REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL NO 536 OF 2019

BETWEEN

ERIC GITARI.....APPELLANT

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT
JOHN MATHENGE .....2ND RESPONDENT
MAUREEN OCHIENG .....3RD RESPONDENT
MARY AKOTH .....4TH RESPONDENT
YVONNE POWERS.....5TH RESPONDENT
MARK ODHIAMBO.....6TH RESPONDENT
GAY AND LESBIAN COALITION OF KENYA.....7TH RESPONDENT
NYANZA WESTERN AND RIFT VALLEY NETWORK.....8TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION.....9TH RESPONDENT
DAVID KURIA MBOTE .....10TH RESPONDENT
ANTHONY OLUOCH.....11TH RESPONDENT
IMMAH REID.....12TH RESPONDENT
GEORGE NJERI.....13TH RESPONDENT
Y. HUSSEIN.....14TH RESPONDENT
J TIROP.....15TH RESPONDENT
KENYA CHRISTIAN PROFESSIONAL FORUM.....16TH RESPONDENT
KENYA LEGAL & ETHICAL
ISSUES NETWORK ON HIV & AIDS.....17TH RESPONDENT
IRUNGU KANGATA.....18TH RESPONDENT
THE REGISTRED TRUSTEES UMMAH FOUNDATION.....19TH RESPONDENT
KATIBA INSTITUTE.....20TH RESPONDENT
KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....21ST RESPONDENT

SUBMISSIONS OF THE 17TH RESPONDENT

Introduction

1. These written submissions are submitted by the Kenya Legal and Ethical Issues Network on HIV and AIDS (KELIN), the 17th Respondent, in response to the appeal and pursuant to directions given by this Honourable Court on 13th July 2020.
2. The 17th Respondent is an independent non-governmental organization established to tackle the legal and ethical issues related to HIV and AIDS and to promote access to quality health care for all in Kenya. It currently operates and works in five (5) counties and in other countries through partnerships with other stakeholders in Eastern and Southern Africa to protect and promote health related human rights including the human rights of marginalized groups such as lesbian, gay, bisexual, transgender and queer (LGBTQ) individuals by providing legal services and support to challenge discrimination and denial of health care services based on sexual orientation.

3. In these submissions, the 17th respondent joins the appellant in ground 4 of the appeal, and also joins the 2nd – 9th respondents in ground 5 of the cross appeal, to wit that the learned judges of the Superior Court erred in law and fact in finding that sections 162 and 165 of the Penal Code (herein also referred to as the impugned provisions) are not incompatible with the right to the highest attainable standards of health as contained in Article 43(1)(a) of the Constitution of Kenya.

The 17th Respondent's case before the High Court

4. The 17th respondents submit that the continued application of the disputed provisions impedes the access and realization of the right to health as enshrined in the Constitution of Kenya, 2010. The 17th Respondent presented its case before the High Court through:
    a) The affidavit of Ishmael Osumbwa[1] sworn on the 9th February 2018 and
    b) The expert affidavit of Anand Grover[2] sworn on the 5th day of February 2018.
5. The 17th respondent also filed submissions in support of its case. These are the submissions dated 9th February 2018[3] and the written submissions on the applicability of the ***Navtej Singh Johar & Others v Union Of India And Another Writ Petition (Criminal) No. 76 Of 2016*** dated 23rd October of 2018.[4]

6. Mr Osumbwa, is a gay man who works as the Executive Director of Persons Marginalised and Aggrieved in Kenya (PEMA Kenya), a community based organization with a mission of championing for the inclusion of gender and sexual minorities, by among other activities, conducting capacity building and activities to enhance the promotion of health, including in the area of HIV and AIDS. In his affidavit he provides the court with information from his experience as to how the impugned provisions stand in the way of ensuring gay people and men who have sex with men to enjoy the right to the highest attainable standard of health including access to essential health services for those living with HIV.

[1] Page 1116 of Volume 3 of the Record of Appeal.
[2] Page 1129 of Volume 3 of the Record of Appeal.
[3] Page 1097 of Volume 3 of the Record of Appeal.
[4] Page 1202 of Volume 3 of the Record of Appeal.

