



## **SUBMISSION BEFORE THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS ON UNLAWFUL KILLING OF LGBTIQ+ PERSONS IN KENYA.**

### **Introduction**

1. The [National Gay and Lesbian Human Rights Commission](#) (NGLHRC) writes this submission to bring to the attention of the Special Rapporteur the situation of unlawful killings of LGBTIQ+ residents of Kenya fueled by discriminatory laws and policies. This submission is based on our expertise in responding to human rights violations against LGBTIQ+ residents of Kenya.

### **General Legal Context Regarding LGBTIQ+ Persons in Kenya.**

2. The Constitution of Kenya, 2010 guarantees all Kenyans the right to equal protection by the law and freedom from non-discrimination.<sup>1</sup> The Supreme Court in Kenya recently affirmed the inclusion of sexual orientation and gender identity within the protected classes against discrimination.<sup>2</sup>

---

<sup>1</sup> Article 27, Constitution of Kenya, 2010

<sup>2</sup> Kenyan Supreme Court, [NGOs Co-ordination Board v EG & 4 others; Katiba Institute \(Amicus Curiae\)](#) [2023] (NGO Coordination Board v EG [2023]), Petition 16 of 2019, 2023 paras 74-79 .The Appellants filed the case in the Supreme Court appealing the decisions of the High Court( Kenyan High Court, [EG v Non- Governmental Organisations Co-ordination Board & 4 others](#) [2015], Petition 440 of 2013, 2015) and the Court of Appeal (Kenyan Court of Appeal, [Non-Governmental Organizations Co-Ordination Board v EG & 5 others](#) [2019], Civil Appeal 145 of 2015, 2019) both of which had affirmed the freedom of association for LGBTIQ+ Kenyans. The court was called to review whether the actions of the appellant in refusing to register the National Gay and Lesbian Human Rights Commission. The majority decision of the Supreme Court affirmed the High Court’s finding that non-normative sexual orientation and gender



3. Despite this interpretation of the Constitution, same-sex relations remain criminalized under the Kenyan Penal Code. Section 162 (a) and (c) of the Code criminalize what is termed as “unnatural offenses,”<sup>3</sup> which the High Court of Kenya<sup>4</sup> has deemed to include anal sex, and Section 165 criminalizes acts of “gross indecency” between “male person[s]”<sup>5</sup>. The definition and application of these offenses have been a topic of some debate. The High Court was called to review the constitutionality of the provisions whereby the High Court ruled that the offenses were not discriminatory as they cover conduct by “any person,”

---

identity would be included under Article 27 (4) of the Kenyan Constitution as protected classes from discrimination.

<sup>3</sup> Section 162, [Kenyan Penal Code](#), 2012 Unnatural Offenses- Any person who—(a)has carnal knowledge of any person against the order of nature; or(b)has carnal knowledge of an animal; or(c)permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.

<sup>4</sup> Kenya High Court at Nairobi, [EG & 7 others v Attorney General; DKM & 9 others \(Interested Parties\); Katiba Institute & another \(Amicus Curiae\)](#) [2019] (EG v Attorney General [2019]), Petitions 150 & 234 of 2016, 2019 paras 271-272. The Petitioners in this case had filed a petition for declaration of section 162 (a) and (c) to be declared unconstitutional owing to the discriminatory application of the offense and the ambiguity in the term “unnatural offenses”. The High Court in this case offered a definition of “unnatural offenses” as including sodomy.

<sup>5</sup> Section 165, [Kenyan Penal Code](#), 2012 Indecent Practices between Males- “Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.” In [EG v Attorney General](#) [2019] para 273, the Kenyan High Court interpreted “indecent acts” as described under Section 2 of the [Sexual Offences Act](#) which includes any contact between the genitals of one person with those of another person where the contact does not involve exploitation, or exposure to pornographic material.



including heterosexuals.<sup>6</sup> The same view was mentioned obiter by the Supreme Court majority decision.<sup>7</sup> The dissenting opinions, however, acknowledged that the sections were chiefly for the criminalisation of same-sex conduct including female relationships.<sup>8</sup>

4. Despite the facially neutral constructions of these offenses, they are by and large used as a basis for the discrimination of LGBTQI+ Kenyans. Further, on February 1, 2024, the Kenya Christian professional forum filed a Public Petition in the Kenyan Parliament calling for stricter enforcement of sections 162 a & c of the penal code of Kenya against homosexual residents of Kenya. In 2014, Hon Duale a member of parliament termed [Homosexuality to be as serious as terrorism](#). While there are a handful of convictions based on the offenses, the impact of criminalisation is felt in the form of the government's discriminatory laws, policies, and practices, as discussed below.

