

Criminalisation of Homosexuality

Updated 25 October 2015

 Kenya		
<p>National Law:</p> <p><i>Kenya Penal Code (as amended by Act No. 5 of 2003), Chapter 63¹</i></p> <ul style="list-style-type: none"> - S162: Carnal Knowledge against the order of nature² - S163: Attempts to have carnal Knowledge against the order of nature³ - S165: Gross Indecency (public or private)⁴ 	<p>Maximum Penalties:</p> <ul style="list-style-type: none"> - 14 years' imprisonment - 7 years' imprisonment - 5 years' imprisonment 	<p><u>Treaty Ratification</u></p> <p>AFRICAN CHARTER</p> <p>CAT</p> <p>CEDAW</p> <p>CRC</p> <p>ICCPR</p> <p>ICESCR</p>
<p>Sections 162 and 163 are applicable to both men and women. Section 165 is applicable only to men.</p>		
<p>Enforcement</p>	<ul style="list-style-type: none"> - 2014: The 2014 United States Human Rights Country Report indicated that the <i>Police detained persons under [the law criminalising same sex sexual activity], particularly suspected sex workers, but released them shortly afterward. Statistics presented in the National Assembly in March indicated police had opened files on 595 'unnatural offenses' cases since 2010, including 49 in 2014. According to a 2014 report issued by the Gay and Lesbian Coalition of Kenya and the National Gay and Lesbian Human Rights Commission, between 2012 and 2014 there were eight prosecutions of gay men on indecency charges.</i>⁵ <p>It was also reported that police more frequently used public order laws (e.g., disturbing the peace) than same-sex legislation to arrest LGBT individuals.</p>	
<p>Statements by Public Figures</p>	<ul style="list-style-type: none"> - 18 October 2015: In an interview with CNN's Fareed Zakaria, Kenya's President Uhuru Kenyatta made his strongest statement in support of basic rights for LGBT people. For the first time, he publicly condemned violence and "witch hunts" against LGBT people. He added: <i>"Every individual has a right to be protected by the law and that's stated in our constitution"</i>⁶ - 8 September 2015: The Anglican Church of Kenya suspended five priests suspected of engaging in same-sex sexual acts. Speaking on this issue, Mt. Kenya West diocesan Bishop Joseph Kagunda said: <i>'it must be noted that the Anglican Church of Kenya and particularly the Diocese is totally against any kind of gay practice and marriage,</i>⁷ 	

- **25 July 2015:** During President Obama’s visit to Kenya, the US President said, in a joint press conference, that Kenya should not discriminate against people based on their sexual orientation. He explained that

If you look at the history of countries around the world, when you start treating people differently, not because of any harm they’re doing anybody but because they’re different, that’s the path whereby freedoms begin to erode... As an African-American in the United States, I’m painfully aware of the history of what happens when people are treated differently under the law.

In response, President Kenyatta noted that despite the U.S. and Kenya sharing some values such as ‘love for democracy, entrepreneurship [and] value for families, there are some things Kenyan culture and society do not accept’. He said ‘the fact remains that this issue is not really an issue that is in the foremost mind of Kenyans.’⁸

- **21 July 2015:** Ahead of President Obama’s visit to Kenya, President Kenyatta dismissed the issue of LGBT rights. He is reported to have said ‘That is a non-issue to the people of this country, and it is definitely not on our agenda at all... Poverty, improved health for our people, better education, better roads, better security, these are our key focuses.’⁹

- **July 2015:** MP, Irungu Kangata, allegedly told a gathering of anti-gay protesters outside parliament that ‘[w]e are telling Mr Obama when he comes to Kenya this month and he tries to bring the abortion agenda, the gay agenda, we shall tell him to shut up and go home.’¹⁰ It is reported that the demonstration suffered low turnout, attracting only a handful of protesters.¹¹

- **May 2015:** Catholic Bishop, Rt. Rev. James Wainaina, from the Murang Diocese, condemned the recent High Court ruling ordering the registration of an LGBTI organisation. He reportedly said that the Catholic Church in Kenya is not ready and will not accept any law allowing homosexuality in society.¹² In contrast, Catholic Parish Priest, Fr. Ambrose Kimutai, cautioned top clerics against making statements stigmatizing and isolating gay people. Fr. Kimutai is reported to have said that Christians should love homosexuals as they are ‘children of god’.¹³