7. In the second affidavit submitted by Professor Anand Grover, a former United Nations Rapporteur on the right to health, he provides the court with international and comparative law and human rights standards on the right to health as it pertains to men who have sex with men.

8. The 17th respondent submits that the learned judges erred in refusing to consider the evidence tendered by Mr. Osumbwa on the basis that there was no link between his organisation and the 17th respondent.[5] This was a grave error by the trial court because:

   8.1. It is clear that Mr Osumbwa swore his affidavit not only on behalf of his organization, which works in the area of promotion of health rights for sexual minorities, but also on his own behalf and drawing on his experiences as a gay man. By doing so, he set out his experience based on his personal experience, showing how he had faced discrimination, stigma and even death threats as a result of his orientation as well as the work that he does within his organization.[6]

   8.2. This was a misdirection since Article 22 of the Constitution of Kenya, 2010 allows courts to receive evidence from any person on violations or threats to violations of the fundamental rights and freedoms in the Bill of Rights, particularly where the case before it concerns an issue of great public interest.

9. Despite the evidence tendered by the 17th respondent showing how the impugned provisions violate the right to health and the right to access health care services by men who have sex with men, the trial court erred by finding that there was no evidence of the violations yet:

   9.1. In his evidence, Mr Osumbwa demonstrated to the court that men who have sex with men have a higher chance of contracting HIV and sexually transmitted infections, but have difficulties accessing treatment due to fear of stigma, discrimination and prosecution should they reveal their sexual activities.[7]

   9.2. The affidavit of Professor Anand Grover, who is an expert in the area of health, law and human rights, and who submitted to the trial court various publications, among them the Report of the Special Rapporteur on the Right of Everyone to the highest attainable standard

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[5] Paragraph 97 and 98 of the Judgment of the High Court.
[6] Paragraphs 14-20 of the Replying Affidavit of Ishmael Osumbwa.
[7] Affidavit of Ishmael Osumbwa at paras 21-28.

of physical and mental health which examined the right to health and the criminalization of private, adult, consensual sexual behavior.

9.3. There was evidence in the form of approved policy documents which are the ***Kenya AIDS Strategic Framework: 2014/2015-2018/2019*** and the ***Kenya AIDS Response Progress Report***[8] published by the Ministry of Health, that the impugned provisions have had a detrimental effect on the HIV response, because they are enforced in a manner that impacts negatively on provision of health services to key populations such as men who have sex with men.

9.4. In the Kenya AIDS Strategic Framework: 2014/2015-2018/2019 the state has recognized that men who have sex with men are part of key populations in the HIV response. In the context of HIV, key populations are those groups who are at increased risk of HIV and who have reduced access either due to criminalization of their behaviour or because they are otherwise marginalized. Key populations are highlighted due to fact that they face human rights abuses due to the legal, cultural and social barriers related to their behavior which increase their vulnerability to HIV.

9.5. These policy documents point several unassailable facts:

a) That men who have sex with men are a vulnerable key population within which new HIV infections is on the rise,[9] and among who are at a higher risk of HIV.[10]

b) The impugned provisions, as has been admitted by the government of Kenya, through the Ministry of Health, are punitive and are implemented in a manner that results in negatively impacts and bars access of health care services for men who have sex with men, among other key populations.[11]

c) There is a need to have an enabling legal and policy environment by decriminalizing behaviour of men who have sex with men in order to enhance access to health care services for men who have sex with men and other key populations.[12]

d) The State, through the Ministry of Health, has identified a need to remove the legal barriers and punitive laws, among them the impugned provisions, that inhibit the access

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[8] The contents of these documents were referred to extensively during submissions and were also referred to at paragraph 176 in the judgment of the trial court.

[9] Page 10 of the Kenya Aids Strategic Framework.

[10] Page 9 of the Kenya Aids Progress Report 2016.

[11] Page 29 of the Kenya Aids Strategic Framework.

