UNIWERSYTET ZIELONOGÓRSKI

DYSKURS PRAWNICZY I ADMINISTRACYJNY 4/2024 ISSN 2657-926X

Wambui Njogu
Kenyatta University School of Law, Arts and Social Sciences
ORCID: 0000-0003-3747-6144
mail: njogu.wambui@ku.ac.ke

The *Ubuntu* Philosophy and Human Rights of LGBTQ Persons: An Analysis of the Legal, Socio-Cultural and Political Dynamics in Kenya

Keywords: *Ubuntu*, LGBTQ+ Persons, human rights

Summary. *Ubuntu* is an African philosophy firmly ingrained in the African culture of looking out for one another. Pegging its principles on the interconnectedness of the African society, it presupposes situations where the well-being of people is subject to how everyone respects and looks out for each other in the spirit of African brotherhood. It also implies equal treatment devoid of any discrimination, thus providing protection of rights innately available to everyone as contemplated by the web of human rights instruments. Indeed, as Desmond Tutu once theorised, a person with *ubuntu* belongs to a greater whole, which whole gets diminished when some people within it are discriminated, oppressed or treated as if they are less human. It is therefore expected that the brotherhood and Africanness theorised under *ubuntu* should be extended to everyone, including LGBTQ+ persons.

Applying the doctrinal legal research methodology, the paper examines the extent to which the *ubuntu* philosophy is applied to LGBTQ+ persons in Kenya. Legislation and judicial decisions are analysed to demonstrate the extent of uneven application of the philosophy. The paper posits that as an African country priding itself in inclusivity and oneness through *ubuntu*, Kenya is guilty of constitutional exclusion and legislative criminalization of LGBTQ+ persons. Even though in the recent past Kenya appears to be subtly extending the *ubuntu* spirit through judicial decisions, LGBTQ+ persons still remain branded 'unnatural', 'abnormal' and 'un-African' leading to social obliteration for being non-conformant with what is 'natural'. Their existence remains constitutionally excluded and legislatively criminalised.

The paper evaluates the usefulness of *ubuntuism* to the human rights situation of LGBTQ+ persons in Kenya. It is driven by the hypothesis that there exists unequal application of the philosophy resulting in systematic exclusion of LGBTQ+ persons, against the philosophy's tenets. Specific interventions for wholistic application of the philosophy are proposed.

Filozofia Ubuntu a prawa człowieka osób LGBTQ+: Analiza prawnej, społeczno-kulturalnej i politycznej dynamiki w Kenii

Streszczenie. Ubuntu jest afrykańską filozofią głęboko zakorzenioną w afrykańskiej kulturze wzajemnej troski i odpowiedzialności za innych. Opierając się na zasadzie współzależności społecznej, zakłada ona, że dobrostan jednostek zależy od tego, w jakim stopniu wszyscy okazują sobie szacunek i troskę w duchu afrykańskiego braterstwa. Filozofia ta implikuje również równe traktowanie, wolne od jakiejkolwiek dyskryminacji, a tym samym ochronę praw przysługujących każdemu człowiekowi, zgodnie z systemem instrumentów ochrony praw człowieka. Jak trafnie zauważył Desmond Tutu, osoba kierująca się ubuntu należy do większej całości, która zostaje umniejszona, gdy niektórzy jej

członkowie są dyskryminowani, uciskani lub traktowani tak, jakby byli mniej ludzcy. Należałoby zatem oczekiwać, że braterstwo i afrykańskość wyrażane przez ubuntu będą rozciągane na wszystkich, w tym także na osoby LGBTQ+.

W artykule, opartym na metodologii dogmatycznoprawnej, zbadano, w jakim stopniu filozofia ubuntu znajduje zastosowanie wobec osób LGBTQ+ w Kenii. Analizie poddano ustawodawstwo oraz orzecznictwo sądowe, aby ukazać nierównomierne stosowanie tej filozofii. Autor stawia tezę, że Kenia — jako państwo afrykańskie odwołujące się do inkluzywności i wspólnotowości wyrażanej przez ubuntu — dopuszcza się konstytucyjnego wykluczenia i ustawodawczej kryminalizacji osób LGBTQ+. Choć w ostatnim czasie można dostrzec subtelne rozszerzanie ducha ubuntu w niektórych orzeczeniach sądowych, osoby LGBTQ+ nadal bywają określane jako „nienaturalne", „nienormalne" i „nieafrykańskie", co prowadzi do ich społecznego wymazywania z powodu niezgodności z dominującym rozumieniem tego, co „naturalne". Ich istnienie pozostaje zatem konstytucyjnie wykluczone i ustawowo kryminalizowane.

Artykuł ocenia użyteczność ubuntuizmu dla sytuacji praw człowieka osób LGBTQ+ w Kenii. Punktem wyjścia jest hipoteza, że filozofia ta stosowana jest nierówno, co prowadzi do systemowego wykluczenia osób LGBTQ+ wbrew jej własnym założeniom. W zakończeniu zaproponowano konkretne działania na rzecz bardziej całościowego i konsekwentnego stosowania tej filozofii.

1. Introduction

Ubuntu is an African philosophy firmly ingrained in the African culture of looking out for one another. A key maxim elaborating *ubuntuism* asserts that for a person to be human, that person must affirm their humanity through recognising the humanity of others and establishing respectful human relations with them[1]. The presence of *ubuntu* therefore requires the presence of kindness and caring for one another, inclusiveness, interconnectedness, value for every life and dignity[2].

By pegging its principles on the interconnectedness of the African society, *ubuntu* presupposes a situation where the well-being of people is subject to how everyone respects and looks out for one another in the spirit of African brotherhood and sisterhood[3]. It also implies equal treatment for everyone, devoid of any discrimination, thus providing protection of all rights innately available to every human being as contemplated by the web of human rights instruments. Indeed, as Desmond Tutu once posited, a person with *ubuntu* belongs to a greater whole, which whole gets diminished when some people within it are discriminated, oppressed or treated as if they are less human. To borrow from Tutu's words, a person with *ubuntu* belongs to a greater whole, which whole gets diminished when some people within it are humiliated, tortured, oppressed, and treated as if they are less human[4]. Since the *ubuntu* pegs its principles on the interconnectedness of the Af-

[1] Mugumbate et al. "Exploring African philosophy: The value of ubuntu in social work" *African Journal of Social Work* 3.1. 2013, pp. 82-100.

[2] *Ibid.*

[3] Brotherhood includes sisterhood.

[4] Aloo Osotsi Magola, The African Bantu Concept of Ubuntu in the Theology and Practice of Bishop Desmond Tutu and its implications for African Biblical Hermaneutics in Madipoane Masenya

rican society, it also presupposes a situation where the well-being and personhood of people is subject to how everyone interacts with one another, respecting and looking out for each in the spirit of African brotherhood. It also implies protection of rights innately available to every human being as contemplated by the web of human rights instruments, equally and without any discrimination based on any considerations. The expectation therefore is that the brotherhood and sisterhood theorised under *ubuntu* should be extended to everyone everywhere, including those socially and culturally constructed as being non-conforming, where human beings who identify as LGBTQ fall.

This paper examines the extent to which the *ubuntu* philosophy and human rights are applied to LGBTQ persons in Kenya and the manner in which the legal, socio-cultural and political dynamics impact the application of the philosophy to this category of individuals. It posits that as an African country priding itself in inclusivity and oneness through *ubuntu*, Kenya is guilty of constitutional discrimination, socio-cultural, religious and political exclusion as well as legislative criminalization of LGBTQ persons. This has led to their social obliteration, with society branding them 'unnatural', 'abnormal' and 'un-African'. Negative branding leads to many forms of dehumanization including discrimination, stigmatization, harassment, violence, and outright ostracism. Due to these socio-cultural, religious and political dynamics, LGBTQ persons in Kenya are considered non-conformant with what is 'natural' and 'normal'. Their existence is socially stigmatized, they are constitutionally excluded and legislatively, they are criminalised with severe penalties being prescribed in the law. This situation exists and persists simply for LGBTQ individuals being who they are and who they were innately created.

