REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTION & JUDICIAL REVIEW DIVISION

PETITION NO 440 OF 2013

ERIC GITARI.....PETITIONER

VERSUS

NON- GOVERNMENTAL ORGANISATIONS

CO-ORDINATION BOARD.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AUDREY MBUGUA ITHIBU…….....….1ST INTERESTED PARTY

DANIEL KANDIE…….....…..2ND INTERESTED PARTY

KENYA CHRISTIAN

PROFESSIONALS FORUM…....……..…..3RD INTERESTED PARTY

KATIBA INSTITUTE……...…….....AMICUS CURIAE

JUDGMENT

Introduction

1. The petitioner, Mr. Eric Gitari, sought to register a non-governmental organisation (hereafter **"proposed NGO"**), with the 1st respondent. The core objectives of the proposed organisations, according to the petitioner, is the advancement of human rights. Specifically, the proposed NGO would seek to address the violence and human rights abuses suffered by gay and lesbian people.

2. His application was made to the 1st respondent, the Non-Governmental Organisations Coordination Board (hereafter **"the Board")**, which, according to the petitioner, rejected his application for registration on the basis that the people whose rights the proposed NGO will seek to protect are gay and lesbian persons.

3. The petitioner then approached this Court by way of his petition dated 2nd September 2013 seeking, inter alia, a determination of the question whether he is a "person" as protected in Article 36, and if so, whether his right to freedom of association has been infringed.

4. In response, the Board, through the office of the Attorney General **(AG),** which is also enjoined in the proceedings as the 2nd respondent, defended its actions, contending that the petitioner's right to freedom of association has not been infringed and if limited, such limitation can be justified, inter alia, on the basis of the criminalisation of homosexual intercourse in the Penal Code.

The Parties

5. The petitioner is an adult male and a lawyer by profession who states that he has worked on equality for Lesbian, Gay, Bisexual, Trans, Intersex and Queer (**LGBTIQ**) persons in Kenya since 2010. He has brought this petition against the 1st respondent, the Board, which is a body corporate established under the provisions of the Non-Governmental Organisations Co-Ordination Act, Cap 19 Laws of Kenya (hereinafter referred to as "the Act"). The Board's functions under the Act are, inter alia, to facilitate and co-ordinate the work of all national and international Non-Governmental Organizations operating in Kenya and to maintain a register of such organizations, with the precise sectors, affiliations and locations of their activities.

6. The 2nd respondent is the Attorney General of the Republic of Kenya, an office established under Article 156 of the Constitution as the principle legal advisor of the national government and with the constitutional responsibility, under Article 156(6), to promote, protect and uphold the rule of law and defend the public interest.

7. In addition to these parties, the Court, on application being made, admitted the **Katiba Institute** (**"Katiba")** as an Amicus Curiae. Katiba describes itself as a registered non-profit making and non-partisan organisation dedicated to the faithful implementation of the Constitution. The basis for its joinder is that the case touches on the rights of gay and lesbians in Kenya and the issues are of considerable public interest and novel in Kenya.

8. The Court also admitted three interested parties on the basis that they had diverse interests in the registration of the proposed NGO. The first interested party is **Ms. Audrey Mbugua Ithibu**, a transgender woman, while the second is **Daniel Kandie**, the father of an intersex child. These parties have an interest in this matter as they are affected by the registration of the NGO by virtue of the fact that they are members of the lesbian, gay, bisexual, transgender and intersex (LGBTIQ) community.

9. The third interested party is the **Kenya Christian Professionals Forum (KCPF)**. KCPF believes that the registration of the proposed NGO will advance a cause against public policy and it will also seek to legalise criminality, that is homosexuality, and it contended that it had an interest in the petition with a view to opposing it.

The Factual Background

10. The facts giving rise to the petition are fairly simple and are not disputed. In accordance with the requirements for registration of a non-governmental organisation, on or about 2nd April, 2013, the petitioner sought to reserve with the Board for the purposes of registration of a non-governmental organisation, the names Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy and Gay and Lesbian Human Rights Organization. He was advised by the Board that all the proposed names were unacceptable and should be reviewed.

11. On March 19, 2013, the petitioner then lodged the names Gay and Lesbian Human Rights Commission; Gay and Lesbian Human Rights Council and Gay and Lesbian Human Rights Collective for reservation. Together with the names, the petitioner sent a letter to the Board dated March 19, 2013 demanding to know why his application had been rejected. By a letter dated March 25, 2013, the Board wrote to the petitioner's Advocates advising that sections 162, 163 and 165 of the Penal Code criminalizes Gay and Lesbian liaisons, and that this was the basis for rejection of the proposed names for the NGO.

12. The Board relied on regulation 8(3)(b) of the NGO Regulations of 1992 as the basis for rejecting the request. The regulation provides that the Director of the Board can reject applications if ***"such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable"***.

13. After three attempts to register the proposed NGO – each with different variations of the names and receiving the same response that the names were unacceptable, the petitioner sought a meeting with Mr. Mugo, a member of the Legal Department of the Board. According to the petitioner, Mr Mugo advised him that he "was not the first to try registering a gay and lesbian association and that any association bearing names gay and lesbian could not be registered by the NGO Board because the association were furthering criminality and immoral affairs". Mr Gitari requested Mr Mugo to put these reasons in writing, but Mr Mugo declined, though he asked the petitioner to drop the names 'gay' and 'lesbian', which the petitioner declined to do.

14. Following the refusal by the Board to register the proposed NGO in the names that the petitioner intended to use, the petitioner enlisted the services of his advocate on record, Mrs. Ligunya, who sought reasons in writing from the Board for the rejection of the application and explained that the petitioner was not seeking to further criminalised conduct but to further the equality of lesbian, gay, bisexual, trans, intersex and queer persons in Kenya.

15. In its letter dated 25th March 2013, the Board set out the basis of its rejection of the petitioner's application: that section 162 of the Penal Code "criminalises gay or lesbian liaisons"; that regulation 8(3)(b) obliges the Director to notify the applicant that the name is not approved on the grounds either that it is already in use or is "inconsistent with any law or is otherwise undesirable".

16. The Board also indicated in the said letter that sexual orientation was not listed as a prohibited ground of discrimination in article 27(4) of the Constitution; and nor was same sex marriage permitted in the Constitution whilst heterosexual relationships are expressly protected in Article 45(2). The Board urged the petitioner to review the proposed name and to provide the Board with the objects of the proposed NGO.

17. In his reply on 17thJune 2013, the petitioner forwarded the objectives and articles of the proposed NGO to the Board, and also explained that the proposed NGO sought to defend rights already in the Bill of Rights. No further communication was received from the Board, but according to the petitioner, his Counsel was advised to seek guidance from the Courts, hence the present petition.

The Petitioner's Case

18. The petitioner's case is contained in his petition dated 19th September 2013 and the affidavit in support sworn on the same day; his supplementary affidavit sworn on 17thJanuary 2014, and submissions dated 13th May 2014.

19. The petitioner's case revolves around the discrimination and stigmatisation that he alleges persons who belong to the LGBTIQ are exposed to in Kenya, which have necessitated the formation of the proposed NGO, and which are at the core of the rejection of the proposed names by the Board.

20. According to the petitioner, in 2011, the Kenyan Human Rights Commission (KHRC), in which he was then working as a programme associate in the KHRC LGBTIQ programme, interviewed LGBTIQ Kenyans to document the discrimination and abuses that they face. This resulted in a report by the KHRC titled **"The Outlawed Amongst Us: A study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya" (2011)**. According to the petitioner, the report shows that LGBTIQ Kenyans are harassed by state officials, subjected to physical violence and death threats and generally stigmatised by their families and society at large as a result of their sexual orientation or gender identity. Further, that LGBTIQ Kenyans are routinely harassed or abused by the police, held in "remand houses" without being informed of the charges against them, and brought to court on false charges. It also found that they are blackmailed, physically and sexually assaulted, and are victims of gang rape.

21. The report further found that in addition to being subjected to violence, LGBTIQ Kenyans face general stigmatisation and exclusion from their families and society at large; that of those interviewed, 89% were disowned by their families for being part of the LGBTIQ community; that they are expelled from school, fired from jobs and rejected by religious and political leaders.

