

regarding SOGI.

KENYA



Penal Code (as amended by Act No. 5 of 2003).

Section 162

[AGAINST ORDER OF NATURE]

"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

is liable to imprisonment for fourteen years:

Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—

- (i) the offence was committed without the consent of the person who was carnally known; or
- (ii) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act."

Section 163

[ATTEMPTED ACTS AGAINST THE ORDER OF NATURE]

"Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years."

Section 165

[SODOMY / GROSS INDECENCY]

"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." Sodomy is prohibited as a common-law offence. It is defined as "unlawful and intentional sexual relationship through the anus between two human males".

On 24 April 2015, in *Gitari v Non-Governmental Organisations Co-ordination Board* the High Court of Kenya found that the State had violated Article 36 (freedom of association) of the newly (2010) Constitution of Kenya, by frustrating the process of registering the NGO, the National Gay & Lesbian Human Rights Commission (NGLHRC). The Court found that LGBTI people are a constituent part of the "every person" enumerated in Article 36, that the limitation of the current criminalising legislation refers to same-sex sexual acts and not one's sexual orientation *per se* (quoting *Kasha Jaqueline v Rolling Stone*, 2010, Uganda). It said it appears that, "the Board has acted in a manner that is both unconstitutional and unlawful, and amounts to an abuse of power", (para. 136) and also that the Board's reliance on its "own moral convictions as a basis for rejecting an application is outside the Board's mandate and a negation of its constitutional obligations" (para. 127), and cannot be used to deny others their constitutional rights.

As Jonah Chinga of the Gay and Lesbian Coalition of Kenya (GALCK) remarked in late-2015 "[d]espite ... barriers [such as homophobic remarks made by President Kenyatta, amongst others], Kenya has a somewhat exceptional position in the region and stands out as an East African country with a thriving LGBQ movement. Unlike neighbouring countries, there are strong ongoing initiatives and growing activism". For example, see 'Research on the Lived Experiences of LBQ Women in Kenya' report produced by GALCK in February 2016.

It is notable that Kenya's first appearance at its 2nd cycle UPR was in January 2015, where according to the report of the Working Group, Chile and Poland recommended decriminalising "... consenting relationships between adults of the same sex", and both Denmark and Chile referred to enacting legislation combatting hatred, while France and Sweden referenced non-discrimination, and Brazil referenced freedom of association and expression "and rights of LGBT persons". The State responded that, "it had come through a long period of national dialogue on the new Constitution. Critical social issues were put to the various fora [...] particularly the use of criminal law in these cases. These issues were really divisive and the requisite political and social consensus on these issues was a working [sic] progress [...] On the rights of LGBT, not a single individual could confirm the application of the criminal law on the basis of his/her sexual orientation".

At paras. 21 and 22 of its Concluding Observations on Kenya in March 2016, the Committee on Economic, Social and Cultural Rights (CESCR) cites LGBTI, decriminalisation, discrimination, health, and stigmatisation. In April, the National Gay and Lesbian Human Rights Commission filed a case to challenge the law penalising same sex sexual relations, whilst making security provisions for staff. In June 2016, the Mombasa High Court ruled that forced anal examinations and forced HIV and Hepatitis B tests of men suspected of same sex sexual conduct, are constitutional. According to the National Gay and Lesbian Human Rights Commission (NGLHRC) the ruling sets a "devastating precedent" that allows suspicion of someone's sexual orientation as grounds for "stripping them of their dignity and their fundamental rights".