The paper examines the manner in which in the recent past, Kenya appears to be adopting two totally divergent legal approaches in its treatment of LGBTQ persons. While on the one hand Kenya continues to constitutionally exclude and legislatively criminalize LGBTQ persons, the environment, through judicial decisions and legislative provisions, seems to subtly extend the *ubuntu* spirit to some who had hitherto been silenced. Accordingly, while some legislation is non-receptive and remains in question, judicial precedents appear to be more accommodative. The legal and jurisprudential application of the *ubuntu* concept by courts while adjudicating constitutional freedoms and human rights violations for LGBTQ divergent persons in Kenya, however, shows a completely different scenario. In this regard, Kenya seems to be divided into two opposites when it comes to applying the philosophy to her people. Only the heteronormative, binary 'normal' and 'natural' human beings seem to count, with this unfortunate and discriminatory

(Ngwan'a Mphahlele) and Kenneth N. Ngwa (eds.), Navigating African Biblical Hermeneutics: Trends and Themes from our Pots and Calabashes, Cambridge Scholars Publishers, 2018, p. 58.

situation being entrenched in the laws. Legal provisions therefore criminalize the existence of people who are, by inference, considered nonconformant with what is 'natural'. Severe penalties are also prescribed[5]. Legislative criminalization of those categories of people leads to social obliteration, especially when society brands them 'unnatural', 'abnormal' and 'un-African', and engaging in sexual conduct that is 'against the order of nature'[6]. Negative branding results in many forms of dehumanization including discrimination, stigmatization, isolation, harassment, violence, and outright ostracism.

In tackling the question of human rights of LGBTQ persons in the legal realm, however, Kenya seems to be adopting two divergent legal approaches. While on the one hand Kenya continues to legislatively criminalize certain groups of people, the law and practice seems to now recognise those who do not strictly fall in the 'known', 'natural' and 'acceptable'. The legal environment, through judicial decisions, and legislative provisions seems to have started to subtly extend the *ubuntu* spirit to everyone. Accordingly, while key legislation is non-receptive and remains in question, some judicial precedents appear to be accommodative of the spirit contained in *ubuntu*. These views appear to be informed by the socio-cultural norms as well as the political dynamics in the country.

Focusing on the application of the *ubuntu* philosophy, human rights and socio-cultural, religious and political dynamics in Kenya, the paper evaluates the usefulness of *ubuntuism* to the human rights situation of LGBTQ persons in the country. It is driven by the hypothesis that there exists unequal application of the philosophy resulting in systematic exclusion of LGBTQ persons in many spheres of their lives, against the philosophy's very tenets.

Applying the doctrinal legal research methodology, the paper seeks to analyse legislation and judicial decisions in the country and the socio-cultural religious and political situation to demonstrate the extent and impact of uneven application of philosophy to LGBTQ individuals, and the manner in which they all seem to strongly permeate the contention that the *ubuntu* philosophy and the spirit of Africanness is applicable only to the 'known', 'natural' and 'acceptable' human beings. The 'known', acceptable and 'normal' human beings in this context fall in the classification of the socially and culturally constructed male: female and heteronormative categories in terms of sex/gender, sexuality and sexual orientation. This creates the impression that LGBTQ individuals are 'unnatural' 'abnormal' and therefore 'non-human'. The paper then analyses recent case law through which Kenya appears to be taking a divergent legal approach that is seemingly accommodative of LGBTQ individuals, despite the public opinion's strong opposition.

[5] See Penal Code Chapter 63 of the Laws of Kenya, Section 162.
[6] *Ibid.*

Interventions for wholistic application of the *ubuntu* philosophy to every Kenyan citizen regardless of any consideration are then proposed.

2. The LGBTQ Question in Kenya: Legal, Socio-cultural, Religious and Political Dimensions

The homophobic, biphobia and transphobic attitudes as well as the discriminatory and unequal treatment of persons belonging to the LGBTQ community have always been strongly and unapologetically portrayed by society in Kenya. The extent and depth to which these attitudes are embedded in the Kenyan society was however publicly and strongly demonstrated in the days following the Supreme Court's delivery of a judgement on a matter touching on the constitutional rights of LGBTQ to associate[7].

The decision in question was rendered in February 2023. In this landmark decision, the Supreme Court, in a majority decision, affirmed a determination earlier rendered by the High Court of Kenya in 2015[8]. In the 2015 High Court decision, a three Judge bench had made a declaration that the wording 'every person', contained at Article 36 of the Constitution of Kenya includes every person living in the Republic of Kenya regardless of their sexual orientation. The High court had proceeded to further declare that, by denying gay and lesbians living in Kenya the right to register an association of their choice, the Respondents were in violation of the Applicants' constitutional right to freedom of association. The High Court proceeded to further declare that persons who identify as Lesbians, gays, bisexual, transgender and queer (LGBTQ), were entitled to exercise their constitutionally guarantees relating to freedom to associate by being able to form an association through which they could exercise their right to associate as provided in the constitution for every Kenyan citizen[9].

The affirmation by the Supreme Court of the decision of the High Court was what led to a national uproar with the country seeming ready to explode. The decision was faulted and attacked from all corners. Political leaders attacked the Supreme Court accusing it of introducing western values to the country. The Court was accused of not just going against legislative provisions criminalizing LGBTQ behaviour, but also of violating the Constitution and allowing homosexuality through the back door, contrary to African cultural beliefs and practices[10].

[7] NGO Coordination Board v EG & 4 Others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] *e*KLR (Supreme Court).

[8] EG v Non-Governmental Organisations Co-ordination Board & 4 others [2015] eKL

[9] *Ibid.,* para. 148.

[10] See Magdalene Kahiu, '"Voluntarily Repent and Resign": Pro-Lifers in Kenya to Pro-LGBTQ Ruling Judges' (ACI Africa, 9 October 2023) https://www.aciafrica.org/news/9309/voluntarily-re-

Kenya's political response was in two forms. The first was through an urgent application filed in the Supreme Court by a member of Parliament, seeking to have the Supreme Court to review and to set aside its judgment[11]. The basis of the parliamentarian's application was, *inter alia,* that the court had erred when it found and decreed that the use of the word "sex" under article 27(4) of the Constitution includes sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex or otherwise'[12]. The member of Parliament further contended that the Supreme Court judgment usurped not just the sovereign power of the people, but also the legislative role and authority of Parliament, since it purported to amend article 27(4) of the Constitution to include sexual orientation and to bring in the ambit of that Article, persons who are lesbian, gay, intersex or otherwise[13]. According to him, the court had disregarded the views of the people of Kenya on 'sex' and 'gender' as contained in the final report of the Constitution of Kenya Review Commission. His further contention was that the decision of the Supreme Court would open the door wide to registration of associations, and entities whose objectives are contrary to the law and inconsistent with public interest. He also wanted to bring to the attention of the Court that there was widespread discontent, uproar, dissent and displeasure with the judgment by the general public and that this discontent was evident in all mainstream media and social media platforms.

When the application for review was rejected by the Supreme Court, the member of parliament reacted by introducing a Parliamentary Bill in the National Assembly[14]. Through the Bill, the politician was seeking to introduce a legal framework prohibiting homosexuality[15], same sex marriages[16], and all Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning (LGBTQ) behaviour and activities. The Bill, which is still pending in parliament also introduces very stiff penalties for engaging

pent-and-resign-pro-lifers-in-kenya-to-pro-lgbtq-ruling-judges [Accessed on: 12.04.2024]; Brian Murimi, 'NTV Kenya: Supreme Court Faces Backlash from MPs over LGBTQ Ruling' (NTV Kenya, 1 March 2023) https://ntvkenya.co.ke/news/supreme-court-faces-backlash-from-mps-over-lgbtq-ruling/ [Accessed on: 7.06.2024].

[11] Kaluma v NGO Co-ordination Board & 5 others (Application E011 of 2023) [2023] KESC.

[12] See para. 79 of the Supreme Court judgement.

[13] Article 27 (4) of the Constitution declares 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, but does not specifically make reference to sexual orientation or gender identity, hence the complaint by the member of Parliament.

[14] The Bill titled 'The Family Protection Bill, 2023', was introduced by a current member of parliament, Peter Kaluma, who is also an Advocate of the High Court of Kenya, immediately after the Supreme Court judgement, and is still pending in Parliament.

[15] It is noteworthy that homosexuality has already criminalised.

[16] Same sex marriages are Constitutionally excluded by Article 45 of the Constitution of Kenya, 2010.

in that kind of behaviour and activities, including life and death sentences, if it is ever passed into law as it is[17]. On his part, the President of the Republic of Kenya expressed his political stand in the media by declaring that there while same sex marriages may happen in other countries they would not be allowed in Kenya[18].

The strong socio-cultural, religious and political anti-LGBTQ views expressed from many spheres of society following the Supreme Court decision have always been and continue to be expressed throughout the country. Anti-LGBTQ protests, which have always been present in the country[19]. And judging from the interpretation of the legislative and constitutional provisions currently in Kenya on this matter, perhaps there was some measure of justification for the uproar.

