmful, which it said was normal in traditional African society.

What was the Court's decision?

Justices Aburili, Mwita and Mavito made a unanimous decision dismissing the Petition. The Court held that sections 162 and 165 of the Penal Code did not violate the Constitution.

Is the law vague or ambiguous?

The Court considered that the provisions are not vague or ambiguous and that the meaning of the law is made clear by referring to a legal dictionary and previous court decisions. The Court interpreted the offences in reference to the following meanings:

Section 162

"Carnal knowledge" is a sexual bodily connection.

"Against the order of nature" means anal penetration.

Section 165

An "indecent act" means contact between the genitals of a person, their breasts and buttocks with that of another person.

Does the law violate constitutional rights?

Equality and freedom from discrimination

The Court held that there was no violation of the right to equality and freedom from discrimination. The Court considered that section 162 did not target LGBT persons but applied to "any person" and that section 165 applied to "any male person". The law therefore was not considered to directly discriminate against people on the basis of their sexual orientation. The Court held further that the examples of social discrimination that the Petitioners described were not supported by "credible evidence".

The right to health

The Court held that contrary to the extensive evidence before it, it could not find any violation of the right to health in a "factual vacuum", or on the basis of "unsupported hypotheses".

Freedom and security of the person

Despite the extensive evidence before the Court, it held that the Petitioners had not demonstrated a particular instance in which their right to freedom and security of the person had been violated.

The rights to privacy and dignity

The Court held that the Petitioners' rights to privacy and dignity were not violated or threatened because it considered that the Constitution's protection of the right of two persons of the opposite sex to marry in Article 45(2) required same-sex sexual practices to be criminalised. The Court reasoned that this was in line with the morals and values of Kenyan society.

The Court held:

"In our view, decriminalizing same-sex sex on grounds that it is consensual and is done in private between adults, would contradict the express provisions of Article 45(2). The Petitioners' argument that they are not seeking to be allowed to enter into same sex marriage is, in our view, immaterial given that if allowed, it will lead to same sex persons living together as couples. Such relationships, whether in private or not, formal or not would be in violation of the tenor and spirit of the Constitution.

***...
Decriminalising the impugned provisions would indirectly open the door for unions among persons of the same sex."***

What does the judgment mean?

- The High Court judgment has failed to uphold the human rights of LGBT persons, MSM and all other persons whose lives are negatively affected by sections 162 and 165 of the Penal Code.
- The effect of the judgment is that the law remains the same and sections 162 and 165 of the Penal Code continue to criminalise same-sex sexual conduct.
- The judgment will remain binding law unless it is overturned on appeal or a higher court reaches a different decision.
- Parliament retains the right to remove sections 162 and 165 from the Penal Code.



*The Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN) was formed in 1994 and registered as a Non-Governmental Organisation (NGO) in 2001. Our goal is to advocate for a holistic and rights-based system of service delivery in health and for the full enjoyment of the right to health by **all**, including the vulnerable, marginalised, and excluded populations.*

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