22. The petitioner further contends that the KHRC report indicated that the LGBTI community face *"numerous forms of discrimination ranging from extra-judicial killings, torture and ill-treatment, sexual assault, arbitrary detention, denial of employment and education opportunities, and other serious discrimination in relation to enjoyment of other human rights."*

23. The petitioner states that his motivation for forming the proposed NGO is his experience at KHRC and the violence and murder of members of the LGBTIQ detailed in the KHRC report. His purposes for seeking registration of the proposed NGO is, with a focus on the infringement of the rights of person who are LGBTIQ, to conduct accurate fact-finding, urgent action, research and documentation, impartial reporting, effective use of media, strategic litigation and targeted advocacy, solely and/or in partnership with local human rights groups on human rights issues relevant to LGBTIQ individuals, groups and communities in Kenya. It is also aimed at publishing annual human rights status reports and briefings on human rights conditions of LGBTIQ individuals, groups and communities in Kenya, as well as to institute, support and advance personal and community legal, economic, social, cultural and other welfare programmes for these individuals, groups and communities in Kenya.

24. The petitioner grounds his case on the provisions of Articles 20(2), 31(3), 27(4), 28 and 36 of the Constitution. He submits that his case concerns the ability and right of citizens to associate in a manner recognised by the State and to share their thoughts and opinions in a collective manner. He contends that in seeking to register the NGO, he was exercising his constitutional right as established under Article 36 by way of forming an NGO to enable him to address the plight of homosexuals, bisexuals and transgender persons in society. It was his contention that Article 36 entrenches freedom to associate for "every person" and does not distinguish between different categories of people.

25. The petitioner submits that the proposed activities of the NGO would be in the national interest as the NGO would conduct accurate fact finding, urgent action, research and documentation, impartial reporting, effective use of the media, strategic litigation and targeted advocacy in partnership with local human rights groups on human rights issues relevant to the gay and lesbian communities living in Kenya.

26. The petitioner further contends that his right to freedom of association, dignity, equality and right not to be discriminated against have been violated. It is also his contention that the justifications presented by the Board for infringing these rights are ill-conceived. It is his case that a person in Article 36 does not exclude gay or lesbian people. In his view, the allegation by the Board that his actions are "tantamount to circumventing not only the law but also the will of the people" is scandalous and oppressive; that the people of Kenya have never been consulted in circumstances where it is considered that associations pursuing the objectives of the proposed NGO should be barred from registration, and that the will of Kenyans is represented in the Constitution.

27. The petitioner further argues that there is no basis for the allegation that the proposed NGO will perpetrate or promote unlawful acts "as opposed to advocating for the equal rights of minorities". He contends that the Board has been provided with the objectives of the proposed NGO, and there is nothing in the objectives that shows that it seeks to further criminal activities. According to the petitioner, the conflation of sections 162, 163 and 165 of the Penal Code and the activities of the proposed NGO is flawed, and nothing in the proposed activities of the proposed NGO would infringe any law whatsoever. It is also his submission that he seeks the protection and promotion of national values and principles of governance enshrined in Article 10 (2)(b) of the Constitution.

28. According to the petitioner, the refusal to register the proposed NGO violates his rights and is tantamount to inhuman and degrading treatment as it ostracises the group and looks upon homosexuals as criminals with no right to associate in any manner whatsoever.

29. The petitioner further alleges that the refusal to reserve and register the proposed NGO is tantamount to a denial of the right to equality before the law, and is a denial of the freedom of expression as well as the freedom to access information irrespective of one's sexual orientation. He therefore asks the Court to grant the following orders:

1. A judicial interpretation that the words 'every person' in Article 36 of the Constitution includes all persons living within the republic of Kenya despite their sexual orientation.

2. A declaration that the respondents have contravened the provisions of Articles 36 of the constitution in failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice.

3. A declaration that the petitioner is entitled to exercise his constitutionally guaranteed freedom to associate by being able to form an association like any other Kenyan.

4. An order of Mandamus directing the 1st respondent to strictly comply with its constitutional duty under Articles 27 and 36 of the Constitution to which it is bound.

5. A declaration that the failure by the respondents to comply with their constitutional duties under Article 36 infringes on:

i. The rights of marginalised and minority groups in the Republic of Kenya to which the petitioner fall and other gay and lesbian persons.

ii. The right of Kenyan Gay and Lesbian citizens to have the Constitution fully implemented both in its letter as well in spirit.

iii. The costs of the petition.

The Case of the 1st Respondent

30. In opposing the petition, the Board relied on the affidavit in reply sworn by Mr. Lindon Otieno, its Legal Affairs Manager, on 18th November 2014, as well as the submissions and authorities filed on its behalf. Its opposition to this petition is in three limbs. It contends, firstly, that the petition is premature as the petitioner failed to exhaust internal remedies under the NGO Act; secondly, that there was no breach of the petitioner's right to associate with others; and finally, that any infringement of the petitioner's rights is justifiable.

31. With respect to the first limb, the Board argues that the decision of its Director is not final and can be appealed against. It is its contention therefore that the petition is premature as the petitioner has not exhausted all the appeal mechanisms provided under section 19(1) of the NGOs Co-ordination Act and as such should be referred back to the Minister.

32. It is its contention, further, that the proposed NGO can be registered, but "with reviewed objectives and a reviewed name that does not offend the provisions of the law. It is its case that under Article 36(3) of the Constitution, a proposed association can be denied registration if reasonable grounds for non-registration are advanced, and it declined to register the proposed NGO on the grounds that the Penal Code at sections 162, 163 and 165 criminalizes gay and lesbian liaisons as they go against the order of nature; and that therefore any NGO with the said names could not be registered. It is also its case that it is vested with the power to refuse to register an NGO if the said NGO has no intention of promoting charity in society.

33. In addition, the Board has sought support in Article 45 of the Constitution, which it submits has provisions on the family and limits marriage to people of the opposite sex. It also relies on international law which it submits only recognizes and protects heterosexual marriages, among which it cites Article 16 of the 1948 Universal Declaration of Human Rights (UDHR) which states that "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." The Board also relies on the case of **Joslin –vs- New Zealand (Communication No. 902/1999) (17th July 2002)** in which the United Nations Human Rights Committee held that marriage as contemplated in the treaty is limited to heterosexual couples.

34. In addition, the Board cites Articles 17(3), 27 and 29(7) of the **African Charter of Human and Peoples Rights (ACHPR)**. Article 27 of the **ACHPR** states that "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interests." ACHPR also recognizes, at Article 17(3), that *"The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State"* and at Article 29(7) that *"…every individual has the duty to preserve and strengthen positive African Cultural Values and to contribute to the moral well being of society.*"

35. The Board argues that the petitioner's proposed NGO is hell bent on destroying the cultural values of Kenyans, and must therefore not be allowed, and further, that whereas the petitioner and his proposed NGO wish to express their rights of expression and association, they would, in doing so, be promoting prohibited acts which amounts to action prejudicial to public interest; and in its view, promotion of morals is widely recognized as a legitimate aspect of public interest which can justify restrictions

3.6 The Board also justifies the rejection of reservation of names and registration of the proposed NGO by referring to passages form the Bible and the Quran to show that both Christianity and Islam prohibit homosexuality. It also contends that legitimising of homosexuality will lead to destruction of society through the recruitment of young boys, and the Board paints what it sees as the grim picture that will

result from registration of the proposed NGO:

"I submit that the legitimization of the homosexual lifestyle would dramatically increase the sexual abuse of young Kenyan children to unimaginable levels. Our children deserve to be protected from all attempts to legitimize homosexuality."

37. It prays that the petition be dismissed.

The 1st and 2nd Interested Parties' Case

38. The crux of the first and second interested parties' submissions is that there is a distinct difference between Lesbian, Gay and Bisexual persons (LGB), and Transgender and Intersex persons (TI). According to the interested parties, being lesbian, gay and bisexual is a feature of who a person is attracted to, people of the same sex or people of both sexes; whereas being a transgender and intersex person is a feature of a person's own identification with a particular sex. The 1st and 2ndInterested Parties are concerned that the registration of the NGO will result in a blurring of these issues.

39. In his submissions on behalf of the 1st and 2nd interested parties, Mr. Ojiambo observed that the petition mentions the 1st Interested Party by association. It was his submission that in light of the petitioner's insistence on the name gay and lesbian, it was clear that a name can affect the operation of an NGO and the people it represents. It was the 1st and 2nd interested parties' case that they are apprehensive that by being classified as LGBTIQ, there will be a misconception that transgender persons are gay and lesbian, which will be wrong. They submit that the differentiation between lesbians and gay, and transgender and intersex persons, should be maintained. The interested parties rely on a number of statutes and decisions from various jurisdictions with respect to the distinction between lesbian and gay persons as against transgender and intersex persons.