3. The Question of Homosexuality, Lesbianism and LGBTQ Persons in Kenya

Perhaps to put the uproar and reaction to the Supreme Court decision from different quarters in the country into context, it would be important to understand the concepts of LGBTQ and the people who identify as LGBTQ in the Kenyan context.

It is significant to begin by pointing out that none of the Kenyan Statutes have defined the terms homosexuality or lesbianism. Neither are the terms, gay, bisexual, transgender queer/questioning contained in any legal instrument in Kenya. The legal framework has perhaps been informed by the cultural, social and religious norms which have rejected LGBTQ identities, terming them as western values which are un-African and incompatible with African cultural, social and religious norms[20]. For purposes of putting the discussion in context however, the term sex/gender is used to refer to the biological and physiological characteristics that define men and women[21]. Sexual orientation is used to refer to the manner in which a person characterizes their sexual and emotional attraction, or sexual orientation to others[22]. These may include a situation where an individual is sexually attracted to a person of the same sex as himself or herself, which is described as homosexuality

[17] *Ibid.*, no. 8.
[18] *Ibid.*
[19] *Ibid.*
[20] Seth.
[21] Janet Kabeberi Macharia, 'Reproducers Reproduced. Social Legal Regulations of Sexuality Among Girls in Kenya (Doctoral Thesis, School of Law, University of Warwick), 1995, p. 18.
[22] See the Preamble of the Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) (Adopted 2006, the International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity).

and includes the term lesbians, with reference to women emotionally and sexually attracted to women and gays, with reference to men emotionally and sexually attracted to other men[23]. Sex/gender identity, on the other, hand is a term used to denote an individual's sense of themselves as being either male or female[24]. When it comes to transgender, this is an umbrella term used to describe people whose gender identity or expression does not match the sex they were assigned at birth. For example, a transgender person may identify as a woman despite having been born with male genitalia and vice versa. The term Queer + is used to describe those human beings who wish to express fluid gender identities or sexual orientations[25].

Many African nations, Kenya included are reluctant to accept that there is evidence of historical acceptability of these identities and orientations amongst certain social groups[26]. In Kenya, the known and accepted sexual orientation is heterosexual, which is the sexual orientation that describes women who are emotionally and sexually attracted to men, and men who are emotionally and sexually attracted to women, referred to as heterosexuals. These fall within the concept of heteronormativity, which is the sexual orientation considered normal, natural, African, acceptable and in consonance with the order of nature[27]. Anyone falling away from the heterosexual normative has been grouped into the LGBTQ+ category, is stigmatized, excluded from the others, subjected to social isolation and discrimination and violence.

Majority of people in Kenya are religious, with a large number practicing Christianity and Islam[28]. The conservative versions of these two religious faiths however hold deep homophobic sentiments and frequently prohibit homosexuality. It is a given that socio-cultural and religious norms, beliefs and politics shape public opinion thus influencing a country's legal framework. Indeed, in the case of Kenya, during the constitutional review process held between 2001 and 2010 representations were made for the protection of the rights of persons who do not conform to the known sex/gender features and sex/gender identities. These representations were however rejected by the Constitution of Kenya Review Commission, the institution then charged with the process, so as to avoid a situation that would have led to the overall defeat of the draft constitution at the national referendum[29].

---

[23] *Ibid.*

[24] David Rowland and Luca Incrocci (eds.) Handbook on Sexual and Gender Identity Disorders (John Wiley and Son), 2008, p. 424.

[25] Polites, A. and Mulcahy, M.B., LGBTQ+. *Exploring Human Services.*

[26] Seth.

[27] Wambui Njogu, 'Non-Recognition of Intersex Persons and Its Impact on Their Human Rights: The Case of Kenya'. (Doctoral Thesis, School of Law, University of Nairobi), 2023, p. 72.

[28] *Ibid.*

[29] *Ibid.*

This rejection was a reflection of the deeply held homophobic, bi-phobic and transphobic sentiments existing in society and the political spaces. Consequently, social, religious and legal barriers have been created where a person who is grouped into the LGBTQ+ category in Kenya is neither considered human nor seen as deserving of any of the human rights entitled to all other human beings under the international, regional and domestic web of human rights. These sentiments have served to shape the law as it currently is and informs the kind of anti-LGBTQ reactions seen after the Supreme Court decision.

The anti-homosexual colonial era laws criminalizing same sex relationships inherited at independence still form part of the legal framework in Kenya. Homosexual conduct, and by association anyone else falling within the LGBTQ acronym. Same sex relationships are criminalized through the Penal Code which proscribes carnal knowledge against the order of nature[30]. The law further criminalizes what it terms as indecent practices between male persons, whether in private or in public[31]. Interestingly, the law does not specifically mention sex or sexual relationships but prefers to call them acts of gross indecency between two male persons, which then has been interpreted to refer to homosexuals[32].

Same sex relationships in Kenya are therefore controlled not just through criminalization in the statutes, but also through stigmatization in social-religious, cultural and political spaces. They are also regulated through Constitutional provisions and other legislative provisions[33]. The Constitution, for instance, categorically states that marriages can only be between persons of the opposite sex, in this case the socially and traditional accepted binary opposites of biological male and female[34]. The rationale and justification behind criminalization, prohibition and exclusion of LGBTQ+ behaviour and conduct finds support not just in in the law but also in most religious, cultural and political settings, which views LGBTQ behaviour and conduct as un-African, despicable and an insult to tradition and African culture[35].

In Kenya most social-cultural and religious attitudes and norms have been mainly binary-based and heteronormative in nature. Basically, they present, have presented and continue to present heteronormativity as well as sex/gender binarism

[30] See Penal Code Chapter 63 of the Laws of Kenya, Section 162.
[31] Penal Code Section 162 (a).
[32] *Ibid.*
[33] *Ibid.*
[34] The Constitution of Kenya 2010, Article 45 (2).
[35] See the various arguments raised in Magdalene Kahiu, '"Voluntarily Repent and Resign": Pro-Lifers in Kenya to Pro-LGBTQ Ruling Judges' (ACI Africa, 9 October 2023) https://www.aciafrica.org/news/9309/voluntarily-repent-and-resign-pro-lifers-in-kenya-to-pro-lgbtq-ruling-judges [Accessed on 12.04.2024]; Brian Murimi, 'NTV Kenya: Supreme Court Faces Backlash from MPs over LGBTQ Ruling' (NTV Kenya, 1 March 2023) https://ntvkenya.co.ke/news/supreme-court-faces-backlash-from-mps-over-lgbtq-ruling/ [Accessed on 7.06.2024].

as the natural and normal conduct, thereby excluding anyone who is not in that category, specifically those who identify as LGBTQ[36]. These social cultural and religious norms, attitudes, and constructs have subsequently stamped sex/gender in the biological and genital male and female binary as what is natural and normal[37]. Anything else has been propounded as criminal and abnormal[38].

Indeed, during the constitutional review process that was held in Kenya in the period preceding the promulgation of the 2010 constitution, representations were made geared towards the protection of the constitutional and human rights of LGBTQ persons[39]. However, this debate was rejected by the Constitution of Kenya Review Commission, the institution tasked with formulating the constitution at that time. The responses from majority of the citizens, religious institutions and the political class had made it clear that representations relating to the inclusion of LGBTQ+ rights would lead to the defeat of the draft Constitution during the national debate and so the Commission rejected those representations[40]. Consequently, the Constitution was passed excluding the rights of persons who are deemed to be sex/gender non-compliant with the known, natural and acceptable, including those who identify as LGBTQ[41].

And so, Kenya remains fixated on the traditional male/female sex gender classification, and the biological male/ female sexual orientation and sexual preferences, generally excluding persons who identify as LGBTQ. And yet, documented research has shown that human beings can innately be either heterosexual, gay, lesbian, bisexual or transgender and that these attributes are innate conditions[42]. Despite this scientific fact, LGBTQ persons in Kenya are excluded, discriminated against, and have their human rights violated, based on constitutional and legislative provisions. They are denied recognition and are excluded because of legislative provisions which impliedly criminalize anyone who seems to belong to LGBTQ. Indeed, to borrow Justice Sachs words, in the eyes of the legal system and society

---

36 Moagi Lefatshe, Violence Against LGBT(QI) Persons in Africa (The Palgrave Handbook of African Women's Studies), 2020, pp. 7-9.

37 *Ibid.*

38 *Ibid.*

39 Wambui Njogu, 'Non-Recognition of Intersex Persons and Its Impact on Their Human Rights: The Case of Kenya' (Doctoral Thesis, School of Law, University of Nairobi), 2023, p. 8.

