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Kenyan High Court upholds criminalization of same-sex relations

The [Kenyan High Court](#) has unanimously dismissed a petition challenging two provisions of the [Penal Code](#) that are applied to criminalise consensual same-sex sexual acts. On 24 May, Justices Chacha Mwita, John Mativo and Roselyne Aburili held that sections 162 and 165 of the Penal Code are not unconstitutional, do not violate the human rights of lesbian, gay, bisexual and transgender (LGBT) Kenyans, and that the law is not vague or unclear.

There are [many troubling aspects](#) of the judgment. Not least is the Court's endorsement of the view that the dignity and rights of LGBT persons are secondary to religious and traditional morality. In reaching this decision, the Court strained to justify an [irrational interpretation](#) of the Constitution's protection of the right to marriage between two persons of the opposite sex, to require the prohibition of sexual intimacy between persons of the same sex.

There are many inadequacies in the judgment, including the Court's reasoning on why the criminal law does not violate the right to health; this is illustrative of the extent to which it misapplied legal principles to reach its conclusion.

One of the arguments made in support of the Petitioners' case was that sections 162 and 165 of the Penal Code violate the constitutional right to the highest attainable standard of health. In support of this argument, the Petitioners gave evidence of their personal experiences. There was also extensive expert evidence provided, including testimony from Professor Chris Beyrer, the Desmond M. Tutu Professor of Public Health and Human Rights, Johns Hopkins Bloomberg School of Public Health, US, and from [Professor Anand Grover](#), the former United Nations Special Rapporteur on the right to health, and expert on HIV and law.

This evidence showed that criminal laws that punish same-sex sexual acts drive LGBT persons and men

who have sex with men (MSM) away from healthcare and HIV services for fear of being identified as gay, discriminated against, persecuted or prosecuted.

When people do access services, the reproachful attitudes of healthcare workers, reinforced and legitimised by the criminal law, leads to LGBT persons and MSM being treated with hostility and denied services. The existence of the criminal sanctions further inhibits healthcare, HIV-prevention services, and access to information and counselling particular to the needs of LGBT persons and MSM.

The evidence illustrated that the environment of stigma and discrimination is exacerbated and sustained by the law, which contributes to MSM's vulnerability to HIV, thereby compromising the country's HIV response. The experts gave extensive references in support of their claims, from local studies, international consensus at the World Health Organization, UNAIDS, and the government's own policy documents.

The [Kenya Legal and Ethical Issues Network on HIV and AIDS \(KELIN\)](#), an interested party in the case, pointed the Court to the government's [HIV Response Progress Report](#), which indicates that HIV prevalence among MSM is 18.2% (the national average is 4.9%) and HIV service coverage for MSM is only 65%.

KELIN also pointed to the government's [AIDS Strategic Framework](#) in which the Ministry of Health acknowledges the need to decriminalise same-sex consensual sex to stop violating the right to health. It demonstrated to the Court that the Ministry of Health has actively fundraised and received funds from the Global Fund to Fight AIDS, Tuberculosis and Malaria and the United States President's Emergency Plan for AIDS Relief (PEPFAR) to remove these legal barriers. The National AIDS & STI Control Programme (NASCOP) has an entire program dedicated to key populations including MSM, and in 2016 published a [Training Manual that acknowledges that violence against key populations hinders access to HIV services](#).

The Kenyan government's own documents therefore show significantly disproportionate vulnerability to HIV for MSM, and inadequate access to services. The link between these facts and the legal barriers in the Penal Code were demonstrated to the Court. This is not only a human rights violation for MSM and LGBT persons but a public health failure, sustained by the criminal law.

In response, the State denied these facts. The Court specifically requested the Ministry of Health to respond to its effective admissions in policy on the harmfulness of the law. The State failed to respond, leaving KELIN's contentions unopposed.

The Kenya Christian Professional Forum filed affidavits in support of the State's case, not from specialists with expertise on HIV or epidemiology, but from an obstetrician-gynaecologist and a psychiatrist. Their affidavits, the high watermark of evidence supporting the State, largely related moralistic opinions on the origins of homosexuality and a baseless claim that the disproportionate vulnerability of MSM and gay men to HIV is a justification to punish same-sex sexual practices.

In constitutional law, it is accepted that the person alleging that their rights have been limited, has an [onus to prove](#) this. When presented with conflicting evidence on an issue, a Court's duty includes weighing the evidence and assessing the credibility of witnesses.

But the High Court did not do this. Instead, in the face of overwhelming evidence in support of the claim (including the Ministry of Health's acceptance in policy documents) that the law violates health rights, the Court simply held that it could not find a violation of the right to health in a "factual vacuum" or on the basis of "unsupported hypotheses."

A further indication of the judgment's strained reasoning, the High Court inappropriately applied a standard of proof applicable in criminal law contexts, stating that the Petitioners were required to prove the

rights violations “beyond reasonable doubt”. This is a much higher standard of proof than the “balance of probabilities” that the [Court of Appeal](#) has confirmed applies in constitutional cases. The High Court held:

It is for that person to demonstrate that there has been a clear transgression of constitutional principles. However, this rule is subject to the limitation that it is operative only until the time it becomes clear and beyond reasonable doubt that the legislature has crossed its bounds.

While there was hardly any “reasonable doubt” raised by the State or its supporters against the overwhelming evidence in support of the Petitioners’ case, the Court not only ignored the Petitioners’ evidence but also raised the legal standard of proof to unobtainable heights for individuals who seek to assert their constitutional rights against the State.

In further bolting its closed door on citizens’ enforcement of constitutional rights, the judgment infers that a simple legislative amendment to the Penal Code would be insufficient to decriminalise same-sex sexual practices – this would need a constitutional amendment first.

The Court held that: “Unless Article 45(2) [the right to marriage between two persons of the opposite sex] is amended to recognise same sex unions, we find it difficult ... to nullify the impugned provisions, whose effect would be to open the door for same-sex unions.”

The Kenyan courts have in recent years increasingly set progressive jurisprudence on the rights of [vulnerable and marginalised groups](#), on the [right to health](#), and on [human rights in the context of Kenya’s HIV response](#), including on the permissible limits to human rights through the [criminal law](#). It has been a source of hope and pride for human rights activists to see the Constitution boldly and independently defended by the judiciary.

In this context, the High Court judgment is not only a disappointing outcome, but the poverty of its reasoning and the potential of its effect to restrict access to justice for individuals seeking to enforce their constitutional rights, is deeply troubling. The judgment establishes regressive constitutional jurisprudence and applies inappropriate standards of proof at the expense of the rights and dignity of LGBT persons. More broadly, it will limit the effectiveness of Kenya’s HIV response.

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This article was first published on 8 June 2019 in the [Health and Human Rights Journal](#). It is reprinted here with permission of the authors.

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