[12] Page 31 of the Kenya Aids Strategic Framework.

of health services to key populations. This means that the State is aware that the impugned provisions are detrimental to the access of health care services for men who have sex with men, that this key population is vulnerable to HIV infection, and that there is a link between stigma and discrimination and the lack of access to health care services.

10. The 17th respondent submits that the trial court failed to consider that the impugned provisions negatively affect the attainment of the right to health for men who have sex with men in the following ways inter alia:

10.1. The application of the disputed provisions has resulted in the creation of stigma and victimization for men who have sex with men[13] and incites stigma, violence, hate and brutality which interferes with the enjoyment of the right to health;

10.2. The criminalization of same-sex conduct creates an enabling environment for stigma and discrimination against men who have sex with men which increases their vulnerability to HIV infection. Access to health care is further impeded by the reproachful attitudes of health care professionals who are not trained to meet the needs of men who have sex with men, refuse to treat them altogether or respond with hostility when compelled to do so.

10.3. In addition, men who have sex with men are unable to access commodities such as condoms, lubricants and anti-retroviral drugs. This puts them at a higher risk of getting infected and also prevents others from getting infected.

10.4. The implementation of the disputed provisions disproportionately affects men who have sex with men who are more at risk of contracting HIV and sexually transmitted infections. This is because they are unable to access services to engage in safe sex and therefore have a higher chance of contracting HIV and other sexually transmitted diseases.[14]

10.5. The impugned provisions have the effect of criminalizing same sex conduct. As a result, men who have sex with men are forced to conceal their sexual histories when seeking health care services, and are unable to fully express their health care needs to health care personnel

[13] Mr Osumbwa's affidavit details the stigma that he and other gay men suffer as a result of their sexual orientation, including denial of housing, denial of health care services, and threats to his person and to his life.

[14] See Para 22 of Mr Osumbwa's affidavit which details his personal experiences.; See Para 57 of Professor Grover's affidavit detailing statistics on how the criminalization of consensual same sex conduct hampers treatment efforts for men who have sex with men.

in health facilities which results in poor quality of health care services, particularly in relation to sexual health.

10.6. Moreover, due to the fear of violations of confidentiality, men who have sex with men are fearful of disclosing their sexual activities to health care personnel, even when they have contracted sexually transmitted infections or even HIV, because of the fear of arrest by the police. This impedes the right of men who have sex with men to access to health care services and compromises the quality of care that they receive. It is also noteworthy that when sexually transmitted infections go untreated, there is also the increased risk of contracting HIV.

10.7. Men who have sex with men cannot access HIV testing and counselling services because these services are ordinarily tailored towards heterosexual couples. Moreover, criminalization of same sex conduct makes it difficult to provide health related information and carry out educational and informational campaigns to sensitize key populations on prevention and management of HIV and other sexually transmitted infections. Such campaigns are geared toward provision of HIV prevention commodities such as condoms and water-based lubricants as well as HIV education and counselling for sexual risk reduction, which are services to which men who have sex with men often have extremely limited access.[15]

11. My Lords, Article 43(1)(a) of the Constitution of Kenya, 2010 places a duty on the state to respect, protect and fulfil the right to health. This is given effect in sections 4 and 5 of the Health Act, where the State is required to develop policies, laws and other measures necessary to protect, promote, improve and maintain the health and well-being of every person. We submit that to comply with the Constitutional and statutory obligations, the state cannot continue to sustain the impugned provisions in the Penal Code, as these have the effect of limiting access to health care services for men who have sex with men. The Kenya AIDS Response Progress Report indicates that the HIV prevalence among men who have sex with men stands at 18.2% and the health care service coverage for this population is 65%, demonstrating that the impugned provisions are used as a means to perpetuate abuse, and negative and discriminatory beliefs towards same-sex relations and sexual minorities.

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[15] The affidavit of Mr Osumbwa lays out the work that he is engaged in providing health related information for men who have sex with men, and the sometimes violent responses that he gets due to continued criminalization of consensual conduct of men who have sex with men.