40 *Ibid.*

41 *Ibid.*

42 Seth Muchuma Wekesa, 'A Constitutional Approach to the Decriminalization of Homosexuality in Africa: A Comparison with Kenya, South Africa and Uganda' (Doctoral Thesis, Faculty of Law, University of Pretoria), 2016, pp. 43-44.

in Kenya, all LGBTQ persons are criminals[43]. Equally, all persons who are born innately LGBTQ, to borrow from Trevor Noah, are 'born a crime'[44].

4. Rights of LGBTQ as Conceptualized under the *Ubuntu Philosophy*

Against the backdrop of the overall discriminatory and condemnation of LGBTQ persons in Kenya, there is a constitutional call for respect for all the human rights for every human being. LGBTQ persons are human beings deserving of human rights as conceptualised by the web of human rights and the ubuntu philosophy[45]. The Constitution does declare categorically and unequivocally that rights and fundamental freedoms under the Bill of Rights belong to everyone[46]. This call is buttressed by the golden thread created by the principle of equality and non-discrimination, which runs through all human rights instruments at the international, regional and domestic levels, and which Kenya has an obligation to protect, fulfil and promote [47]. As an African country guided by the spirit of *ubuntuism,* these are the African traditions and values that Kenya seeks to protect, if it is to adhere to the doctrines that make up *ubuntu*, one of which is that no one should be left behind.

Even though human rights protection and promotions need to apply to everyone including LGBTQ persons, they have been denied recognition and are constantly subjected to discrimination within society. Some fundamentalist religious leaders denounce all forms of sin including homosexuality and lesbianism[48]. Politicians engage in what Walimbwa et al. refer to as political homophobia[49], with some leaders trying to gain political mileage and popularity through condemnation of LGBTQ+ individuals[50].

Cases abound of societal condemnation of LGBTQ persons, violations of their rights including their right to security, limb and life, stigmatization and general and widespread discrimination. Most of them are forced to live in hiding. The sad

[43] Justice Sachs in 'National coalition for Gay and Lesbian Rights versus the Minister for Justice. (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999).

[44] Trevor Noah, Born a crime: stories from a South African childhood. Spiegel & Grau, 2016, p. 10.

[45] Constitution of Kenya 2010, Article 19.

[46] *Ibid*.

[47] These rights are contained in all human rights instruments in place at the International, Regional and National levels.

[48] Mbote.

[49] Walimbwa, et al., Political homophobia and the effect on GBMSM programmes in Kenya: The significance of a community-led rapid agency assessment. *Global Public Health*, *18*(1). https://doi.org/10.1080/17441692.2023.2271989.

[50] https://nation.africa/kenya/blogs-opinion/opinion/kaluma-s-strange-legal-proposals-4347812 [Accessed on 12.04.2024].

situation that is their daily lived experience was demonstrated in a case filed by Eric Gitari, a person who is gay. In his petition to the High Court, Eric narrated the various violations that LGBTQ persons constantly undergo[51]. On a personal level, he stated that he experiences discrimination, rejection and hostility. He was once denied a haircut, a very basis service, for reasons that the barber shop indicated that other patrons were complaining and did not want to be associated with LGBTQ+ persons. He also stated that he had been a target of numerous threatening, insulting and death messages on Facebook and other social media outlets[52].

Eric's experiences are not unusual for persons in this category in Kenya. LGBTQ persons constantly have their rights to privacy and dignity violated, as was explained by another gay person, who narrated the way his right to employment and labour rights were violated by an employer who created a very hostile work environment for him. He had been working as flower handler from which he was fired, with his employer categorically telling him: "People like you are not allowed in this office"[53]. Yet another gay person explained how he had the word *shoga* a derogatory Swahili word for a 'homosexual' written on his car and on the door to his house, causing him to feel extremely intimidated and threatened, to a point he had to move out of his home due to stigma[54]. Activists in Kenya frequently face harassment, job losses, and are sometimes forced into exile. The founder of a lesbian and bisexual women's group in Mombasa for instance, was targeted by a group of vigilantes in the area, who assaulted her and threatened to kill her, forcing her to flee from her home[55]. Even more disturbing narrations were reports of physical assaults and threats of assaults by law enforcement officers, policemen and some parliamentarians, who frequently issue statements calling for the arrest of all homosexual persons. They also incite the public to arrest homosexuals where the police fail to do so[56].

No doubt, therefore, despite the consensus that every human being, by virtue of being born human is entitled to rights and freedoms, those who disclose behaviour considered to belong to LGBTQ conduct do not. Due to lack of laws protecting LGBTQ individuals in Kenya, many become vulnerable to abuse. They end up being lumped in the 'illegal and criminal' group contemplated by the Penal Code,

[51] EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae) Petition 150 & 234 of 2016 (Consolidated).

[52] *Ibid.*

[53] *Ibid.*

[54] *Ibid.*

[55] *Ibid.*

[56] *Ibid.*

which criminalizes all acts against morality[57]. Consequently, they are constantly subjected to discrimination, hate crimes and physical and mental violence.

The Penal Code begins by providing for unnatural offences and proceeds to criminalize, in part, carnal knowledge by any person against the order of nature[58]. It further makes it an offence punishable by imprisonment, for a person, either female or male, to allow a male person to have carnal knowledge 'against the order of nature'[59]. The Penal Code moreover creates the offence of indecent practices between males hence creating a crime where a male person engages in acts of 'gross indecency' with another man. It is these provisions of the law that are widely interpreted to mean that sexual acts between persons of the same sex are criminalized, thus justifying criminalization of conduct and sexual behaviour attributed to LGBTQ+ persons.

This law used to justify criminalization of homosexuality and LGBTQ persons, has been in operation since 1930, having been introduced into Kenyan Statutes during the colonial period. Courts and society have interpreted the law as criminalizing acts of 'anal intercourse between men', which are what are referred to as 'gross indecent acts'. The law has also been interpreted as outlawing sexual conduct which, in the opinion of a person making an arrest of a person suspected of committing such acts, would be considered as falling outside what is viewed as 'proper heteronormative sexual conduct'. This is an interpretation that has been drawn from judicial decisions as well[60].

Other than the inferences drawn from the provisions of the Penal Code, it is worth noting that the law does not expressly criminalize homosexuality or the state of being a homosexual. It only criminalizes sexual acts 'against the order of nature', which term, as seen, is not defined in law. Indeed, recent progressive jurisprudence around LGBTQ rights has observed that due to the vagueness in the law, Section 62 of the Penal Code does not, in fact, specifically amount to criminalizing those who confess to being lesbians or homosexuals in Kenya[61]. Neither does the law criminalize the right of association of people based on their sexual orientation. It also does not specifically limit the freedom of association of persons based on

57 See The Penal Code, Cap 63 of the Laws of Kenya which at Chapter Fifteen criminalizes all crimes against morality.

58 *Ibid.*, Section 162.

59 See Sections 162 and 163 of the Penal Code. It is worth noting that the Penal Code does not define what constitutes against the order of nature, leaving the law to draw inferences.

60 See C O L & another v Resident Magistrate – Kwale Court & 4 others [2016] eKLR, Para 47 and 51 where Emukule Judge observed that section 162 of the Penal Code envisages matters of sodomy or acts against the order of nature which can only be proved through rectal or anal examinations, if the modern man and woman has now converted the anus into a sexual organ.

61 *Ibid.*, no. 47.

their sexual orientation[62]. And perhaps it is this vagueness in the law that has in the recent past led to what appears to be a change in the tide of the legal realm, which now seems to be subtly listening to LGBTQ persons fighting against criminalization of same sex conduct, dehumanization, discrimination, stigmatization and exclusion that Kenya has since before independence been subjecting them to.

5. So, Is the Legal Tide Now Changing and Is It Likely to Change the Social Tide?

Recent jurisprudence and legislation appear to be departing from the general legal and societal position of considering LGBTQ persons in Kenya as criminals *ab initio*. The majority decision in the recent landmark Supreme Court judgement is a clear demonstration of this position[63]. Other cases which have been decided in the recent past seem to be leaning more towards protection of the rights of everyone, regardless of any consideration.

In 2018, for instance, the Court of Appeal swiftly moved to protect the right to dignity and privacy for persons who had been forced to undergo degrading and nonconsensual anal examinations in a bid to prove that they had engaged in homosexual activities contrary to the provisions of the Penal Code[64]. The facts leading to this Court of Appeal decision were that the Petitioners had been arrested from a bar in Diani, a town in Kwale County of the coastal region of Kenya, on suspicion of being involved in *inter alia* gay activities. At the time of investigating the alleged offences, the investigating officer had attempted to forcefully have the petitioners undergo an anal examination, which they refused. Upon arrest, the Petitioners were presented before the Principal Magistrate's Court and charged with criminal offences which included practicing unnatural offences[65], and committing an indecent act with an adult[66]. The prosecution applied for and was granted an order compelling them to undergo the medical tests. They were then taken to the Coast General Hospital where they were forced to undergo HIV and hepatitis B testing, and then thereafter subjected to forced anal examinations. The results of the medical examinations were presented and admitted by the subordinate court.