40. According to the interested parties, gays and lesbians are cases of sexual orientation while transgender are medical conditions. They submit that other countries have also made the differentiations, citing as an illustration the Gender Recognition Act of the United Kingdom which deals with issues of transgender and the Alteration of Gender Act of South Africa which differentiates issues of gender differentiation and sexual orientation. Their submission is that there is no community known as LGBTIQ as this implies that those who are transgender are also homosexual which, is not the case.

41. To the allegation by the petitioner that there was a violation of his right under Article 36, the 1st and 2nd interested parties submit that the Article mentions the right to form, join and participate in an association, and also about registration of an association. Their contention is that the petitioner already enjoys the right to form an association as he was already running an NGO which has been in existence since 2012. Their contention is that there is no evidence that an application for registration has been made, and it cannot therefore be said that Article 36 has been violated. The interested parties agree with the Board that the petitioner's prayer seeking an order of mandamus to compel the Board to carry out its mandate was premature and can only be considered once an application for registration is made.

The 3rd Interested Party's Case

42. KCPF, the 3rd interested party, was joined to the proceedings on the date of the hearing of the petition upon the oral application of its Counsel, Mr. Harrison Kinyanjui, who also made oral submissions on its behalf. They did not file any pleadings or submissions on the matter.

43. The position taken by KCPF is that the petition should not be allowed. Mr. Kinyanjui submitted that

the prayers sought in the petition did not accord with the submissions made; that the petitioner seeks to have the Court find that sexual orientations cannot be a ground of discrimination, but that the framers of the Constitution had used the term sex, and did not include sexual orientation.

44. KCPF submitted further that the petitioner's rights under Article 36 were not violated as he has not shown whether he was denied the right to form or associate, or that his rights under Article 36(3) were violated. Counsel referred to the letter from the Board dated 25th March 2013 in which the Board indicated its rejection of the proposed name on the basis of Section 162 of the Penal Code. He asked the Court to consider whether the rejection of the names proposed by the petitioner on the basis of Section 162 was unreasonable It was his submission that under regulation 8 of the NGO Regulations, Parliament has given the regulations as a guide; and the name of an NGO can be refused approval under regulation 8(3)(ii) if it is repugnant or is otherwise undesirable.

45. The 3rd interested party submitted further that the petitioner wished to have an organization that promotes homosexuality, which is prohibited under section 162, registered. He contended that Article 59(2)(d) and (e) mandate the Kenya National Commission on Human Rights to monitor violation of rights, and if the petitioner felt that the rights of homosexuals and gays are violated, he already had an existing organization to go to.

46. With respect to the petitioner's submission that the proposed NGO was intended to undertake targeted advocacy, Mr. Kinyanjui posed the question whether the proposed organization will not then go out and target children and vulnerable people. In his view, the Court was being asked to open floodgates for all sorts, including paedophiles, and he maintained that society's moral values should be maintained.

Submissions by the Amicus Curiae

47. In its submissions Katiba contends that the Board's decision not to register the proposed NGO violated several of the petitioner's rights, including the right to freedom of association and fair administrative action. It submits that the laws relied on by the Board as justification for rejecting the request for registration are irrelevant to the issue of registration, and further, that it is not law for the purposes of Article 24 of the Constitution. It is also its submission that the denial of registration did not meet the requirements of Article 24 of the Constitution.

48. Katiba also argues that the 1st respondent violated the right to fair administrative action guaranteed under Article 47 in respect of the petitioner and those who were meant to benefit from the registration of the proposed NGO by failing to notify him of the refusal and reasons therefore so that he could provide an explanation or mitigate against the adverse decision. In addition, it contends that the manner in which the Board exercised its discretion was unreasonable and procedurally unfair, and therefore derogated further on the Article 47 rights of the petitioner.

49. In his oral submissions, Mr. Wanyoike for the Amicus argued that the issue before the Court was not about sexual orientation or whether sexual orientation should be included in the Constitution. In his view, the petition related to the provisions of Article 47 of the Constitution in relation to the requirement that a body such as the NGO Board gives reasons for its decision. The reasons given by the Board, in the view of the Amicus, seemed to be the name of the proposed NGO, and that if the name is changed, the NGO would be registered.

50. The second reason appeared to be that registration would offend section 162 of the Penal Code, and thirdly, that the proposed NGO did not appear to have charitable purposes. It was its submission that it

did not appear that the petitioner understood the reasons why he was denied registration.

51. The Amicus also submitted that Article 47 is subject to Article 24 of the Constitution. It was its submission that to the extent that the respondent has not addressed itself to Article 24, the Court should send back the case to the Board for reconsideration.

52. The Amicus also drew attention to the importance of Article 36 and its inter-linkage with other rights. It was its submission that when the right to association is denied, it also affects other persons who may not be gay or lesbian.

53. Finally, the Amicus pointed out that the proposed NGO had set out its objectives, which did not include carnal knowledge among members. In its view, it does not follow that when one is homosexual, they will have sex – they may be celibate; and further, that there ought to be a methodical analysis of Article 24, for once there is denial of registration, there is a limitation of the right to associate. Such limitation, in accordance with Article 24, had to be by law, the question in this case being what law.

54. The Amicus pointed out that the law relied on by the Board was Section 162 – 165 of the Penal Code which raised issues of morality. The issue before the Court was about registration, not about criminality; further, the Court needed to ask whether the law relied on is law for the purposes of Article 24. It was the submission of the Amicus that the provisions of the Penal were vague law that came into force in the 19th century, and did not meet the test set by Article 24.

55. On the question whether, as demanded by Article 24, there were less restrictive means rather than the limitation of the right, it was the submission of the Amicus that the Board had not provided evidence to show the less restrictive means.

Issues for Determination

56. We are grateful for the detailed pleadings of the parties in this matter, as well as their extensive submissions and authorities. We appreciate the concerns of the 1st and 2nd interested parties with the possibility of blurring the issues of distinctions between the lesbian, gay and bisexual persons and those who are transgender or inter sex. We also note the moral and religious concerns raised by the Board and KCPF: the submissions that homosexuality is prohibited under Kenyan law; that marriage as protected under the Constitution is between heterosexual couples; and that international and regional conventions recognise only heterosexual unions. However, we must state at the outset that this petition, in our view, is not about marriage, or morals.

57. This petition raises the question of the right to freedom of association and non-discrimination and equality before the law with regard to persons who belong to the lesbian, gay, bisexual, transgender, intersex and queer groups. It seeks an answer to two questions:

i) whether such persons have a right to form associations in accordance with the law; and

ii) if the answer is in the affirmative, whether the decision of the Board not to allow the registration of the proposed NGO because of the choice of name is a violation of the rights of the petitioner under Articles 36 and 27 of the Constitution.

58. These, in our view, are the core issues that this petition raises.

59. Before delving into an analysis of the core issues set out above, however, it is important to dispose

of the issue of the timing of this petition which has been raised by the Board. It is its submission that the petitioner had not exhausted internal remedies before approaching this Court, and that the petition is therefore premature and should be dismissed.

Failure to Exhaust Internal Remedies

60. The principle that where procedures and processes exist for the resolution of disputes, such processes must be exhausted before a party approaches the Court for relief is well settled- see **Francis Gitau Parsimei & 2 Others –vs- The National Alliance Party & 4 Others, Petition No. 356 and 359 of 2012; Kones vs. Republic and Another ex-parte Kimani Wa Nyoike Civil Appeal No. 94 of 2005** and **Speaker of the National Assembly -vs- Karume (2008) 1 KLR (EP) 425** in which the Court of Appeal expressed itself as follows:

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

61. Is there a clear mechanism with respect to appeal, established by law, for the grievance that the petitioner has against the decision of the Board? According to the Board, the NGO Coordination Act provides the procedure for a party dissatisfied with a decision of the Board made under the Act to appeal to the Minister. The provision for appeal is set out in section 19 of the Act, which is contained in Part III thereof. It provides as follows:

19. (1) Any organization which is aggrieved by decision of the Board made under this Part may, within sixty days from the date of the decision, appeal to the Minister.

(2) On request from the Minister, the Council shall provide written comments on any matter over which an appeal has been submitted to the Minister under this section.