#### **Duty to Investigate and Prosecute Cases of killings of LGBTQI+ persons.**

5. Cases of violence against LGBTQI+ persons, especially LGBTQI+ persons with a public profile in Kenya, are rarely concluded and are generally not investigated at

---

<sup>6</sup> [EG v Attorney General](#) [2019] paras 296–297

<sup>7</sup> [NGO Coordination Board v EG](#) [2023] para 63

<sup>8</sup> [NGO Coordination Board v EG](#) [2023] paras 44 & 190. Both Justice Ouko and Justice Ibrahim while dissenting on the freedom of association for LGBTQI+ Kenyans mentioned that while “unnatural offences” covers “any person”, “offences against the order of nature” could be considered to include female same-sex relationships



all. Across 2021 and 2022, the following cases were never conclusively investigated and no suspects were apprehended nor prosecuted:

- In 2021, Erica Chandra, a transgender woman, was found dead in a ditch along General Mathenge Road, a street in Nairobi.<sup>9</sup>
- During the same year, a gay activist, Joash Mosoti, was found having been tortured and strangled to death in his apartment in Bamburi, Mombasa.<sup>10</sup>
- In 2021, Chriton Atuhwera, a queer activist and refugee, succumbed to injuries inflicted by a homophobic fire-bombing of the LGBTQIA+ community at Kakuma Refugee Camp.<sup>11</sup>
- In 2022, Rose Mbesa, an intersex person, was found dead by the side of the road at Kachibora Township in Kitale having also been raped before their death.<sup>12</sup>

6. In some instances, the Directorate of Criminal Investigations (DCI) has conducted investigations leading to prosecutions of cases involving LGBTQI+ persons. Such cases are however investigated only where there is enormous pressure and outcry for the inquiry to be conducted especially by civil society organizations. Further civil society organizations including NGLHRC have had to be actively

---

<sup>9</sup>Audi, [Jinsiangu Releases Statement Addressing the Unfortunate Demise of Erica](#), Q4Queer, 1 September 2021

<sup>10</sup> [GALCK's Statement Regarding the Tragic Death of Joash Mosoti](#), 13 May 2021

<sup>11</sup> [Homophobic Attack Leaves Man Dead At Kakuma Refugee Camp: Un Safety Measures Review Needed](#), Amnesty International Australia, 16 May 2021. See also National Gay and Lesbian Human Rights Commission and Amnesty International, ['Kenya: "Justice Like Any Other Person" - Hate and Discrimination against LGBTI Refugees in Kenya'](#), 2023 pg 27

<sup>12</sup>Gerald Bwisa, ['50-year-old intersex woman raped and killed in Trans Nzoia'](#), Nation, 5 May 2022



involved in the process of prosecuting perpetrators in cases of killing LGBTQI+ persons. This was the case in the killing of Edwin Chiloba, a queer activist, in 2023 which sparked international attention and immediate calls for an investigation of the killing.<sup>13</sup> The prosecution of the suspect in Edwin’s case is still ongoing before the Kenyan High Court where NGLHRC is representing the victim.<sup>14</sup>

7. Another incident where a case was fully investigated was the death of Sheila Lumumba, a non-binary lesbian, who was murdered in 2021.<sup>15</sup> In Sheila's case, there were allegations of lack of prosecution by the police with the family making statements on having been the ones to recover the murder weapon even after the police had finalized their examination of Sheila's home where the murder happened.<sup>16</sup> The perpetrator in that case has been convicted after pleading guilty and is currently serving his sentence.<sup>17</sup>