The Petitioners were very unhappy with the forced medical examinations and filed a petition in the High Court challenging their prosecution, the non-consensual tests and anal examinations conducted on them, which they described as

---

62 *Ibid*.

63 *Ibid*., no. 46.

64 COL & Another v Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR (Civil Appeal No. 56 of 2016).

65 Contrary to section 162 (a) as read with section 162 (c) of the Penal Code.

66 Contrary to section 11 A of the Sexual Offences Act 2006 (No. 3 of 2006).

inhuman and degrading. They also complained of being forced to undress in the full glare of the police and medical personnel who witnessed the entire medical examinations, which was carried out in a degrading and intrusive manner[67]. They also took issue with the fact that the medical examinations were undertaken without their consent, were done in the presence of police officers and the reports of the findings of the examination made public and so their status was made known to everybody. They termed these actions unconstitutional and a violation of their human rights, which rights are guarded by the Constitution of Kenya and various other international human rights instruments. In particular, they claimed that the forced medical examinations violated Article 29(f) of the Constitution, which prohibits cruel and degrading treatment. They argued that the fact that they had been made to raise their legs and metal spatulas inserted into their anuses in the presence of police officers and other medical personnel amounted to cruel and degrading treatment in violation of the Constitution of Kenya as well as Article 10 of the International Covenant on Civil and Political Rights (ICCPR), and the African Charter on Human and People's Rights. They further contended that the conduct by the police officers also amounted to a violation of their right to dignity, taking the view that the violation of their right to dignity was an egregious violation given that dignity is at the heart of a human being irrespective of sexual orientation.

However, The High Court dismissed their appeal observing that the mouth and anus were not sexual organs and that the Petitioners had not suffered violation of any of their rights as claimed[68]. Dissatisfied with the High Court decision, the Petitioners moved to the Court of Appeal[69], protesting the violations of their rights and freedoms as provided under the Bill of Rights as provided by the Constitution of Kenya, 2010, and as zealously guarded by all other human rights instruments. The Court of Appeal, while agreeing with the Petitioners, observed that by virtue of being human, each person is entitled to have his or her dignity and human worth respected, regardless of one's status or position or mental or physical condition. The Court further stressed that dignity is central to the protection of fundamental freedoms and right and is inherent to every person regardless of any consideration. The Court concluded by stating that the conduct of the Respondents in subjecting the appellants to anal examinations violated their rights under Article 25, 27, 28 and 29 of the Constitution of Kenya, 2010 and that the use of evidence obtained through the forced anal examination to prosecute them was in violation of their

[67] COL & Another V Resident Magistrate – Kwale Court & 4 Others [2016] eKLR.

[68] *Ibid*.

[69] COL & another v Principal Magistrate Ukunda Law Courts & 4 others [2018] eKLR (Civil Appeal No. 56 of 2016).

rights under Article 50 of the Constitution. The Appeal was therefore allowed, and the judgment of the High Court set aside.

In overturning the decision of the High Court in its entirety, the Court of Appeal basically extended protection to persons who identify as homosexuals, and further protected them from having their dignity and right to privacy violated through nonconsensual and invasive medical examinations. As a result, the prosecution's practice of subjecting LGBTQ persons to invasive and dehumanising examinations to prove that there had been sexual contact was found to be illegal. This decision was a positive step towards safeguarding the rights to dignity, privacy and equality for LGBTQ persons and confirms that forced anal examinations cannot be allowed to be carried out with a view to proving offences under the Penal Code.

Judicial sympathy towards LGBTQ persons in Kenya is also demonstrated in the case of Audrey Mbugua[70]. Audrey is a transgender woman who was born a biological male in 1984, assigned the male sex/gender at birth and raised as a boy. Consequently, her school certificates and identity documents identified her as a male and contained a male name Andrew Mbugua, and a male sex/gender marker. Later in life, Audrey identified as a transgender woman, changed her name to Audrey Mbugua a female name, and embarked on changing her identity documents including her academic certificates to reflect the female sex/gender she now identifies with. To this end, she approached the Kenya National Examination Council (KNEC), the government body responsible for academic certificates, and requested for the change. Her request was denied, forcing her to move to court seeking orders to compel KNEC to change the particulars of her certificates to reflect her new name and remove the male gender mark. The court agreed with her and granted an order of mandamus, compelling KNEC to change the male name in the certificates to her female acquired name and to remove the male gender mark. In so doing, the Court emphasized that every person was entitled to their human dignity, and underpinned the fact that human dignity is that intangible element which makes a human being complete. The judiciary, through this decision, therefore set a good precedent with respect to transgender persons and acknowledged them as human beings in line with their unique status. This position was confirmed in the Court of Appeal[71].

Further affirmation of the rights of LGBTQ persons is seen in the case of Republic vs NGO Board versus Transgender Education[72]. Here, the Transgender

[70] Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR (Judicial Review case No. 147 of 2013).

[71] Kenya National Examinations Council v Republic & 2 others [2019] eKLR.

[72] Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others [2014] eKLR (Judicial Misc Application No. 308A of 2013).

Education and Advocates (TEA), an organization formed for the purposes of Advocating for the human rights and preventing stigma faced by transgender people both in Kenya and internationally moved the court when the (Non-Governmental Organisations NGO Coordination Board[73] refused to register it as a Non-Governmental Organization (NGO). In issuing an order compelling the NGO Board to register TEA as an NGO, the Court stressed that to discriminate against people and deny them the freedom to associate on the basis of gender or sex is discriminatory and contravenes the provisions of Article 27(4) of the Constitution.

The case of Peter Solomon Gichira versus the Attorney General, is also significant in the LGBTQ human rights discourse currently happening in Kenya[74]. Here, the Petitioner had filed a suit seeking judicial interpretation of the term 'gender' as used in the Constitution of Kenya. The Petitioner felt that it was critical to get a judicial interpretation of the term gender given that there are situations in Kenya where a disparity exists between a person's assigned sex/gender and a person's expressed gender identity and also given that there are people who are born with biological traits such as transgender whose identity does not match the sex/gender assigned to them at birth[75]. The Petitioners argument was that restricting the term sex/gender to men and women excludes persons of a 3rd gender where LGBTQ persons fall, from enjoying their human rights.

Even though this Petition is yet to be heard, the High Court did consider it to be of substantial public importance warranting the empanelment of a bench of uneven judges. This decision also goes to show that courts in Kenya are now moving towards seriously engaging with the question of acknowledging and recognising other sex/genders and sex/gender identities, among them LGBTQ persons.

Despite the wild and widespread condemnation of the Supreme Court decision delivered in February 2023 therefore, the same was a significant pointer that Kenya

---

[73] This body is now known as the National Federation of Public Benefits Organisational (National Federation of PBO's), having been reconstituted under the Public Benefits Organisations (PBO) Act 2013, which came into operation on 14th May 2024.

[74] Peter Solomon Gichira v Attorney General & another [2015] eKLR (Petition No. 313 of 2015).

[75] The terms sex and gender are usually conflated and used interchangeably to denote the biological physical genitalia through which men and women are differentiated. However, studies have shown that the terms sex and gender are distinct. Sex refers to the biological characteristics that define human beings as female or male, and now, in some jurisdictions, as intersex. Sex is usually assigned at birth and the sex differentiation made on the basis of external genitalia, chromosomes, hormones and the reproductive system. On the other hand, gender has been defined as both a social construct and a personal identity. In the context of social terms, gender refers to the socially created roles, personality traits, attitudes, behaviours and values attributed to and acceptable for men and women, as well as the relative power and influence of each. In individual terms gender refers to the specific gender group with which an individual identifies, regardless of their sex. See Francisco Valdes, 'Queers, Sissys, Dykes and Tomboys: Deconstructing the Conflation of 'Sex', 'Gender' and 'Sexual Orientation' (1995)83 California Law Review 20.

may be opening up towards recognition of the rights of LGBTQ+ community, as members of the human race.

It would, however, be remiss of this paper if it does not analyse the journey leading to this Supreme Court groundbreaking decision.