(3) The Minister shall issue a decision on the appeal within thirty days from the date of such an appeal.

(3A) Any organization aggrieved by the decision of the Minister may, within, twenty-eight days of receiving the written decision of the Minister, appeal to the High Court against that decision and in the case of such appeal—

(a) The High Court may give such direction and orders as it deems fit; and

(b) The decision of the High Court shall be final.

62. Part III of the NGO Act deals with the process and requirements for registration of non-governmental organisations. It provides that applications for registration shall be made to the executive director of the Bureau, defined in the Act as the executive directorate of the Board, in the prescribed form. The Act sets out what should be specified in the application, to be made by the chief officer of the proposed organization, as including the other officers of the organization; the head office and postal address of the organization; the sectors of the proposed operations, its budgets, duration of its activities, the national and international affiliation, and the certificates of incorporation, and such other information as the Board may require. A certified copy of the constitution of the proposed Non-Governmental Organization is also required.

63. Section 14 in Part III of the Act empowers the Board to refuse *registration* of a proposed organisation if—

(a) it is satisfied that its proposed activities or procedures are not in the national interest; or

(b) it is satisfied that the applicant has given false information on the requirements of subsection (3) of section 10; or

(c) it is satisfied, on the recommendation of the Council, that the applicant should not be registered.

64. In the case before us, the Board was dealing, not with the registration of the proposed NGO, but with the question of whether or not the name(s) that the petitioner sought to reserve for the proposed NGO were acceptable. The Board placed reliance on the NGO Regulations, rather than the provisions of Part III of the Act, to reject the petitioner's names. Section 32 of the Act empowers the Minister to make regulations for the efficient carrying into effect of the provisions of the Act. Though not expressly so stated, the NGO Co-ordination Regulations 1992 would appear to have been made pursuant to Section 32. Regulation 8 provides the process for the approval of names for registration of NGOs. It provides as follows:

The Director shall, on receipt of an application and payment of the fee specified in regulation 33, cause a search to be made in the index of the registered Organizations kept at the documentation centre and shall notify the applicant either that—

(a) such name is approved as desirable; or

(b) such name is not approved on the grounds that—

(i) it is identical to or substantially similar to or is so formulated as to bring confusion with the name of a registered body or Organization existing under any law; or

(ii) such name is in the opinion of the Director repugnant to or inconsistent with any law or is otherwise undesirable.

65. The decision impugned in this petition was made pursuant to the regulations. The Board placed reliance on Regulation 8(3)(b)(ii) and advised the petitioner that the names he sought to reserve for the registration of the proposed NGO were not acceptable in the opinion of the Director.

66. In our view, this was not the decision contemplated in Section 19 of the NGO Act, on which appeal lies to the Minister. The decision is a purely administrative decision with regard to the name by which an organisation should be registered, and in our view, the intention of the law in Section 19 was for appeal to lie in respect of substantive decisions such as refusal of registration, or cancellation of registration. Section 19 of the Act is clear that an appeal only lies to the Minister when the Board has made a decision in terms of the Act. As the Board did not make the decision in terms of the Act, there is no appeal provided for the petitioner.

67. Moreover, there is nothing in the Regulations that provides that an aggrieved applicant can appeal a decision made in terms of the Regulations to the Minister. As such, there is no statutory prescribed internal remedy, which was prescribed or available to the petitioner. It is our view that the Court cannot close its doors on the petitioner for failure to exhaust an internal remedy that does not apply to his

circumstances.

68. In any event, the Board itself appears to have been of the view that the petitioner did not have a right of appeal under the Regulations, and did not advise him of such right. On the contrary, it is undisputed that the Board believed an approach to the Court to clarify the question of the proposed NGO was necessary, and suggested that he approach the Court for clarity on the issue.

69. The petitioner submits that the Board is in any event estopped from raising this issue, and in our view, it would also be to send the petitioner on a run-around if the result, as it appears, is known to be a foregone conclusion. It is undisputed that the Board, through Mr. Mugo, had advised the petitioner that the Board would not register organisations aimed at protecting gay and lesbian individuals. He contends, and this has also not been disputed, that his Counsel was informed by Mr. Otieno that the petitioner "should seek guidance from the courts on whether the NGO Board could allow gay and lesbian associations to enjoy government recognition on an equal basis with other associations through registration".

70. We observe also, and this is also recognised by the Board, that the issues raised in the petition are of significant public importance requiring authoritative judicial guidance. Furthermore, the petitioner claims a breach of rights that cannot be dealt with by the Minister and can only be determined by the courts. In the circumstances, it is our finding, and we so hold, that the petition is properly before us.

The Right to Freedom of Association

71. The petitioner alleges that by its decision, the Board has violated his right to freedom of Association guaranteed under Article 36 of the Constitution, which provides, so far as is relevant for present purposes, that:

(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.

(2) A person shall not be compelled to join an association of any kind.

(3) Any legislation that requires registration of an association of any kind shall provide that—

(a) registration may not be withheld or withdrawn unreasonably; ….

72. Article 36 thus grants "every person" the right to form an association "of any kind". It also provides that an application to form an association can only be refused on reasonable grounds, and no person can be compelled to join an association. This is the breadth of the right of freedom of association as provided for in the Constitution. It covers every person and any kind of association. It can only be limited in terms of law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

73. The petitioner has expressly sought a declaration that he is a "person" for the purposes of Article 36 of the Constitution. It is our view that this is to ask the Court to address itself to the obvious: an individual human being, regardless of his or her gender or sexual orientation, is a "person" for the purposes of the Constitution. We will however, say a few things on the point for the avoidance of doubt.

74. It must be acknowledged, first, that the Board does not dispute that the petitioner falls within the definition of a person for the purposes of Article 36 of the Constitution, as Mr. Otieno expressly states in

his affidavit in opposition to the petition. The Constitution is also clear with regard to what the term "person" as used in the Constitution refers to. Article 260 defines a person to include a company, association or other body of persons whether incorporated or unincorporated.

75. The word "person" is defined in the Oxford Concise English Dictionary as ***" a human being regarded as an individual. "*** Black's Law Dictionary, 9th Edition, defines the term person as "***A human being, also termed natural person."*** The Constitution thus extends the definition of "person" from only the natural, biological human being to include legal persons. Neither Article 36 nor the definition of "person" in Article 260 creates different classes of persons. There is nothing that indicates that the Constitution, when referring to "person", intended to create different classes of persons in terms of Article 36 based on sexual orientation. Moreover, Articles 20(3) and (4) of the Constitution provide that a Court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom and promotes the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights.

76. Article 20(1) of the Constitution provides that the Bill of Rights applies to all persons. Article 259 provides that the Constitution must be interpreted in a manner that advances human rights and fundamental freedoms. Clearly, there can be no argument that the term ***"every person"*** in Article 36 properly construed does not exclude homosexual persons, and the petitioner therefore falls within the ambit of Article 36 of the Constitution, which guarantees to all persons the right to freedom of association.

77. The right to freedom of association is also expressly recognised in international covenants to which Kenya is a party. Article 20 of the Universal Declaration of Human Rights provides that:

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

78. In the International Covenant on Civil and Political Rights, it is provided at Article 22 that:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others….

79. The African Charter on Human and Peoples' Rights provides at Article 10 that:

1. Every individual shall have the right to free association provided that he abides by the law.

2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.

80. These provisions clearly include all individual, natural persons, and there is nothing to indicate that sexual orientation is a matter that removes one from the ambit of protection by the Constitution. In fact, subject to the limitations under the Constitution, even persons who have been convicted of criminal offences are entitled to the enjoyment of the fundamental rights and freedoms guaranteed under the

Constitution.

The Content and Import of the Right to Freedom of Association

81. That the right of citizens to freedom of association is an important and powerful right, critical to the enjoyment of other rights, cannot be disputed. It is the right that safeguards against the banning of political parties, as was recognised by the African Court of Human and Peoples' Rights in the case of **Jawara vs The Gambia (2000) AHRLR 107 (ACHPR 2000)**. It is also the right that prevents the deportation of political opponents-see the decision of the African Court of Human and Peoples' Rights in **Amnesty International vs Zambia (2000) AHRLR 325 (ACHPR 1999)**. In addition, it has been used to fight persecution of people on the basis of political opinions and convictions-see **Aminu v Nigeria (2000) AHRLR 258 (ACHPR 2000)** and **Sudan: Law Office of Ghazi Suleiman v Sudan (II) (2003) AHRLR 144 (ACHPR 2003)**.