## **Duty to Prevent the Killing of LGBTQI+ Persons in Kenya**

---

<sup>13</sup> [‘Kenyan LGBTQ activist Edwin Chiloba smothered to death - pathologist’](#), BBC, 11th January 2023. See instances on Commissioner Solomon Ayele Dersso, [‘Press Statement on the tragic murder of Edwin Chiloba in Kenya’ African Commission on People and Human Rights](#), 7 January 2023; Barnabas Bii, [‘US Government extends helping hand in gay rights activist Edwin Chiloba murder probe’](#) Nation Africa, 11 January 2023; see also [Joint Statement On The Investigation Into The Murder Of Edwin ‘chiloba’ Kiptotich Kiptoo](#), 10 January 2023

<sup>14</sup> Titus Ominde, [‘DNA on LGBTQ activist Edwin Chiloba's body matched that of suspected killer’](#) Nation, 9 May 2024 See also [Case Update:#JusticeforEdwinChiloba](#), 8 May 2024

<sup>15</sup> [Joint Statement On The Brutal Murder Of Sheila Lumumba](#), 26th April 2024

<sup>16</sup> Khatondi Soita, [‘Police leave family of murdered non-binary lesbian to find murder weapon’](#), OpenDemocracy, 25 April 2022. See also Erin Kilbride, [‘Inadequate Kenyan Police Response to Brutal Killing of Non-Binary Lesbian’](#), Human Rights Watch, 29 April 2022

<sup>17</sup> Elizabeth Okwatch, [‘What did Sheila Lumumba want?’](#), Minority Africa May 2024. See also, [Joint Statement on the Sentencing of Billington Wambui Mwathi in the Shiela Lumumba Case](#), 18th December 2023



8. The Human Rights Committee has remarked on the duty of states to protect vulnerable persons, including LGBTQI+ persons, refugees, and asylum seekers, who may be exposed to specific threats or pre-existing patterns of violence.<sup>18</sup> LGBTQI Kenyans, refugees & Asylum seekers face several human rights violations with the Commission having received 7000+ cases of human rights violations since its inception. The violations vary from physical assault, verbal assault, threats to kill and cause harm, conversion practices, sexual violence, intimate partner violence and cases of blackmail and extortion.<sup>19</sup> Being that most of these cases go unreported or where reported are oft not investigated, these violations manifest patterns which have led to the killings of LGBTQI+ persons. In Sheila's case, for example, there had been previous reports of a threat Sheila received from a co-worker owing to their gender expression which was reported to the police and went uninvestigated.<sup>20</sup>

#### **a) Regulating and Investigation of Hate Speech**

9. The Kenyan Constitution provides exemptions to freedom of expression, including expression that advocates for hatred based on the group of persons within the protected classes of discrimination.<sup>21</sup> The Kenyan Supreme Court as discussed above includes sexual orientation and gender identity as such protected

---

<sup>18</sup> UN Human Rights Committee (HRC), '[General comment no. 36, Article 6 \(Right to Life\)](#)', CCPR/C/GC/35, 3 September 2019 para 23

<sup>19</sup> See NGLHRC generally, [2022 Annual Report](#), 2023, [2020/2021 Legal Aid Report](#), 2022 [2019/2020 Legal Aid Report](#), 2021, [2018/2019 Legal Aid Report](#), 2020

<sup>20</sup> Elizabeth Okwatch, '[What did Sheila Lumumba want?](#)', *Minority Africa* May 2024

<sup>21</sup> Article 33(2), Constitution of Kenya, 2010



classes.<sup>22</sup> Despite the existence of such provisions, homophobic rhetoric is churned out specifically by political leaders. In particular, a Member of Parliament, Mohammed Ali, has called for the killing of LGBTQI+ persons, using the Bible and Quran to justify these statements.<sup>23</sup> Mohammed Ali has also been amongst those organising anti-LGBTQIA+ demonstrations within the Coastal region of Kenya, which, while not contributing to any known killings, have resulted in witch hunts and violations of queer persons especially in the coastal region.<sup>24</sup> One other Member of Parliament, Peter Kaluma, has been chief in making vitriolic statements on his social media handle including inciting members of the public to conduct citizen arrests of LGBTQI+ persons despite there being no law allowing for such arrests nor allowing the arrest of LGBTQI+ persons based solely on their identity.<sup>25</sup>