12. The 17th respondent therefore submits that based on current evidence before the court, if same sex sexual relations continue to be criminalized, it follows that interventions for men who have sex with men will continue to be inadequate, and that this key population will continue to have limited access to health services and information, thereby violating the right to the highest attainable standard of health as provided under the Constitution of Kenya, 2010 and the Health Act, 2017.

The State Obligation to enforce the right to health for men who have sex with men: The Normative Content

13. The right to the highest attainable standard of health is included in the Bill of Rights at Article 43(1)(a) and the powers of the court to enforce fundamental rights are beyond doubt. Section 4 of the Health Act, 2017 vests the responsibility to observe, respect, protect, promote and fulfill the right to the highest attainable standard of health in the State, and in accordance with the Health Act, the State has the responsibility to develop policies, laws and other measures necessary to protect, promote, improve and maintain the health and well-being of every person,[16] and to ensuring the realization of the health related rights and interests of vulnerable groups within society.[17]
14. The right to health is also recognized in regional and international treaties which by virtue of Article 2(5) and (6) of the Constitution forms part of Kenyan law. By becoming party to the above treaties, Kenya assumed the obligations and duties under these treaties to respect, protect and fulfil human rights of all Kenyans irrespective of their sexual orientation.
15. The International Covenant on Economic Social and Cultural Rights (ICESCR)[18] binds Kenya to ensure the enjoyment of the highest attainable standard of physical and mental health.[19] The Committee on Economic Social and Cultural Rights (CESCR) has expressed concern that sexual relations between consenting adults of the same sex are criminalized in the Penal Code and that those affected are stigmatized and socially excluded and are "discriminated in gaining access to social services, particularly health-care services. It has therefore urged Kenya to repeal the impugned provisions in order to ensure no one is discriminated in accessing healthcare owing to their sexual orientation."[20]

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[16] Section 4(a) of the Health Act.
[17] Section 4(c) of the Health Act.
[18] Acceded to on 1 May 1972.
[19] See Article 12 (1) of the ICESCR.
[20] See Concluding observations on the combined second to fifth periodic reports of Kenya E/C.12/KEN/CO/2-5, 6 April 2016, para 21-22."

16. In its General Comment No. 14: The Right to the Highest Attainable Standard of Health, the CESCR has stated that Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The CESCR has also authoritatively stated that Articles 2.2 and 3 of the ICESCR proscribe any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on any grounds, including sexual orientation or other status.
17. The right to health is related to the right to life, which finds expression in Article 6(1)[21] of the International Covenant on Civil and Political Rights (ICCPR) which is equally binding to Kenya.[22] The Human Rights Committee, in General Comment 36 on article 6 of the International Covenant on Civil and Political Rights on the right to life[23] states that "the duty to protect life also implies that states parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity." These general conditions include the prevalence of life threatening diseases, such as HIV. — 10
18. Article 16 of the African Charter on Human and Peoples' Rights (ACHPR) also provides for the right to health, and requires state parties to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.[24] The effect of these treaties, all ratified by Kenya is that State parties commit to ensure the respect every individual to enjoy the highest attainable state of physical and mental health.
19. Principle 17 of the Yogyakarta Principles (Principles on the Application of International Human Rights Law) in relation to sexual orientation and gender identity affirm the right to the highest attainable standards of health, without discrimination on the basis of sexual orientation or gender identity, and states that sexual and reproductive health is a fundamental aspect of this right. While the Principles are not binding, they affirm binding international legal standards with which all States must comply. — 20

The Impugned Provisions Are a Barrier To The Four Essential Elements Of The Right To Health: Availability, Accessibility, Acceptability And Quality Of Health Care Services

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[21] Para 26 of General Comment No.36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life. CCPR/C/GC/36.

[22] Acceded to on 1 May 1972.

[23] Para 26 of General Comment 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life.

[24] Acceded to on 23 January 1992.