82. The right has also been jealously guarded by the African Commission on Human and Peoples' Rights which has held in **Civil Liberties Organisation v Nigeria, Communication No 101/93** at para 15 that:

"Freedom of association is enunciated as an individual right and is first and foremost a duty for the State to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join, without State interference, in associations in order to attain various ends."

83. The African Court of Human and Peoples' Rights held **in Law Office of Ghazi Suleiman v Sudan (II) (2003) AHRLR 144 (ACHPR 2003)** that:

"By preventing Mr Ghazi Suleiman from gathering with others to discuss human rights and by punishing him for doing so, the respondent state had violated Mr Ghazi Suleiman's human rights to freedom of association and assembly which are protected by articles 10 and 11 of the African Charter."

84. The right to freedom of association is an essential component of democracy, providing individuals with invaluable opportunities to, inter alia, express their political opinions, engage in literary and artistic pursuits, and form social bonds with others in an association. The Uganda Court of Appeal in **Kivumbi vs. Attorney-General [2008] 1 EA 174** expressed itself on the issue as hereunder:

"The fundamental right of freedom of expression is closely related to freedom of religion, belief and opinion, the right to dignity, the right to freedom of association and the right to peaceful assembly etc. These rights are inherent and not granted by the State and it is the duty of all Government agencies who include the police to respect, promote and uphold these rights. These rights and many others taken together protect the rights of individuals not only to individually form and express opinions of whatever nature, but to establish associations of groups of like-minded people to foster and disseminate such opinions even when those opinions are controversial..."

85. The Court recognized the competing claims within a society, and the need to strike a balance between these claims:

"In every society there is always tension between those who desire to be free from annoyance and disorder on one hand and those who believe to have the freedom to bring to the attention of

their fellow citizens matters which they consider important...The way, therefore, any legal system strikes a balance between the above-mentioned competing interests is an indication of the attitude of the society towards the value it attaches to different sorts of freedom. A society especially a democratic one should be able to tolerate a good deal of annoyance or disorder so as to encourage the greatest possible freedom of expression..."

86. Freedom of association is universally accepted as fundamental to a democratic society. The principles of pluralism and democracy necessitate that all citizens be free to assemble and express their opinions, and be limited in their ability to do so only by very narrow and specific circumstances. Within the Kenyan context, **Mbondenyi, Morris Kiwinda, Ambani & John Osogo** state in **"The New Constitution of Kenya: Principles, Government and Human Rights**":

"The right to freedom of association has been violated with impunity in a number of occasions. These violations were manifested in the banning of political parties, persons being arrested because of their political belief and the prohibition of any assembly for a political purpose in a private or public space. Because of such incidents the 2010 Constitution appears to provide some safeguards for the enjoyment of this right by organisations or groups by ensuring that their registration is not withheld or withdrawn unreasonably."

87. The African Commission on Human and Peoples' Rights has recognised, in its Resolution on the Right to Freedom of Association, adopted by the African Commission on Human and Peoples' Rights, at its 11th Ordinary Session, that:

"Authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution and international human rights standards; … in regulating the use of the right to association, the competent authorities should not enact provisions which will limit the exercise of the freedom and such a regulation should be consistent with state obligations under the Charter."

88. As we understand the Board's position to be, it does not accept the names that the petitioner proposed for registration of his organisation because the name(s) represents groups whose interests the Board takes the view should not be accorded the right to associate on the same level as others. However, in a representative democracy, and by the very act of adopting and accepting the Constitution, the State is restricted from determining which convictions and moral judgments are tolerable. The Constitution and the right to associate are not selective. The right to associate is a right that is guaranteed to, and applies, to everyone. As submitted by the petitioner, it does not matter if the views of certain groups or related associations are unpopular or unacceptable to certain persons outside those groups or members of other groups. If only people with views that are popular are allowed to associate with others, then the room within which to have a rich dialogue and disagree with government and others in society would be thereby limited.

89. In addition, the Constitution and the right of freedom of association applies regardless of the popularity of the objects of the association. At the core of constitutional supremacy is that the Constitution reigns supreme, regardless of popular views. In **Patrick Reyes v The Queen Privy Council Appeal No. 64 of 2001,** at paragraph 26 the Privy Council held that:

"***The court has no licence to read its own predilections and moral values into the Constitution, but is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society… In carrying out its task of constitutional interpretation the court***

is not concerned to evaluate and give effect to public opinion."

90. In South Africa, the Constitutional Court has held in **National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6** that:

[136] "A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself."

91. The Court concluded that while the Constitution recognises the right of persons who, for reasons of religious or other belief, disagree with or condemn homosexual conduct to hold and articulate such beliefs, it does not permit the state to

"…turn these beliefs - even in moderate or gentle versions - into dogma imposed on the whole of society. "

92. It cannot also be proper, as the Board suggests, to limit the right to freedom of association on the basis of popular opinion. As the Constitutional Court of South Africa held at paragraph 88 of its decision in **S v Makwanyane and Another (CCT3/94) [1995] ZACC 3**,:

"Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for Constitutional adjudication…. The very reason for establishing [the Constitution], and for vesting the power of judicial review…. in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society."

93. Similar views were expressed in the decision of the United States Supreme Court in **West Virginia State Board of Education v Barnette 319 U.S 624 (1943)** at 638:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to a vote, they depend on the outcome of no elections".

94. The United Nations Human Rights Council in adopting Resolution 15/21 of 2001 states that freedom of association is an "essential component of democracy" and are subject only to the limitations permitted by international law, in particular international human rights law and:

"is indispensible to the full enjoyment of these rights, particularly where individuals may espouse minority or dissenting religious or political beliefs".

95. Finally, we note the words used by Prof Makau Mutua, in his article **"Why Kenyan Constitution**

must Protect Gays" published in the *Sunday Nation*, 24th October 2009, which is referred to in the petitioner's submissions:

"Constitutions are not meant to protect only individuals that we like, and to leave unprotected those who are unpopular, or those the majority may find morally objectionable. A person's identity – especially if it exposes them to ridicule, attack, or discrimination – must be the reason for constitutional protection. Constitutions protect individuals from tyranny of the state and oppression from their fellow human beings".

96. We recognise, as is evident also from the submissions of the Board and the 3rd interested party, that the group whose human rights and interests the proposed NGO seeks to protect is not a popular or accepted group in Kenyan society. Indeed, as can be observed from the extensive submissions by the Board, even contemplating registering such an NGO is perceived as bringing moral decadence into society, and as a herald of the breakdown of society. The moral basis on which the Board rejects the name proposed by the petitioner is made manifest in the averments made, on the basis of his belief, by Mr. Otieno on behalf of the Board. At paragraph 18 -22, he states as follows:

18." THAT the Gay and Lesbians are human beings first and as such can and must only enjoy rights and freedoms enjoyed by every other human being as there are no special rights accruing to or set aside for persons who have made conscious choices to be Gay or Lesbian and this is informed by the fact that homosexuals lifestyle is a learned behaviour that has absolutely nothing to do with our genetic makeup and whereas gays and lesbians are entitled to their inherent dignity as human beings, this should never be construed to mean that they have a cause to convert the world to a cul-de-sac lifestyle that negates the fundamentals of human survival.

19. THAT it is the 1st Respondent's contention that homosexuality is largely considered to be a taboo and repugnant to the religious teachings, cultural values and morality of the Kenyan people and the Law as per the aforementioned provisions of the Constitution and the Penal Code punishes same sex sexual acts as crime.

20. THAT from the reading of Article 45 of the Constitution it is crystal clear that the Constitution expressly authorizes opposite sex marriage but is silent about same sex marriage and it is therefore the 1st Respondent's contention that any proposed NGO must be formed with clear objectives that are not illegal according to any law.

21. THAT the 1st Respondent contends that the Constitution has a preamble that acknowledges God as the supreme guiding authority in our affairs as a nation and so inevitably, God will feature prominently in moral questions that offends the way we live and govern ourselves as Kenyans and this is the philosophy that informed the decision to retain the Penal Code Sections 162-165 that criminalizes homosexual behaviour in society.

22. THAT the petitioner can as well champion the rights of the Gays and Lesbians through other forms other than the registration of an NGO and that the Petitioner's objectives have failed to demonstrate public benefit and charitable purposes which is a prerequisite for the registration of NGOs."