10. The National Cohesion and Integration Commission (NCIC) is a government entity in Kenya tasked with investigating and reducing hate speech.<sup>26</sup> The definition of the offense of “hate speech” in Kenyan law is however quite limiting as it only includes statements advocating for hate based on color, race, nationality, or ethnic origins.<sup>27</sup> This definition excludes hateful utterances against

---

<sup>22</sup> [NGO Coordination Board v EG \[2023\]](#) para 74–79

<sup>23</sup> [Video Recording of Mohammed Ali Responding to questions on Killing of LGBTQI+ persons](#)

<sup>24</sup> Experience of the National Gay and Lesbian Human Rights Commission in provision of legal aid. In September 2023, NGLHRC and other partners participated in a situation monitoring at the height of the anti-LGBT demonstrations. During this time, NGLHRC received approximately 100 cases.

<sup>25</sup> [Statement by Peter Kaluma on citizen arrests fo LGBTQ persons](#) , 20 May 2024

<sup>26</sup> Section 15 as read in with Section 25, [National Cohesion and Integration Act](#), 2008 (Kenya)

<sup>27</sup> Section 13, [National Cohesion and Integration Act](#), 2008 (Kenya)



LGBTQI+ persons. While incitements to violence are criminalized exclusive of the grounds for such incitement<sup>28</sup>, there have been no investigations by the NCIC, the DCI, or other duty bearers as to the hateful utterances made against LGBTQI+ persons.<sup>29</sup> Complaints addressed to the NCIC last year by NGLHRC and other queer organizations were disregarded with the NCIC claiming to have no jurisdiction on hate speech based on non-normative SOGIE-SC.<sup>30</sup>

#### **b) The Situation for LGBTQI+ refugees**

- II. Kenya serves as one of the only countries in East Africa which offers asylum based on non-normative sexual orientation and gender identity.<sup>31</sup> However, LGBTQI+ refugees—especially those who reside in Dadaab and Kakuma camps—are exposed to several human rights violations.<sup>32</sup> Referencing the death of Chriton, mentioned above, the fire-bombing incident formed part of a series of events fueled by a lack of investigations of threats made against the LGBTQIA+ community at Kakuma Camp.<sup>33</sup> Queer refugees at Kakuma Camp reported only one instance of follow-up cases of reports of violations which violations include express threats to life.<sup>34</sup>

---

<sup>28</sup> Section 96, Kenyan [Penal Code](#), 2012

<sup>29</sup> [Statement: Kenyan authorities must stop dangerous anti-LGBTQ protests](#), 5 October 2023

<sup>30</sup> *ibid*

<sup>31</sup> UNHCR Kenya, '[UNHCR Statement on the situation of LGBTQI+ refugees in Kakuma camp](#),' 25 March 2021

<sup>32</sup> Kate Pincock, '[UNHCR and LGBTI refugees in Kenya: The limits of 'protection'](#)' [2020] 45 *Disasters*

<sup>33</sup> National Gay and Lesbian Human Rights Commission and Amnesty International, '[Kenya: "Justice Like Any Other Person" - Hate and Discrimination against LGBTI Refugees in Kenya](#)', 2023 pg 31

<sup>34</sup> National Gay and Lesbian Human Rights Commission and Amnesty International, '[Kenya: "Justice Like Any Other Person" - Hate and Discrimination against LGBTI Refugees in Kenya](#)', 2023 pgs 32-34





12. The violations against LGBTQI+ refugees are further fueled by a lack of clarity in registration procedures, as well as by the Kenyan encampment policy, which requires most refugees to reside within designated camps. This is especially dangerous for queer persons, as it has been shown that most host communities as well as other refugees within the camps are not accepting of queer persons leading to increased violence towards queer refugees.<sup>35</sup>
13. The Kenyan Government's inadequate resourcing for refugees including LGBTQI+ refugees, unclear processes for refugee status determination coupled with unclear processes for resettlement and reintegration procedures have led to at times dire economic indignity for queer refugees especially those who live in urban areas.<sup>36</sup> One instance, for example, was the suicide of a gay refugee from Uganda who had gone to seek financial assistance from the UNHCR offices in Nairobi.<sup>37</sup> The suicide has been credited to mental health concerns due to the disillusionment faced by the gay refugee as regards their economic situation.<sup>38</sup>