Eric Gitari, the petitioner therein, sought to register a non-governmental organization (NGO) with the core objective of advancement of human rights, specifically addressing the violence and human rights abuses suffered by gay and lesbian people in Kenya. To this end, he made an application for the registration of the NGO to the National Council of Non-Governmental Organization's Coordination Board (NGO Coordination Board) as it then was[76]. With his application, Gitari forwarded three possible names for the organisation namely *Gay and Lesbian Human Rights Council*; *Gay and Lesbian Human Rights Observancy* and *Gay and Lesbian Human Rights Organization*. The Board rejected his application on grounds that the proposed NGO would seek to protect the rights of gay and lesbian persons contrary to sections 162 and 165 of the Penal Code. The Board further said that inclusion of the terms 'gay' and 'lesbian' was unacceptable as these words were aimed at pursuing an interest that was inconsistent with the law. The Board further added that registering such an NGO would result in the furthering of an illegality. He was advised to drop the words 'gay' and 'lesbian' from the proposed names, if he wanted to have the NGO registered. Gitari refused to drop the words from the proposed names whereupon the Board declined the application for registration.

Upon the rejection, Gitari filed a petition in the Constitutional and Human Rights division of the High court[77]. His arguments *inter alia,* were that in seeking to register the proposed NGO, he was also exercising his constitutional freedom to associate as established under Article 36 of the Constitution of Kenya 2010[78]. He further argued that the proposed NGO was to help him address the plight of homosexuals, bisexuals and transgender persons in the society. He further contended that Article 36 entrenches freedom to associate for 'every person' and does not exclude gay or lesbian people, and therefore, refusal to register the NGO violated his rights and was tantamount to discriminating against him and others, on the grounds of his sexual orientation, as well as subjecting him and others to inhuman and degrading treatment. He also contended that the refusal also affected other LGBTQ individuals by ostracising them and looking upon them as criminals with no rights to associate.

[76] *Ibid.*, no. 59.

[77] EG v Non-Governmental Organisations Co-ordination Board & 4 others [2015] eKLR.

[78] Article 36 of the Constitution grants the freedom of association to everyone residing in the Republic of Kenya.

The NGO Coordination Board and the State through the Attorney General opposed Gitari's petition, stating that the refusal to register the NGO was justifiable on several grounds. First, the Penal Code at sections 162, 163 and 165 criminalizes gay and lesbian liaisons since they go against the order of nature. Second, Article 45 of the constitution limits marriages to people of the opposite sex and third, the proposed NGO was intent in destroying the cultural values of Kenyans and could not be allowed, especially since it goes against public interest and religious values as contained in the Bible and Koran, all of which prohibit homosexuality.

During the proceedings, five other parties were allowed to be enjoined in the suit for various diverse reasons and interests in the proposed NGO. Among these were a transgender woman and the father of an intersex child, who were allowed to join for reasons that they were members of the LGBTQ community. The Kenya Christian Professionals Forum[79], was also allowed to join as an interested party, and it vehemently opposed the petition arguing that if formed, the proposed NGO would advance and promote a cause against public policy and would seek to legalize homosexuality which is prohibited and criminalized under section 162 of the Penal Code. The Kenya Christian Professionals Forum further argued that the NGO, if registered, would target children and vulnerable people and work against the moral values of the society. The *Katiba Institute,* was enjoined as *amicus curiae*, representing the faithful implementation of the Constitution and supported Gitari's petition on grounds that refusal to register the NGO violated his right to freedom of association and other rights as constitutionally provided.

This petition raised the question of the right to freedom of association and non-discrimination and equality before the law regarding persons who belong to the lesbian, gay, bisexual, transgender, and intersex and queer (LGBTQ) groups. Among the key issues framed by the court for determination were first, whether sexual minorities have a right to form associations in accordance with the law and second, and if the answer to the first issue was in the affirmative, whether the decision of the Board not to allow the registration of the proposed NGO because of the choice of name constituted violation of the rights of the petitioner under Articles 36 and 27 of the Constitution.

In answering the key issues raised in the Petition, the High Court pointed out that the Petitioner was seeking to register an NGO whose core mandate was to protect the human rights of those who belong to the Lesbian, Gay, Bisexual, Trans, Intersex and Queer (LGBTQ) community, thus seeking the protection of the right to associate for every person as recognized by the constitution. It is also

[79] The Kenya Christian Professionals Forum Ltd is a company limited by guarantee comprising of Christian professionals from various denominations and from diverse professional fields in Kenya sharing common values on issues of family, life and religious freedom and social justices.

important to note that the Court also pointed out that the purported justification by the NGO Coordination Board, of placing reliance on sections 162 and 165 of the Penal Code, could not apply because, the Penal Code does not expressly criminalize homosexuality or the state of being a homosexual. The Penal Code only criminalizes sexual acts against the order of nature. The Court reiterated that there is no law criminalizing those who confess to be lesbians or homosexuals in Kenya, which is a clear manifestation that such sexual orientation is not necessarily criminalized. In any case, the term 'against the order of nature' has not been defined by the law.

The Court was also of the further view that the law does not criminalize the right of association of people based on their sexual orientation, nor does it limit the freedom of association of persons based on their sexual orientation. It therefore concluded by pointing out that the moral, religious or cultural beliefs and convictions being relied on by the Respondents to deny the Petitioner his rights, however strong, can never be a basis for limiting rights. Moral and religious beliefs and convictions however strong, can never be a basis for limiting rights and neither are they laws as contemplated under the Constitution.

The court therefore determined that the actions by NGO Coordination Board declining the registration of the proposed NGO amounted to a limitation of the Petitioner's rights and a violation of the right to non-discrimination. The Court's decision in effect gave legal recognition to the organization that the Petitioner had intended to register, which would then grant LGBTQ persons in Kenya the freedom to associate. In giving legal recognition to the organisation that the Petitioner intended to register, the court also gave recognition to the LGBTQ group that would be served by that the organization if registered. But more importantly, the Court determined that persons who are gay, lesbian, bisexual and transgender are recognized as human beings, however reprehensible their sexual orientation or sex/gender identity may be to certain members of society. And once recognised as human beings, their rights also stood guaranteed under Article 19 (2) of the constitution, by virtue of their being human.

By affirming the right of LGBTQ persons to register associations, and by allowing such organisations to be properly identified and registered as such, as such, the Court set the important precedent on the recognition of the existence of LGBTQ groups. The Court also confirmed that these categories of human beings do exist. The court further reaffirmed the fact that the terms LGBTQ make reference to human beings, people who, like other citizens, have the right to freely associate and to be free from all forms of discrimination. In effect, this decision expanded the democratic space within which LGBTQ advocacy groups can operate. By giving them legal recognition, these groups would be able to actively agitate for

the respect for their human rights, which are often and routinely denied based on non-recognition.

The Respondents, however, were dissatisfied with the High Court's decision and moved to the Court of Appeal[80]. They asked the Court of Appeal to overturn the decision of the High Court and criticized the High Court's decision to identify LGBTQ as innate attributes of people. They also accused the High Court of disregarding the religious preference of Kenyans in the Constitution of Kenya and for failing to consider that the Penal Code outlaws and criminalizes homosexual behaviour in Kenya. The Respondents' contention appeared to be based on the presumption that registration of the proposed NGO would amount to an action that could be construed as aiding and abetting the crime, which actions are equally criminalized under the Penal Code.

The Court of Appeal, through a majority decision however upheld the decision of the High Court and observed that the people in Kenya who answer to any of the descriptions in the acronym LGBTQ, are 'persons', and that they all fall under the umbrella of Article 36 of the Constitution of Kenya, 2010. Like everyone else, they have a right to freedom of association which includes the right to form an association of any kind.

This was a majority decision[81], and therefore the findings and holdings of the High Court were retained. The pronouncements made in both the High Court and Court of Appeal go to the heart of recognition of the rights of LGBTQ persons. For instance, the majority vote in the decision urged a culture of respect and tolerance of differences that abound in the society and a frank discussion based on an 'open and democratic society based on human dignity, equality, equity, and freedom' which the Constitution of Kenya envisages.

However, the Respondents were so opposed to the Court of Appeal's majority decision that they now moved to the apex court in the land, the Supreme Court[82]. This Court, which is the final arbiter in the country, however[83], once again, ruled in favour of Eric Gitari, and confirmed that the NGO Coordination Board had limited the LGBTQ's community's freedom of association and discriminated against them on account of their sexual orientation, in violation of the provisions of the Constitution.

While it is true the Supreme Court's decision extremely incensed the Kenyan society, it was a landmark success for LGBTQ persons. The highest court on the

[80] Non-Governmental Organizations Co-Ordination Board v EG & 5 others [2019] eKLR (Civil Appeal No. 145 of 2015).

[81] The Court of Appeal Bench constituted five judges, 2 of whom dissented.