20. An essential element of the right to health is *accessibility.* A dimension of accessibility is non-discrimination, which means that "health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population in law and in fact, without discrimination on any of the prohibited grounds".[25] My Lords, men who have sex with men and in this regard:
    20.1. The ICESCR recognizes "sexual orientation" as a prohibited ground for discrimination. Along the same lines, the CESCR in General Comment No. 20 explains that "other status" in Article 2 of the ICESCR is taken to include sexual orientation and gender identity.[26]
    20.2. The CESCR further states that non-discrimination, in the context of the right to sexual and reproductive health, also encompasses the right of all persons, including men who have sex with men, to be fully respected for their sexual orientation. Criminalization of sex between consenting adults of the same gender is a clear violation of human rights. —10
    20.3. The CESCR also states that State parties also have an obligation to combat homophobia and transphobia, which lead to discrimination, including violation of the right to sexual and reproductive health."[27]

21. Another dimension is physical accessibility which means that health facilities, goods and services must be within safe physical reach for all sections of the population especially vulnerable and marginalized groups, including persons living with HIV.[28] This is particularly significant in the context of men who have sex with men, who are gravely affected by the impugned provisions, and whose activities are criminalized. The direct result of this criminalization is the limitation of access to health facilities by this section of the population. Moreover, men who have sex with men may not be able to access services (which may be within physical reach) that are specifically tailored for the general population because such access may not be safe either because of stigma as well as potential criminal charges from exposing themselves. —20
22. It is noteworthy that a majority of health centers, particularly those that provide services in relation to HIV management are generally funded through external donor funding such as the Global Fund

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[25] General Comment 14 para 12 (b)
[26] Para. 32 of General comment No. 20 on Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009, UN Doc E/C.12/GC/20,.
[27] Para 23 of General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) (2 May 2016) E/C.12/GC/22.
[28] Para 12(b) of General Comment 14.

to Fight against HIV, Tuberculosis and Malaria. In fact, the Ministry of Health has indicated that 75% of all interventions and programmes on HIV are funded by external donors.[29] These donors have invested in health care centers to provide services suited to men who have sex with men, but there has been limited investment by the Kenyan government in this regard. The fact that service provision for key populations is not a priority for the Kenyan government violated the third aspect of accessibility, which is economic accessibility.

23. The final aspect of accessibility is with regard to information accessibility, which entails the right to seek, receive and impart information and ideas on health issues as well as to have health data treated with confidentiality.
24. The right to health is an all-inclusive right which includes dimensions of accessibility to medical care as detailed above, as well as a state obligation to ensure the underlying determinants of health are respected. To do this, the State must respect and promote factors that promote conditions which ensure that people can lead a healthy life which include the underlying determinants of health such as the right to access health related information and the right to housing. -10
25. We submit that in order to properly address the right to health by considering how the impugned provisions affects each of the underlying determinants. In this regard, the affidavit of Ishmael Osundwa sets out how he, as well as other gay men, routinely get evicted from their housing due to discriminatory attitudes, brought out specifically by criminalization of their conduct.

The State obligation to Respect, Protect and Fulfil the Right to Health for Every Person

26. The State has three obligations in relation to the right to health. The first is the duty to respect the right to health. This requires that States refrain from denying or limiting equal access for all persons and refraining from enforcing discriminatory practices or policies.[30] Thus the duty to ensure that there is non-discrimination in provision or access to health services is an immediate state obligation.[31] The second duty is the duty to protect which entails an obligation take measures to protect all vulnerable or marginalized groups of society,[32] while the third duty is to fulfil, or facilitate the right to health. This latter duty requires states to take positive measures that enable and assist individuals and communities to enjoy the right to health.[33] Based on these duties, we submit that -20

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[29] Page xii of the Ministry of Health, Health Sector Working Group Report Medium Term Expenditure Framework (MTEF) For The Period 2018/19 to 2020/21.

[30] General Comment 14 para 34.

[31] General Comment 14, para 18-19; General Comment 20, para 33; General Comment 22.

[32] General Comment 14 para 35.

[33] General Comment 14 para 36.

there is a duty to ensure that the impugned provisions be struck off the statute book for being in contravention of the Constitutional and international law obligations on the right to health.