97. The Court has noted the sentiments expressed by Mr. Otieno, as well as the counter argument by the petitioner in his supplementary affidavit that Mr Otieno's views on the matter are matters of opinion, which Mr. Otieno is unqualified to make.

98. However, this Court is enjoined by the Constitution to apply the law without fear or favour. More particularly, it must do so without prejudice, and be able to distinguish between the right to assemble of those of a sexual orientation that is not socially accepted, and the homosexual acts that the respondents and the 3rd interested party argue are criminal acts prohibited by law. The duty of the Court is not to substitute these views and beliefs with constitutional provisions, but to examine the act of the Board which is the subject under challenge in this petition, and determine whether it accords with the Constitution, and if not, to uphold the Constitution.

99. The petitioner seeks the registration of an NGO which has at its core the protection of the human rights of those who belong to the LGBTIQ community. Whatever the views of the Board are with regard to such people, its duty as a state entity is to act in accordance with the Constitution. What the petitioner seeks is not legalisation of same sex unions or marriages as the Board and 3rd interested party appear to be apprehensive about, but the right to associate in an organisation recognised by law.

100. Can the petitioner lawfully and constitutionally be denied this right? From the objectives of the proposed NGO which we have set out earlier in this judgment, the proposed NGO has at its core the protection of human rights, the human rights of persons who are gay, lesbian, transgender or intersex. In this context, the United Nations has recognised, in the **"Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" ("The Declaration on human rights defenders") United Nations General Assembly Resolution A/RES/53/144 8th March 1999**, that there is a need to protect the rights of every individual. Article 1 of the Declaration states that ***"Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international level".***

101. At Article 5, the Declaration states that:

"For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has theright, individually and in association with others, at the national and international levels:

(a) To meet or assemble peacefully;

(b) To form, join and participate in non-governmental organizations, associations or groups;

(c) To communicate with non-governmental or intergovernmental organizations."

102. The UN Declaration on Human Rights defenders was adopted by all the members of the United Nations General Assembly. It is intended to protect human rights defenders from the violations they have been subjected to as a direct response to their human rights work. While it is not a legally binding instrument, it represents a strong commitment by States and specifies how existing human rights standards apply to human rights defenders by providing a framework to analyse the level of protection accorded to human rights defenders in a given country.

103. The petitioner wishes to register a non-governmental organisation to, among other things, conduct accurate fact finding, urgent action, research and documentation, impartial reporting, effective use of the media, strategic litigation and targeted advocacy in partnership with local human rights groups on human rights issues relevant to the gay and lesbian communities living in Kenya. As a defender of the human rights of the gay and lesbian community in Kenya, the petitioner has a right, as stated in the UN

Declaration on Human Rights defenders, and in accordance with the Constitution, "***To form, join and participate in non-governmental organizations, associations or groups."*** The only limitation to this right, as is expressly stated in the Constitution, is that the activities of the association must be in accordance with the law. If they are not, then it would not be protected by the Constitution.

104. We have not heard the petitioner to say that the proposed NGO is intended to promote homosexual intercourse, same sex marriage, or, as argued by the respondents, paedophilia. As a society, once we recognise that persons who are gay, lesbian, bisexual, transgender or intersex are human beings, which the Board expressly recognises as averred by Mr. Otieno, however reprehensible we may find their sexual orientation, we must accord them the human rights which are guaranteed by the Constitution to all persons, by virtue of their being human, in order to protect their dignity as human as stated in Article 19(2):

The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings."

Whether the Petitioner's Right to Freedom of Association Has Been Limited

105. The Board alleges that it has not limited the petitioner's right to form an association but, in the words used by Mr. Otieno at paragraph 17 of his replying affidavit, *"has merely advised the Petitioner against forming an organisation perpetrating or promoting an illegality*." The position taken by the Board is that if the petitioner changes the name of the proposed NGO, then the Board will register it. As a result of the rejection of the names that the petitioner sought to reserve, the petitioner avers that he cannot register the proposed NGO, and he cannot therefore, as he deposes in his affidavit in support of the petition, open bank accounts, sign leases to open legal aid offices, receive endowments and grants, and thus cannot achieve the desired objectives of the proposed NGO.

106. As is apparent from the letter from the Board dated 25th March 2013 as well as the contents of the Board's affidavit before us, the Board takes issue with both the name and the objects and purposes of the proposed NGO as they regard it as furthering an illegality. It is thus difficult not to reach the conclusion that the decision of the Board, in rejecting the names submitted by the petitioner, was a rejection of his application for registration of his proposed NGO. The suggestion to use another name logically flows from a rejection of the name of the NGO, but cannot be divorced from a rejection of the objects of the proposed NGO, as well as the target group whose rights the proposed NGO seeks to protect.

107. Whatever hue the Board wishes to place on its rejection of the name sought to be used by the petitioner, its effect is a rejection of his application to register an association to advocate for the rights of LGBTIQ. The petitioner simply cannot register an association for such purposes. Given the analysis set out above with respect to the right to association, we find and hold that the acts of the Board were an infringement of the petitioner's right to associate guaranteed by Article 36.

Whether the Limitation of the Petitioner's Right to Freedom of Association is Justifiable in a Free and Democratic Society

108. The next question we must address, once we have established that there was a limitation of the petitioner's right to freedom of association, is whether such limitation is justifiable under the Constitution. As was held in **Karua vs. Radio Africa Limited T/A Kiss Fm Station and Others Nairobi Hccc No. 288 Of 2004 [2006] 2 EA 117; [2006] 2 KLR 375:**

"On the question of what is justifiable in an open and democratic society, the questions which fall to be considered are the needs or objectives of a democratic society in relation to the right or freedom concerned. Without a notion of such needs, the limitations essential to support them cannot be evaluated...The aim is to have a realistic, open, tolerant society and this necessarily involves a delicate balance between wishes of the individual and the utilitarian "greater good of the majority". But democratic societies approach the problem from the standpoint of the importance of the individual, and the undesirability of restricting his or her freedom. However in striking the balance certain controls on the individual's freedoms of expressions may in appropriate circumstances be acceptable in order to respect the sensibilities of others... The limitation of constitutional rights for a purpose that it is necessary in a democratic society involves the weighing up of competing values and ultimately an assessment based on the proportionality…[T]he fact that different implications for democracy, and where "an open and democratic society based on freedom and equality" means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established but the application of these principles with particular circumstances can only be done on a case-by-case basis and this is inherent in the requirement of proportionality, which calls for the balancing of different interests."

109. We recognise that freedom of association is not absolute and can be limited. However, such limitation must accord with the provisions of Article 24, which provides for limitation of rights and freedoms in the following terms:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom…

110. In determining what is reasonable, the standard is clearly that of "***an open and democratic society based on human dignity, equality and freedom***, the standard adopted in Kenya in accordance with the dictates of the Constitution. We, accordingly associate ourselves with the position adopted in **Kivumbi vs. Attorney - General (supra)**that:

"The standard against which every limitation on the enjoyment of fundamental rights and freedoms... is an objective one. The provision... clearly presupposes the existence of universal democratic values and principles, to which every democratic society adheres. It also underscores the fact that by her Constitution, Uganda is a democratic state committed to adhere to those principles and values, and therefore, to that standard. While there may be variations in applications, the democratic values remain the same...[D]emocratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified. The Court must be guided by the values and principles essential to a free and democratic society. The following is a summary of the criteria for justification of law imposing limitation on guaranteed rights: (1) the legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right; (2) the measures designed to meet the objective must be rationally connected to it and not arbitrary, unfair or based on irrational considerations; and (3) the means used to impair the right of freedom must be more than necessary to accomplish the objective."

111. Article 24(2)provides that:

Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

…

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation".

112. To justify the limitation of the petitioner's right to freely associate, the Board must demonstrate that there is legislation that allows the limitation of the right of freedom of association of people based on their sexual orientation. From the depositions and submissions by the Board, it is apparent that it places reliance on the provisions of the Penal Code, which criminalises ***"carnal knowledge…. against the "order of nature".*** Section 162 of the Penal Code provides as follows:

162. 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 orher against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years:…

113. Section 163 criminalises the attempt to commit any of the offences specified in section 162, and makes such attempt a felony punishable by imprisonment for seven years. At Section 165, the Penal Code criminalises what is termed as the commission of acts of "gross indecency" between males:

165. 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.