[82] NGO Coordination Board v EG & 4 Others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) [2023] KLR (Supreme Court).

[83] *Ibid.*

land has now pronounced itself on a key issue to the effect that sexual orientation is one of the protected characteristics against discrimination under the Constitution was[84].

6. What About Legislation?

While criminalization of LGBTQ persons continues to be inferred from the vague provisions of the Penal Code[85], a few recent legislative provisions in Kenya, just like judicial pronouncements examined above also appears to be departing from the stringent condemnation of LGBTQ persons. In the current Children Act, for instance, homosexuality is not mentioned at all[86]. This is in stark contrast to its predecessor which had been enacted in 2001, and which is now repealed, which specifically provided homosexuality as a ground for which one could not be allowed to adopt a child. The specific provisions provided as follows: "An adoption order shall not be made if the applicant or, in the case of joint applicants, both or any of them is a homosexual"[87].

Legislative provisions in Kenya, through the now repealed Children Act, appears to have placed homosexuals in the same category with persons of unsound mind within the meaning of the Mental Health Act and criminals who have been charged and convicted of criminal offences[88], as persons who are unfit to adopt children.

The drafters of the Children Act 2022, however, removed this provision. The equivalent of the section in the 2022 Act, being section 186, does not contain homosexuality as a ground to deny an applicant adoption rights. Indeed, the Act in its entirety does not mention a homosexual or homosexuality at all. The removal of that limitation implies that a person who is a homosexual can now exercise their rights to adoption, a non-natural but legal alternative to parenthood route, under the current Act. This was no doubt a win for persons who identity as homosexuals[89].

---

84 The Constitution of Kenya 2010, Article 27(4).

85 Criminalization of same sex unions are also inferred from the provisions of Article 45(2) of the Constitution of Kenya 2010, which prohibits same sex marriages in Kenya.

86 Children Act (2022).

87 Children Act (2001) (now repealed), section 158 (2) (a).

88 *Ibid.,* section 158 (3) (a) and(b) respectively.

89 While the Constitution, 2010 does not specifically provide for adoption, Article 15(3) does entitle citizenship to a child adopted by a Kenyan citizen. Part XIV of the Children Act, 2022 which has replaced Part XII of the Children Act, 2001 (now repealed), is quite elaborate on the prerequisites for adopting a child in Kenya. Unlike its predecessor the current Act does not limit persons provide homosexuality as a ground for limiting the right to adoption.

7. Is the LGBTQ Community in Kenya out of the Woods Yet?

While legislation and judicial precedents appear to be making important legal strides for LGBTQ persons, it cannot be said that the journey in the fight for the rights and freedoms for LGBTQ persons is over. The fact that the community is not out of the woods yet is demonstrated by a case that has been pending in court since 2016[90]. Here, Eric Gitari and seven others have unsuccessfully been fighting to get the provisions of the Penal Code used in Kenya to violate the rights of certain people based on their actual or perceived sexual orientation either repealed and or declared unconstitutional[91]. They have also been seeking to get same sex conduct decriminalised.

The eight petitioners in two consolidated petitions filed in the High Court, have challenged the constitutionality of Sections 162(a) and (c), and 165 of the Penal Code, for being vague and uncertain, and for being used to violate the rights of people based on their actual or perceived sexual orientation[92]. They are also seeking a declaration that sexual and gender minorities in Kenya are entitled to the right to the highest attainable standards of health care services as guaranteed in Article 43 of the Constitution[93]. The Petitioners are also seeking an order directing the government to develop policies and adopt practices prohibiting discrimination on grounds of sexual orientation and sex/gender identity and or expression in the health sector. Essentially, the petition seeks to have Kenyans who identify as LGBTQ treated without equally and discrimination as provided in the Constitution.

These petitions pointed out that the impugned provisions of the Penal Code to undermine various fundamental and human rights such as the prohibition on discrimination the right to equal treatment before the law, the right to dignity, the right to privacy, the right to the highest attainable standard of health and freedom of security of the person, all of which are contained in the Constitution and international human rights instruments[94]. The Petitioners are asking the court to give meaning to these provisions of the Constitution for everyone, by striking out the offending provisions of the Penal Code. Their argument has been that the vague and uncertain terms contained in the provisions of the Penal Code are not just used to perpetuate violations of the rights of LGBTQ+ persons, but have also enabled stigma, which prevents them from seeking health care services. This in turn has had a detrimental effect on the provision of life-saving treatment, including HIV prevention and treatment therapies, for men who have sex with men.

---

[90] EG & 7 others v Attorney General consolidated with DKM & 9 others.
[91] *Ibid.*
[92] Petition 150 of 2016 and Petition 234 of 2016.
[93] *Ibid.*
[94] *Ibid.*

The Respondents opposed the petitions, arguing that the court would be overstepping its mandate if it granted the orders sought and that granting such orders would amount to legalising homosexuality through the back door. The Respondents further argued that any orders granted as prayed in the petitions would have a drastic negative impact on the cultural, religious, social, and policy aspects in Kenya. They therefore asked the court to dismiss the petitions in their entirety.

In a detailed judgment, delivered in May 2019, the High Court dismissed the petitions. In so doing, the Court observed that the impugned provisions of the Penal Code were neither vague nor ambiguous and were not, in fact, discriminatory. According to the Court, the criminalisation of consensual intercourse between people of the same sex could be rationalised and justified under Article 45(2) of the Constitution, which only allows marriages between adults of the opposite sex. These provisions were therefore constitutionally justifiable.

The impugned sections of the Penal Code indirectly criminalizing LGBTQ conduct and behaviour therefore remain firmly entrenched in the law. Equally, LGBTQ persons' right to marry and found a family like other members of society also remains constitutionally excluded through the provisions of the constitution which provide as follows: "Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties"[95].

The Petitioners have appealed the decision which is currently pending appeal before the Court of Appeal in Nairobi[96].

But more disturbing is the proposed anti-homosexuality Bill in the form of the Protection of the family Bill currently pending in Parliament, which, if passed into law, will have LGBTQ persons hounded like animals with the support of the law. The way the law treats LGBTQ individuals will always impact the way society treats them.

8. Are LQBTQ+ Persons Part of the Whole as Envisioned by the Spirit of Ubuntu?

Africa in general, Kenya included, prides itself in being guided by the *ubuntu* philosophy, a theory widely cited as having an African flavour[97]. *Ubuntu* is a term drawn from the words *Umuntungumuntu ngabantu* translated to mean that a person

---

[95] Constitution of Kenya 2010, Article 45 (2).

[96] EG & 7 others v Attorney General consolidated with DKM & 9 others.

[97] Wambui Njogu, 'Non-Recognition of Intersex Persons and Its Impact on Their Human Rights: The Case of Kenya'. (Doctoral Thesis, School of Law, University of Nairobi), 2023, p. 22. See also 'Thaddeus Metz, Toward an African Moral Theory' [in:] Isaac E. Ukpokolo (ed.), Themes, Issues and Problems in African Philosophy (Palgrave, Macmillan), 2017, p. 106.

becomes a person through others [98]. It is a way of life which references morals, values and ethics centred around the way people treat each other amongst communities in Africa[99]. The philosophy has been employed in many parts of Africa, mostly the Southern part of Africa but also in Egypt and the Eastern region of Africa[100]. Indeed, East Africa, of which Kenya is a part, is touted as being the birthplace of *ubuntu,* which is seen as a variant of the word *utu,* a Kiswahili term which means 'a person' or 'humanity'. The notion of *utu* was popularized in East Africa by Julius Nyerere, the late president of Tanzania, in relation to the *ujamaa* concept of empowering vulnerable members of society through looking out for one another[101]. Desmond Tutu similarly popularised *ubuntu* by proclaiming it as the very essence of being human[102]. To him, it is a principle which provides that a person exists and becomes whole through others, a principle that speaks to the intrinsic worth of everyone, and a principle that relies on the intrinsic self-worth of everyone independent of race, status or sex/gender[103]. It is *ubuntu* that distinguishes a person from an animal[104], regardless of any differences[105]. In essence, this means that a person with *ubuntu* belongs to a greater whole, and where certain people within the greater whole are excluded, humiliated, oppressed, stigmatized and treated as if they are less human, then the whole gets diminished[106]. Suffice to say that the spirit of *ubuntu* can be said to be firmly ingrained in the African culture of looking out for one another[107].

[98] Rodreck Mupedziswa, et al., Ubuntu as a Pan-African Philosophical Framework for Social Work in Africa in Janestic Mwende Twikirize and Helmut Spitzer (eds.), Social Work Practice in Africa Indigenous and Innovative Approaches (Fountain Publishers), 2019, p. 22.