27. There is a minimum core obligation for states in the provision of the right to health. We submit that in order to ensure the respect of the right to the highest attainable standard of health, the state has an obligation to ensure the right to access all health facilities and all health care facilities, without discrimination, to all persons, particularly those who are vulnerable or marginalized, such as men who have sex with men, as well as to ensure the equitable distribution of all health facilities, goods and services.
28. Moreover, states have a duty to ensure that there is no retrogression, which occurs where laws or policies have the effect of reduction of existing protections of rights. —10
29. We submit the impugned provisions have the effect of negating all the state and constitutional obligations on the right to attainable standard of health. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health's report[34] states that:
    29.1. Criminalization of consensual-sex conduct has severe deleterious impacts self-guard and sometimes tragic consequences on health seeking behavior.[35]
    29.2. In jurisdictions in which same-sex sexual conduct is criminalized "affected individuals are much more likely to be unable to gain access to effective health services, and preventative health measures that should be tailored to these communities are suppressed. The fear of judgement and punishment can deter those engaging in consensual same-sex conduct from seeking out and gaining access to health services. This is often a direct result of attitudes of health-care professionals who are not trained to meet the needs of same sex practicing clients not only in terms of sexual health but also with regard to health care more generally. Often health professionals may refuse to treat homosexual patients although or respond with hostility when compelled to do so. Where patients may be guilty of criminal offences, by engaging in consensual same sex conduct, this has the potential to jeopardize the obligations of confidentiality that arise during the course of doctor-patient relationship as health professionals may be required by law to divulge details of patient interaction. [36] —20

[34] Para 18 of the Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover A/HRC/14/20 (27 April 2010).
[35] *Ibid* Para 17.
[36] Para 18

29.3. The problems are compounded for persons living with HIV. Due to historical circumstances – most significantly, the association of AIDS with the gay community- the enjoyment of the right to health is disproportionately impacted as it pertains to HIV diagnosis and treatment.[37]

30. In this regard, the 17th respondent relies on the decision of the Supreme Court of India in ***Navtej Singh Johar & Others v Union Of India And Another Writ Petition (Criminal) No. 76 Of 2016***, which, when considering the constitutionality of section 377 of the Penal Code of India, worded in similar terms to the disputed provisions, found that this provision deprived men who have sex with men to the right to health in a cruel and debilitating manner. In particular, the court held that the application of the impugned provisions significant detrimental impact on the right to health of those persons who are susceptible to contracting HIV such as MSM and transgender persons, that it pushes key populations away from the public health system, and that it created serious obstacles to effective HIV prevention and treatment by fostering stigma and discrimination. The Court also found that criminal sanctions attached to private consensual conduct between adult males denied those adults to the full realization of their right to health, as well as their sexual rights by forcing them into a realm of fear and shame.

Conclusion

31. In conclusion, we submit that the impugned sections of law continue to impede health care services for men who have sex with men, and particularly HIV prevention and treatment efforts and programs. Moreover, men who have sex with men continue to suffer stigma and discrimination in access to health care services on basis of the impugned sections. As demonstrated by the government policy documents, the State is fully aware of these violations of the right to health towards men who have sex with men, and has acknowledged the need to repeal the impugned provisions. In this regard, it has continued to take steps, as advised by the Global Commission report on HIV and the Law to repeal the law and ensure that there is an enabling legal environment that respects, promotes and protects the rights of all.

32. In order to ensure respect for the Constitutional right to ensure the highest attainable standard of health for all, these sections must be struck out.

33. Based on the aforesaid submissions, the 17th respondent invites this Honourable Court to allow this appeal, set aside the judgment of the High Court dated 24th May 2019 and declare the disputed

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[37] Para 19

provisions as unconstitutional and void to the extent that they purport to criminalize same sex conduct between consenting adults due to the detrimental effect that they have on the attainment of the highest standard of health as provided under Article 43(1)(a) of the Constitution of Kenya.

34. We humbly submit.

DATED at **NAIROBI** this 23rd day of November **2020**

NYOKABI NJOGU
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