114. A reading of the above provisions indicates that the Penal Code does not criminalise homosexuality, or the state of being homosexual, but only certain sexual acts***"against the order of nature."***. That the State does not set out to prosecute people who confess to be lesbians and homosexuals in this country is a clear manifestation that such sexual orientation is not necessarily criminalised. What is deemed to be criminal under the above provision of the Penal Code is certain sexual conduct ***"against the order of nature"***, but the provision does not define what the ***"order of nature"*** is.

115. More importantly, the Penal Code does not criminalise the right of association of people based on their sexual orientation, and does not contain any provision that limits the freedom of association of persons based on their sexual orientation.

116. A parallel may be drawn with the situation in Uganda, and jurisprudence from that jurisdiction with regard to sexual orientation and the commission of homosexual acts. Section 145 of the Penal Code of Uganda is couched in terms similar to those of Section 162. In the case of **Kasha Jacqueline and Others v Rolling Stone Limited and Another No 163 of 2010** the High Court of Uganda held that:

"Section 145 of the Penal Code Act [does not] render every person who is gay a criminal under that section of the Penal Code Act. The scope of section 145 is narrower than gayism generally.

One has to commit an act prohibited under section 145 in order to be regarded as a criminal." (Emphasis added)

117. In **Kanane v State 2003 (2) BLR 67 (CA)**, the Botswana Court of Appeal held that the sections of the Penal Code that criminalised same-sex sexual conduct did not prevent people from associating with each other. Similarly, in the United States, at a time when sodomy laws were still enforceable, the Supreme Court held in ***Healy v James*** **408 U.S. 169 (1972) at 185 – 186** that:

"The Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organisation … guilt by association alone, without establishing that an individual's association poses the threat feared by the Government is impermissible."

118. Thus, it is evident that the Board's reliance on the provisions of the Penal Code to limit the petitioner's freedom of association is untenable. We are also of the considered view that should the proposed NGO transgress the law, there are sufficient legal safeguards to address such transgressions. We are therefore satisfied that there are less restrictive means to achieve the Board's purpose and allay its fears.

119. The Board also relies on the absence in Article 27(4) of the Constitution, which prohibits discrimination on any ground, of sexual orientation as a listed ground, as a basis for its rejection of the petitioner's application to register the proposed NGO. It also cites the provisions of Article 45, which speaks of marriage between a man and a woman and does not mention same sex marriage, as a justification for not registering the proposed NGO.

120. This approach is flawed for two reasons. First, the absence of sexual orientation as one of the prohibited grounds in Article 27(4) does not assist the Board or give the state free reign to discriminate against people. The word used in the Article is ***"including"*** the grounds listed therein; the list in Article 27(4) is thus not closed, and is subject to interpretation to include such grounds as the context and circumstances demonstrate are a ground of discrimination. Secondly, the Board misapplies the limitation analysis. Once a limitation is demonstrated, the onus is on the Board to justify its conduct with reference to the law that allows it to infringe or limit the petitioner's right to association. The petitioner is not under any obligation, once he has demonstrated a violation of his right, to show that there is no justification for limiting his rights. The obligation to show that there is a law that justifies such limitation lies squarely on the Board= See **Lyomoki and Others vs. Attorney General [2005] 2 EA 127**. Has the Board discharged this burden?

121. In our view, the answer is a resounding no. The Board and the Attorney General rely on their moral convictions and what they postulate to be the moral convictions of most Kenyans. They also rely on verses from the Bible, the Quran and various studies which they submit have been undertaken regarding homosexuality. We must emphasize, however, that no matter how strongly held moral and religious beliefs may be, they cannot be a basis for limiting rights: they are not laws as contemplated by the Constitution. Thus, neither the Penal Code, whose provisions we have set out above, which is the only legislation that the respondents rely on, nor the religious tenets that the Board cites, meet the constitutional test for limitation of rights.

122. To cite religious beliefs as a basis for imposing limitations on human rights would fly in the face of Article 32 of the Constitution. Freedom to profess religious beliefs, with due respect, encompasses freedom not to do so. Or, to put it differently, freedom of religion encompasses the right not to subscribe to any religious beliefs, and not to have the religious beliefs of others imposed on one.

123. In Kenya, the Constitution is supreme, and it requires conduct to be justified in terms of laws that meet the constitutional standard. The state has to act within the confines of what the law allows, and cannot rely on religious texts or its views of what the moral and religious convictions of Kenyans are to justify the limitation of a right. The Attorney General and the Board may or may not be right about the moral and religious views of Kenyans, but our Constitution does not recognise limitation of rights on these grounds. The Constitution is to protect those with unpopular views, minorities and rights that attach to human beings – regardless of a majority's views. The work of a Court, especially a Court exercising constitutional jurisdiction with regard to the Bill of Rights, is to uphold the Constitution, not popular views or the views of a majority.

124. As the Court observed in the case of **John Harun Mwau & 3 Others v Attorney General & 2 Others Petition No 65 of 2011 [Consolidated with] Petitions No's 123 of 2011 and 185 of 2011[2012]**:

"This case has generated substantial public interest. The public and politicians have their own perceptions of when the election date should be. We must, however, emphasis that public opinion is not the basis for making our decision. Article 159 of the Constitution is clear that the people of Kenya have vested judicial authority in the courts and tribunals to do justice according to the law. Our responsibility and the oath we have taken require that we interpret the Constitution and uphold its provisions without fear or favour and without regard to popular opinion… our undertaking is not to write or rewrite the Constitution to suit popular opinion. Our responsibility is to interpret the Constitution in a manner that remains faithful to its letter and spirit and give effect to its objectives."

125. It is our finding therefore, and we so hold, that the acts of the Board in rejecting the petitioner's names for the proposed NGO, and by extension its refusal to register the proposed NGO, is a limitation of the petitioner's right to freedom of association which the Board has not been able to justify in accordance with the requirements of the Constitution.

Violation of the Right to Non-Discrimination

126. As noted earlier, this petition is premised on the discrimination that persons who are LGBTIQ are subjected to, and which the petitioner argues necessitates the registration of the proposed NGO. The petitioner submits that he is entitled to equal benefit of the law, and to deny registration of the proposed NGO is discriminatory and in violation of Article 27 of the Constitution.

127. It is undisputed that the Board is, as provided in Article 21(1), under a constitutional duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms guaranteed in the Bill of Rights, and in particular, to uphold and address the needs of vulnerable groups-see Article 21(3). The constitutional duty on the Board, as a State entity, is to uphold the Constitution, which involves protecting, among other rights, the right of freedom of association of "every person," which includes the right to form an "association of any kind". To rely on its own moral conviction as a basis for rejecting an application is outside the Board's mandate and a negation of its constitutional obligations.

128. This is particularly so in light of the fact that the Board has, on a previous occasion, been reminded by the Court of its constitutional obligations. In **The Matter of an Application for Judicial Review Orders between the Republic and Transgender Education and Advocacy, MiscAppl 308A of 2013**, the Board had refused to register the proposed organisation as the individuals who were seeking to have it registered had different names on their identity documents and in the application. The reason for the difference was that Aubrey Mbugua, who had been diagnosed with Sexual Identity Disorder (SID), had

the name Andrew Ithibu Mbugua on her identity card, but had changed the name to Audrey Mbugua Ithibu. The Court held that the Board, in considering gender in respect to the names of the proposed officials of the proposed organisation, was taking into consideration an irrelevant consideration. The Court rendered itself as follows:

"When an officer is exercising statutory powers he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters." …

Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful."

129. The Court held that the basis for refusal is "not grounded in law" and for this reason the Court concluded that the Board had not lawfully exercised a power bestowed on it, and further, that to "***decline to exercise a power on some extraneous grounds amounts to abuse of power".***

130. In a finding that has great relevance to the present matter, the Court further held that ***"To discriminate [against] persons and deny them freedom of association on the basis of sex or gender is clearly unconstitutional"*** as this would contravene Article 27(4) of the Constitution. Article 27 provides:

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

…

(4) 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.

131. The wording of Article 27 is clear – the right to equality and non-discrimination applies to "every person", the meaning of which we have already addressed. In addition, article 27(2) provides no internal qualifier and is written in broad terms of "equal enjoyment of all rights and fundamental freedoms".

132. In relation to Article 27(4), whilst it does not explicitly state that sexual orientation is a prohibited ground of discrimination, it prohibits discrimination both directly and indirectly against any person on any ground. The grounds that are listed are not exhaustive – this is evident from the use of "including" which is defined in article 259(4)(b) of the Constitution as meaning ***"includes, but is not limited to"***.