### **c) Sexual and Gender-Based Violence amongst LGBTQI+ persons in Kenya**

---

<sup>35</sup> Organization for Refuge, Asylum and Migration (ORAM) and Rainbow Railroad, '[The Challenges Facing LGBTQI+ Refugees in Kakuma Camp, Kenya](#)', 2021

<sup>36</sup> HIAS Kenya, '[Protection Assessment of LGBTQI+ Displaced Persons in Urban Kenya \(Nairobi, Mombasa and Nakuru\)](#)', 2024 See also Amka Africa Justice Initiative, '[A False Safe Haven. The Registration and Documentation Woes of Intersex, Transgender and Gender Non-conforming Asylum Seekers and Refugees in Urban Kenya.](#)', 2022; National Gay and Lesbian Human Rights Commission and Amnesty International, '[Kenya: "Justice Like Any Other Person" - Hate and Discrimination against LGBTI Refugees in Kenya](#)', 2023

<sup>37</sup> Nita Bhalla, '[Investigation after gay refugee found dead at U.N. refugee office in Kenya](#),' Reuters, 13 April 2020

<sup>38</sup> Josh Milton, '[Gay refugee and father-of-one found dead outside UN offices in apparent suicide after being left with nowhere to turn](#), Gay News, 14 April 2020



14. Cases of intimate partner violence coupled with cases of blackmail and extortion are quite common for LGBTQI+ persons in Kenya.<sup>39</sup> Most blackmail and extortion cases involve such extortion due to the victim's sexual orientation and gender identity.<sup>40</sup> They are mostly coupled with threats to kill or cause harm and, at times, physical violence.
15. There have been some attempts in Kenya to deal with SGBV, including the enactment of the Protection from Domestic Violence Act, of 2016<sup>41</sup>, the incorporation of gender desks at Police Stations, and the introduction of specialized courts handling SGBV cases.<sup>42</sup> However, most of these mechanisms remain inaccessible to queer persons. First, queer persons are mostly afraid to make reports of such incidents to the police stations owing to a fear of discrimination or victimization. Second, Kenyan authorities typically demonstrate an unwillingness to investigate claims by queer victims of sexual- and gender-based violence and sometimes adopt an abrasive and victim-blaming approach.<sup>43</sup>

---

<sup>39</sup> Katherine A Lewis et al, "[You'll Be Chased Away](#)": Sources, Experiences, and Effects of Violence and Stigma among Gay and Bisexual Men in Kenya' [2023] 20(4) Int J Environ Res Public Health

<sup>40</sup> Nita Bhalla, '[Kenya LGBTQ+ dating app blackmail cases go to court](#)' Context News, 7 May, 2024

<sup>41</sup> Kenyan [Prevention of Domestic Violence Act](#), 2016

<sup>42</sup> Judiciary of Kenya, [Sexual And Gender Based Violence \(SGBV\) Courts](#)

<sup>43</sup> Human Rights Watch, '[The Issue is Violence: Attacks on LGBT People on Kenya's Coast](#)', 2015. See also, Racheal George and 3 Others, '[Displacement and gender-based violence among people with diverse sexualities and gender identities in Kenya](#)' (ODI, 2021); Katherine A Lewis et al, "[You'll Be Chased Away](#)": Sources, Experiences, and Effects of Violence and Stigma among Gay and Bisexual Men in Kenya' [2023] 20(4) Int J Environ Res Public Health



16. Such violations may result in patterns of violence which may escalate to killings, such as in the Edwin Chiloba case, where the accused was Chiloba’s partner.<sup>44</sup>

**d) Suicide, Attempted Suicide, and Suicidal Ideation amongst LGBTQI+ persons in Kenya.**

17. The right to life has also been discussed to include the obligation of the state to protect LGBTQI+ persons from suicide.<sup>45</sup> LGBTQI+ persons in Kenya are more susceptible to mental health concerns owing to the stigmatizing, discriminatory, and often violence-laden environment in Kenya.<sup>46</sup> These circumstances are further exacerbated by the inaccessibility of mental health care services by LGBTQI+ persons in Kenya. Access to most mental health care services is characterized by discriminatory mental health care providers or stigmatization by other staff within the mental health care facilities.<sup>47</sup> Even where these services are provided in an affirming way, most queer persons have reported that prohibitively high costs often impede access to the services.<sup>48</sup>

