

Case Digest:

**Eric Gitari v NGO Board & 4 others, [2015], Petition
440 of 2013, The High Court of Kenya at Nairobi**

Claimant: Eric Gitari
First defendant: Non-Governmental Organisations Co-ordination Board
Second defendant: Attorney General
First interested party: Audrey Mbugua Ithibu
Second interested party: Daniel Kandie
Third interested party: Kenya Christian Professionals Forum
Amicus Curiae: Katiba Institute

Presiding: Hon. Mr. Justice Isaac Lenaola
Hon. Lady Justice Mumbi Ngugi
Hon. Mr. Justice G.V. Odunga

Constitutional law – Bill of Rights – Freedom of association – Whether LGBTIQ people have a right to form associations in accordance with law

Constitutional law – Bill of Rights – Freedom of association – Whether decision to refuse to register NGO on the basis of its name violated rights to freedom of association and freedom from discrimination

Constitutional Law – Bill of Rights - Non-discrimination – Whether the Constitution protects against discrimination on grounds of sexual orientation

FACTS:

- (a) The claimant, Mr. Eric Gitari, sought to register a non-governmental organisation (NGO) with the first respondent, the Non-Governmental Organisations Co-ordination Board (NGO Board). The NGO would seek to address the violence and human rights abuses suffered by LGBTIQ people.
- (b) In accordance with the requirements for the registration of a NGO, the claimant sought to reserve with the NGO Board the names Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observatory and Gay and Lesbian Human Rights Organization. He was advised by the Board that all the proposed names were unacceptable and should be reviewed.
- (c) The claimant 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. He also sent a letter to the NGO Board asking why his application had been rejected.

- (d) The NGO Board wrote to the claimant's lawyers, advising that under sections 162, 163 and 165 of the Penal Code same-sex conduct is criminalised, and that this was the basis for rejection of the proposed names. The NGO Board relied regulation 8 (3) (b) of the NGO Regulations of 1992, which provides that an application may be rejected if "such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable".
- (e) After three attempts to register the proposed NGO the claimant scheduled a meeting with Mr. Mugo, a member of the Legal Department of the Board. According to the claimant, Mr. Mugo advised him that any association bearing the names gay and lesbian could not be registered by the NGO Board because the association furthered criminality and immoral affairs.
- (f) The claimant commenced litigation proceedings on the grounds that his constitutional rights to freedom of association (Article 36) and freedom from discrimination (Article 27) had been violated.
- (g) The respondents contended that the claimant's right to freedom of association had not been infringed and if it has been limited, such limitation can be justified on the basis of the criminalisation of same-sex conduct in the Penal Code. They argued that 'sexual orientation' is not a prohibited ground of discrimination under the Constitution.

REMEDIES SOUGHT:

- A judicial interpretation that the words 'every person' in Article 36 of the Constitution includes all persons living within the republic of Kenya regardless of their sexual orientation.
- A declaration that by failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice the respondents contravened the provisions of Article 36 of the Constitution.
- 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.
- An order of mandamus directing the 1st respondent to strictly comply with its constitutional duty under Articles 27 and 36 of the Constitution.
- A declaration that the failure by the respondents to comply with their constitutional duties under Article 36 infringes on:
 - The rights of marginalised and minority groups, such as gay and lesbian people, in the Republic of Kenya.
 - The right of gay and lesbian Kenyan citizens to have the Constitution fully implemented both in its letter as well as in spirit.
- The costs of the petition.

ISSUES:

- 1) Whether LGBTIQ people have a right to form associations in accordance with the law.
- 2) If the answer to Issue (1) is in the affirmative, whether the decision of the NGO Board not to allow the registration of the proposed NGO because of the choice of name is a violation of the rights of the claimant under Articles 36 and 27 of the Constitution.