133. Thus, even were Article 27(4) not phrased in the broad language that prohibits discrimination against any person on any ground, the Court would have to look at the Constitution holistically, and would find that the principles of equality, dignity and non-discrimination run throughout the Constitution like a golden thread. To illustrate, the Preamble to the Constitution states as follows:

"***RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."***

134. Article 20(4)(a) enjoins the Court, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b)

the spirit, purport and objects of the Bill of Rights. We have also set out above the national values and principles enshrined in Article 10 of the Constitution which include equality, human rights, non-discrimination and protection of the marginalised.

135. Consequently, aside from the breadth and all-inclusiveness of the provisions on equality in Articles 27(1) and (2), as well as the breadth of the reach of the right to non-discrimination in Article 27(4), when these provisions are interpreted, as they must be, holistically, the commitment to equality in the Constitution becomes overwhelmingly clear.

136. It appears to us that in the present case, the Board has acted in a manner that is unconstitutional and unlawful, and amounts to an abuse of power. It is not for the Board to only register NGOs whose names are in harmony with the personal views and convictions of its officials regarding gay and lesbian people. By refusing to register the proposed NGO because it objects to the name chosen for it, or because it considers that the group whose interests the proposed NGO seeks to advocate is not morally acceptable in Kenyan society, then it has arrogated to itself, contrary to the Constitution, the power to determine which person or persons are worthy of constitutional protection, and whose rights are guaranteed under the Constitution.

137. The Board and this Court are constitutionally mandated, when applying the Constitution, to give effect to the non-discrimination provisions in Article 27 and the national values and principles set out in Article 10, which include, at Article 10(2), "***human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised***." An interpretation of non-discrimination which excludes people based on their sexual orientation would be in conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination. To put it another way, to allow discrimination based on sexual orientation would be counter to these constitutional principles.

138. Moreover, Article 259(2) provides that the Constitution shall be interpreted in a manner that advances human rights and fundamental freedoms in the Bill of Rights. The rights to equality and dignity would not be advanced if people were denied the right not to be discriminated against based on their sexual orientation.

Collateral Issues

139. Having thus disposed of the main issues raised in the petition, we believe it is prudent, in closing, to deal with the other issues raised in opposition to the petition, and to the registration of the proposed NGO.

Lack of Charitable Objects

140. The Board has argued that it is vested with the power to refuse to register an NGO if the said NGO has no intention of promoting charity in society. However, no provision of the law has been cited to support this contention, and it is clearly untenable in light of the many non-governmental organisations registered to pursue issues of governance and protection of human rights. There is no basis in law for the contention that only NGOs with the intention of promoting charity in society are to be registered.

Objections to Registration on Moral Grounds

141. We have noted the views expressed by the 3rd interested party, KCPF, whose views and perceptions mirror those of the Board and the Attorney General. However, as already observed, this

petition is not about whether homosexuality is lawful or not. That is a question that is outside the matters raised in this petition, which seeks to answer the question whether those who belong to the LGBTIQ community have a right to associate or not, a question which we have already answered in the affirmative.

Objections with Respect to Whether or Not the Proposed NGO should include Transgender and Intersex Persons

142. Similarly, the arguments by the Board, on the basis of opposition by the 1st and 2nd interested parties, that it should not register the proposed NGO because the proposed name includes transgender and intersex persons, is not sustainable. Mr. Otieno avers at paragraph 23 of his affidavit that the Transgender Education and Advocacy Network, headed by the 1st interested party, had opposed the registration of the proposed NGO by its letter dated 16th November 2013. According to Mr. Otieno, the basis of the 1st interested party's objection is that the petitioner's proposed NGO has objects that relate to fighting for the rights of transgender and intersex people with the sole aim of exploiting them economically, sexually and legally, and that such transgender and intersex persons will not benefit in any way if the proposed NGO is registered. Mr. Otieno further echoes in his affidavit the argument made by the 1st interested party that sexual orientation and gender identity are different issues and so the proposed NGO cannot be a mouthpiece for transgender and intersex persons.

143. With respect, there is nothing known in law that would prevent the registration of an organisation because it seeks to pursue the interests of a particular group on the basis that there is another group that pursues the same interests. The restriction under the Act is with respect to the similarity of names, with regulation 8(b)(i) requiring that a name shall not be acceptable if *(i) "it is identical to or substantially similar to or is so formulated as to bring confusion with the name of a registered body or Organization existing under any law*." As there is no compulsion on any person to become a member of one or other organisation, the Board and the 1st and 2nd interested parties cannot purport to choose for transgender or intersex persons the group or groups they can or should join. Article 36(2) is clear: no-one can be compelled to join an association of any kind.

144. Further, the matters raised with respect to alleged exploitation of transgender and intersex persons presupposes an inability, on their part, to make choices and decisions with respect to which organisations to join or not join, and is paternalistic in essence. As was recognised in **Lyomoki and Others vs. Attorney General (supra)**

"the freedom of association includes the freedom to disassociate or not to associate at all since the right to disassociate is a natural concomitant of the right to associate."

Disposition

145. The upshot of our findings above is that the Board infringed the petitioner's freedom of association in refusing to accept the names he had proposed for registration of his NGO, thereby in effect refusing to contemplate registration of the proposed NGO. There is a whiff of sophistry in the recommendation by the respondent that the petitioner registers his organisation, but by another name. What this recommendation suggests is that the petitioner can register an organisation and call it say, the Cattle Dip Promotion Society, but carry out the objects of promoting the interests of the LGBTIQ community, which suggests that what the Board wants to avoid is a recognition of the existence of the LGBTIQ groups.

146. The reality, though, is that these groups exist. The terms are recognised and generally accepted as the correct terminology to refer to persons of a specific sexual orientation. The Board may have

difficulties accepting the term and the reality, but the terms refer to persons who, like other citizens, have the right to freedom of association.

147. It is, in addition, our finding that the Board also violated the petitioner's right to non-discrimination by refusing to accept the names proposed on the basis that the proposed NGO sought to advocate for the rights of persons who are not socially accepted. As we observed above, our understanding of the objectives of the proposed NGO is the protection of persons whose sexual orientation is gay or lesbian, as well as persons who are transgender or intersex, from discrimination and other violation of their rights. It is not for the promotion of the sexual acts ***"against the order of nature"*** prohibited by the Penal Code, nor is it to advance paedophilia as submitted by the Board, which are criminal offences with respect to which clear penal consequences are provided.

148. In the circumstances, we are satisfied that the petition is merited. We therefore allow the same, and grant the following declarations and orders:

i. We hereby declare that the words "Every person" in Article 36 of the Constitution includes all persons living within the republic of Kenya despite their sexual orientation.

ii. We hereby declare that the respondents have contravened the provisions of Articles 36 of the constitution in failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice.

iii. We declare that the petitioner is entitled to exercise his constitutionally guaranteed freedom to associate by being able to form an association.

iv. We hereby issue an order of Mandamus directing the Board to strictly comply with its constitutional duty under Article 27 and 36 of the Constitution and the relevant provisions of the Non-Governmental Organizations Co-ordination Act.

149. With regard to costs, we take the view that this matter raised issues of great public interest and will impact on a minority and vulnerable group. In the circumstances, we direct that each party bears its own costs of the petition.

150. We are grateful to the parties for their very extensive pleadings, submissions and authorities in this matter, which have been of great assistance to the Court.

151. We recognise that this decision has been delayed, a fact that is regrettable, but the delay is attributable to the nature and complexity of the very contested issues that it raises and the very busy schedule of the members of the Bench dealing with the matter. We extend our apologies to the parties, and are grateful for their patience and understanding.

Dated and Signed at Nairobi this 24th day of April 2015

ISAAC LENAOLA **MUMBI NGUGI** **G.V. ODUNGA**

JUDGE **JUDGE** **JUDGE**

Dated, Delivered and Signed at Nairobi this 24th day of April 2015

ISAAC LENAOLA

JUDGE

24/4/2014

Coram – Lenaola J

Kariuki – Court Clerk

Mr Obunah for Respondent

Miss Rotich holding brief for Mr Waikwa for Amicus Curies and holding brief for Mrs Ligunya for petitioner

Mr Kinyanjui for KCPF

ORDER: Judgment duly delivered proceedings to be supplied

LENAOLA

JUDGE

30/4/2015