[99] *Ibid*., no. 83.

[100] Fainos Mangena, 'African Ethics through Ubuntu: A Postmodern Exposition', 2016, p. 9, Journal of Pan African Studies 69.

[101] Julius Kambarage Nyerere, Ujamaa: The Basis of African Socialism (Tanganyika Standard), 1962.

[102] Desmond Tutu, God is not a Christian: Speaking the Truth in Times of Crisis (Random House), 2011, pp. 21-24.

[103] *Ibid*.

[104] *Ibid*.

[105] Aloo Osotsi Magola, The African Bantu Concept of Ubuntu in the Theology and Practice of Bishop Desmond Tutu and its implications for African Biblical Hermaneutics in Madipoane Masenya (Ngwan'a Mphahlele) and Kenneth N. Ngwa (eds.), Navigating African Biblical Hermeneutics: Trends and Themes from our Pots and Calabashes (Cambridge Scholars Publishers), 2018.

[106] Wambui Njogu, 'Non-Recognition of Intersex Persons and Its Impact on Their Human Rights: The Case of Kenya'. (Doctoral Thesis, School of Law, University of Nairobi), 2023, p.22.

[107] Rodreck Mupedziswa, et al., Ubuntu as a Pan-African Philosophical Framework for Social Work in Africa [in:] Janestic Mwende Twikirize and Helmut Spitzer (eds.), Social Work Practice in Africa Indigenous and Innovative Approaches (Fountain Publishers), 2019, p. 22.

9. Conclusion and Recommendations

Since the spirit of *utu*, *ujamaa* and *ubuntu* has been linked to the concepts of a person's dignity and intrinsic worth, through birth and within the community, no one should be deprived off humanness for identifying as LGBTQ. Equal treatment devoid of any discrimination should be extended to everyone, thus providing protection of rights innately available to every human being as contemplated by the Constitution and entire web of human rights instruments. The Africanness and humanness theorized under *ubuntu* belongs to everyone everywhere, including those socially and culturally constructed as being non-conforming, where persons belonging to the LGBTQ groups fall.

LGBTQ persons are people who have been excluded, suffered stigma and have been denied enjoyment of certain rights because of that exclusion, and because of certain provisions in the law. It is about people who, because of their sexual orientation and or sex/gender variances have sexual needs which may be alternative to those of other members of society. These variances do not make them less human to justify condemnation and violations of their rights supported by the law. It is important that these violations be redressed through the law.

Kenya, in its transformational constitution, prides itself in being a just society where everyone's needs are taken care of within the true spirit of *ubuntu*. The expectation therefore is that the Africanness and humanity theorized under *ubuntu* should be extended to everyone. A number of amelioration measures can be undertaken to extend the principle of humanity contemplated through *ubuntuism* to LGBTQ individuals. These amelioration measures can be a combination of both legal and extra-legal.

In terms of legal approaches, it is important for Kenya to review and adjust laws which directly discriminate and exclude LGBTQ individuals[108]. Strategic litigation, as a legal approach is crucial and, in Kenya, this has extensively been undertaken. However, the results have been varied. While some cases have resulted in progressive judgements[109], others have not[110] .This is not to say that strategic litigation should not be pursued. It is the activism in the judiciary that has led to some of the gains already being enjoyed by LGBTQ persons in Kenya.

108 Seth Muchuma Wekesa, 'A Constitutional Approach to the Decriminalization of Homosexuality in Africa: A Comparison with Kenya, South Africa and Uganda'. (Doctoral Thesis, Faculty of Law, University of Pretoria), 2016, p. 318.

109 NGO Coordination Board v EG & 4 Others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) [2023] KLR (Supreme Court).

110 EG & 7 others v Attorney General consolidated with DKM & 9 others.

Legal processes by themselves cannot guarantee enjoyment of rights and freedoms which LGBTQ persons in Kenya have been denied for so long. A blend of legal models and other forms of non-legal tools would achieve better results[111].

The first of these non-legal measures should be an attempt to dismantle religious and social barriers, through which people in Kenya have been socialised to believe that human beings should only be male or female and heterosexual. Accepting that human beings can belong to the LGBTQ community and that being different in terms of gender identity or sexual preference does not diminish a person's humanness would help reduce levels of stigma, ostracization, rejection, and all other forms of discrimination. Awareness creation, public education and sensitization through grassroot movements and local advocacy groups within cultural and religious contexts would be good strategies that can help changes negative attitudes, misconceptions, socio-cultural and political negative attitudes through which LGBTQ persons are considered subhuman. This would also help remove the exclusion of persons belonging to the LGBTQ categories as this exclusion not only results in loosening the respect for human rights fabric but also that of the *ubuntu* and *utu* fabric, which Africa in general and Kenya in particular prides itself in.

References

Judges' (ACI Africa, 9 October 2023) https://www.aciafrica.org/news/9309/voluntarily-repent-and-resign-pro-lifers-in-kenya-to-pro-lgbtq-ruling-judges accessed 12 April 2024; Brian Murimi, 'NTV Kenya: Supreme Court Faces Backlash from MPs over LGBTQ Ruling' (NTV Kenya, 1 March 2023) https://ntvkenya.co.ke/news/supreme-court-faces-backlash-from-mps-over-lgbtq-ruling/ [Accessed on: 7.06.2024].

Kabeberi Macharia, Janet 'Reproducers Reproduced. Social Legal Regulations of Sexuality Among Girls in Kenya (Doctoral Thesis, School of Law, University of Warwick, 1995).

Kahiu, Magdalene "Voluntarily Repent and Resign": Pro-Lifers in Kenya to Pro-LGBTQ Ruling.

Lefatshe, Anna Moagi, Violence Against LGBT(QI) Persons in Africa. (The Palgrave Handbook of African Women's Studies 2020).

Majola, Aloo 'The African Bantu Concept of Ubuntu in the Theology and Practice of Bishop Desmond Tutu and its implications for African Biblical Hermaneutics [in:] Madipoane Masenya (Ngwan'a Mphahlele) and Kenneth N. Ngwa (eds.), Navigating African Biblical Hermeneutics: Trends and Themes from our Pots and Calabashes (Cambridge Scholars Publishers, 2018).

Mangena, Fainos, 'African Ethics through Ubuntu: A Postmodern Exposition' (2016) (Journal of Pan African Studies 69)

Metz, Thaddeus, Toward an African Moral Theory' [in:] Isaac E. Ukpokolo (ed.), Themes, Issues and Problems in African Philosophy (Palgrave, Macmillan, 2017), p. 106.

Mugumbate, Jacob, and Andrew Nyanguru. "Exploring African philosophy: The value of ubuntu in social work." *African Journal of Social Work* 3.1 (2013): 82-100.

[111] Seth Muchuma Wekesa, 'A Constitutional Approach to the Decriminalization of Homosexuality in Africa: A Comparison with Kenya, South Africa and Uganda'. (Doctoral Thesis, Faculty of Law, University of Pretoria), 2016, p. 318.

Mupedziswa, Rodreck *et al.*, Ubuntu as a Pan-African Philosophical Framework for Social Work in Africa [in:] Janestic Mwende Twikirize and Helmut Spitzer (eds.), Social Work Practice in Africa Indigenous and Innovative Approaches (Fountain Publishers, 2019)
Njogu, Rodreck, 'Non-Recognition of Intersex Persons and Its Impact on Their Human Rights: The Case of Kenya'. (Doctoral Thesis, School of Law, University of Nairobi, 2023), p.22.
Noah, Trevor, Born a crime: stories from a South African childhood. Spiegel & Grau (2016).
Nyerere, Julius K. 'Ujamaa: The Basis of African Socialism (Tanganyika Standard 1962).
Polites, Andrea and Mulcahy, M. Beth, LGBTQ. *Exploring Human Services*. (College of DuPage Digital Press 2022).
Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) (Adopted 2006, the International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity).
Rowland Dand Luca Incrocci (eds.) Handbook on Sexual and Gender Identity Disorders (John Wiley and Son, 2008).
Tutu, Desmond God is not a Christian: Speaking the Truth in Times of Crisis (Random House, 2011).
Valdes, Francisco 'Queers, Sissys, Dykes and Tomboys: Deconstructing the Conflation of 'Sex','Gender' and 'Sexual Orientation'(1995) 83 California Law Review, 20).
Wekesa, Seth M. 'A Constitutional Approach to the Decriminalization of Homosexuality in Africa: A Comparison with Kenya, South Africa and Uganda'. (Doctoral Thesis, Faculty of Law, University of Pretoria, 2016).