HELD:

1. **YES.** Article 36 of the Constitution grants “every person” the right to form an association “of any kind”. This right 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. (72) An individual is a “person” for the purposes of the Constitution regardless of their gender or sexual orientation. (73) The Court is enjoined to apply the Constitution without prejudice, and must 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. (98) The Penal Code does not criminalise homosexuality but rather certain sexual acts “against the order of nature” which is not defined. (114) Moreover, the Penal Code does not contain any provision that limits the freedom of association of individuals on the basis of their sexual orientation. (115) The NGO the claimant seeks to register aims to protect the human rights of those who belong to the LGBTIQ community. Whatever the views of the NGO Board are with regard to such people, it has a duty as a state entity to act in accordance with the Constitution. (99) Once it is recognised that LGBTI people are human beings, which the NGO Board expressly recognised in its submission, they must be accorded with their constitutionally guaranteed human rights, however reprehensible society may find their sexual orientation. (104) Moral or religious beliefs, no matter how strongly held, cannot be a basis for limiting rights. (121) Freedom of religion encompasses the right not to have the religious beliefs of others imposed on one. (122) The Constitution protects those with unpopular views, minorities and rights that attach to human beings, regardless of the views of the majority. It is the duty of the Court to uphold the Constitution, not the views of the majority. (123)
2. **YES.** As illustrated by the letter from the NGO Board to the claimant’s lawyers, and by the NGO Board’s affidavit, they take issue with both the name and the object and purpose of the proposed NGO since they regard it as promoting illegal conduct. (106). The NGO Board’s decision to reject the names submitted by the claimant 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 the rejection of the objectives of the proposed NGO. (106)
 - a. The acts of the NGO Board in rejecting the claimant’s name for the proposed NGO, and by extension its refusal to register the proposed NGO, is a limitation on the claimant’s freedom of association under Article 36 which

the NGO Board could not justify in accordance with the requirements of the Constitution.

- b. Article 27 of the Constitution protects the right to equality and non-discrimination of “every person”. (131) Although Article 27 (4) does not explicitly list sexual orientation as a prohibited ground of discrimination the grounds listed are not exhaustive, as is evident from the use of the word ‘including’. (132) Allowing discrimination on the basis of sexual orientation would be counter to the constitutional principles of human rights, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. (137) The NGO Board violated the claimant’s right to non-discrimination.

Claim upheld.

POINTS OF INTEREST

On enjoying rights regardless of sexual orientation:

At para 98: “..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.”

At para 104: “As a society, once we recognise that persons who are gay, lesbian, bisexual, transgender or intersex are human beings...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..”

On the claim that LGBT organisations promote illegal conduct where same-sex conduct is criminalised:

At para 114-115: “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. 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.”

On the claim that the NGO Board simply rejected ‘the name’ of the proposed NGO:

At para 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.”

On citing moral or religious beliefs to justify limitations on rights:

At para 121-122: “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. 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.”

Domestic decisions referenced:

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; 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]; The Matter of an Application for Judicial Review Orders between the Republic and Transgender Education and Advocacy, MiscAppl 308A of 2013.

Decisions from courts in other jurisdictions referenced:

Kivumbi vs. Attorney-General [2008] 1 EA 174; National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6; S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; West Virginia State Board of Education v Barnette 319 U.S 624 (1943); Lyomoki and Others vs. Attorney General [2005] 2 EA 127; Kasha Jacqueline and Others v Rolling Stone Limited and Another No 163 of 2010; Kanane v State 2003 (2) BLR 67 (CA).

Decisions of international courts and bodies referenced:

Jawara vs The Gambia (2000) AHRLR 107 (ACHPR 2000); Amnesty International vs Zambia (2000) AHRLR 325 (ACHPR 1999), Aminu v Nigeria (2000) AHRLR 258 (ACHPR 2000); Sudan: Law Office of Ghazi Suleiman v Sudan (II) (2003) AHRLR 144 (ACHPR 2003); Law Office of Ghazi Suleiman v Sudan (II) (2003) AHRLR 144 (ACHPR 2003); Civil Liberties Organisation v Nigeria, Communication No 101/93; Patrick Reyes v The Queen Privy Council Appeal No. 64 of 2001.

Treaties, resolutions and declarations referenced:

Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; The African Charter on Human and Peoples’ Rights; The African Commission on Human and Peoples’ Rights Resolution on the Right to Freedom of Association; “The rights to freedom of peaceful assembly and of association”, United Nations Human Rights Council Resolution A/HRC/RES/15/21 (6th October 2010); “Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms” United Nations General Assembly Resolution A/RES/53/144 (8th March 1999)

In its submissions the NGO Board relied on the UN Human Rights Committee case of Joslin v New Zealand (Communication No. 902/1999) (17th July 2002).