---

<sup>44</sup> Lynn Kolongei and Mercy Ereu, [‘Witnesses say slain activist, key suspect had a relationship’](#), The Standard, 3 August 2023

<sup>45</sup> UN Human Rights Committee (HRC), [‘General comment no. 36. Article 6 \(Right to Life\)’](#), CCPR/C/GC/35, 3 September 2019 para 9

<sup>46</sup> Mental Health Taskforce, [Mental Health and Wellbeing Towards Happiness & National Prosperity](#) (Ministry of Health, 2020). See also Gary W Harper et al, [‘Mental Health Challenges and Needs among Sexual and Gender Minority People in Western Kenya’](#), [2021] 18(3) Int J Environ Res Public Health; Katherine A Lewis et al, [“You’ll Be Chased Away”: Sources, Experiences, and Effects of Violence and Stigma among Gay and Bisexual Men in Kenya](#) [2023] 20(4) Int J Environ Res Public Health

<sup>47</sup> Stephanie Haase, Virginia Zweigenthal, Alex Müller, [‘Barriers in Access to Healthcare for Kenyan Queer Womxn and Trans Men: Findings of a Cross-Sectional Online Survey and Interviews’](#) [2021]

<sup>48</sup> Stephanie Haase, Virginia Zweigenthal, Alex Müller, [‘Barriers in Access to Healthcare for Kenyan Queer Womxn and Trans Men: Findings of a Cross-Sectional Online Survey and Interviews’](#) [2021]



18. The Kenyan Mental Health Policy, 2015–2030<sup>49</sup> and the Kenyan Suicide Prevention Strategy, 2021–2026<sup>50</sup> have both acknowledged the need for adopting mental health for vulnerable groups, but have both failed to include LGBTQI+ persons. This is the situation even after a government–sanctioned report on mental health acknowledged the vulnerability of LGBTQI+ persons and a need for a queer-responsive approach to mental health care provision.<sup>51</sup>

## **Recommendations**

### **Legislative Reforms**

The Kenyan Government should review discriminatory laws that affect LGBTQI+ persons. Particularly, the Kenyan Parliament should:

- Repeal the discriminatory sections 162 (a) and (c), 163 and 165 of the Penal Code.
- The Kenyan Government should adopt equality legislation that specifically guarantees the enjoyment of rights by LGBTQI+ Kenyans.
- The definitions of “hate speech” under the National Cohesion and Integration Commission Act should be amended to include hate speech based on

---

<sup>49</sup> Ministry of Health, [Kenya Mental Health Policy: 2015-2030](#), 2015

<sup>50</sup> Ministry of Health, [Kenyan Suicide Prevention Strategy 2021-2026](#)

<sup>51</sup> Mental Health Taskforce, [Mental Health and Wellbeing Towards Happiness & National Prosperity](#) (Ministry of Health, 2020)



SOGIE-SC status as being hate speech. The NCIC should further be tasked with investigating cases of hate speech against LGBTQI+ persons.

### **Policy Reforms**

- The Kenyan Government should amend the Kenya Mental Health Policy and the Kenyan Suicide Prevention Strategy to include LGBTQI+ persons as vulnerable groups. Further, mental health providers and workers in such facilities should be sensitized in ensuring provision of non-discriminatory services.
- The Kenyan Government should abide by the Supreme Court ruling (*Petition 16 of 2019*) on Freedom of Association for LGBTQI+ Kenyans<sup>52</sup> to ensure rights protection for LGBTQI+ Kenyans.
- The Kenyan Government should uphold resolution 275 of the African Charter on protection against violence on the basis of Sexual Orientation & Gender Identity.
- The Kenyan Parliament should reject any attempts to pass anti-queer hate legislation that falls short of Kenya's constitutional and international law's promises to Equality & Non-Discrimination based on real or perceived Sexual Orientation & Gender Identity.

---

<sup>52</sup> <https://kenyalaw.org/caselaw/cases/view/252450>