- **May 2015:** Kenya’s Vice President, William Ruto, told church worshippers that homosexuality had no place in Kenya. He is reported to have said:

*We will not allow homosexuality in our society as it violates our religious and cultural beliefs... We will stand with religious leaders to defend our faith and our beliefs... There’s no room for homosexuality in this country. That one I can assure you.*¹⁴

- **29 April 2015:** The Archbishop of the Kenyan Anglican Church, Eliud Wabukala, has

called on the NGO Coordination Board not to comply with the Kenyan High Court's order requiring the government body to register an LGBTI organisation. The Archbishop stated that *'[t]he judgement was made on very narrow considerations and it is not only against Christianity but also against the Muslim teachings and traditions.'*¹⁵

- **September 2014:** Kenya opposed the UN Human Rights Council resolution condemning violence and discrimination based on sexual orientation and gender identity.¹⁶

- **June 2014:** As part of the 2015 UPR process, the Kenya Human Rights Commission together with other civil society human rights organisations submitted a joint report to inform Kenya's second universal periodic review. With respect to sexual minorities the report recommended that

*[t]he government should ensure that barriers to accessing health services are removed and policies put in place to promote and protect the rights of LGBTI persons to access the highest attainable standard of health care including reproductive health. The government should also publicly condemn and take action against those propagating attacks, hateful and inciteful sentiments against LGBTI persons and decriminalize consensual same sex conduct between adults.*¹⁷

- **1 May 2014:** A Kenyan filmmaker, Wanuri Kahiu, made a statement to the press that it is not homosexuality that is un-African but homophobia.¹⁸

- **26 March 2014:** A number of Kenyan MPs discussed the anti-homosexuality laws in Parliament. MP Aiden Duale, upon being asked why the government was not actively pursuing homosexuals, responded by comparing gay people with terrorists, arguing: *'We need to go on and address this issue the way we want to address terrorism... It's as serious as terrorism. It's as serious as any other social evil.'* Other MPs posed similarly homophobic questions, including one which asked about the best approach to stop Ugandan gay refugees from crossing the borders. In the course of the debate Mr. Duale did concede that no new anti-homosexuality laws would be implemented: *'We do not need to go the Uganda way, we have the constitution and the penal code to deal with homosexuality, and so this debate is finished, we will not be enacting any new tougher laws.'*¹⁹

- **30 April 2014:** Kenyan pastor, John Makokha, invited the LGBTI community to join his church: *'Gays and lesbians are children of God and created in his image... they should be accepted and affirmed as such. They deserve a place to worship and serve God.'*²⁰

- **24 April 2014:** Gay Kenyan author, Binyavanga Wainaina, was named in *The Times* 100 most influential people.²¹ Coming out in January, Wainaina spoke of the anti-homosexuality laws recently introduced in Uganda and (specifically) Nigeria: *'It's*

	<p><i>hard to imagine any more repressive law of any kind anywhere in the world. It's just the most terrible thing.</i>²²</p> <ul style="list-style-type: none"> - 21 January 2014: KTN TV, Kenya's leading national news station, invited gay rights activists to talk about LGBTI equality.²³ - 25 July 2012: Monica Mbaru, a prominent LGBTI human rights defender, was appointed as a judge on the Kenyan Industrial Court.²⁴ - 3 May 2012: The Kenyan National Commission on Human Rights released a report on sexual and reproductive health in Kenya, and called for the removal of anti-homosexual legislation: <i>'The government should decriminalise same sex relationships and sex work with a view to ensure that they enjoy the human rights enshrined in the Constitution 2010 under the Bill of Rights.'</i>²⁵
<p>Persecution and Discrimination</p>	<ul style="list-style-type: none"> - 8 September 2015: The Anglican Church of Kenya suspended five priests suspected of engaging in same-sex sexual acts.²⁶ - 2 September 2015: Nyeri County Commissioner issued arrest threats against gay and lesbian sex workers and the head of police reportedly said that 12 suspects had been arrested.²⁷ - 11 August 2015: A Kenyan pastor and his partner were reportedly forced to flee their country after it emerged that they had become the first to publicly marry.²⁸ - July 2015: Reports have emerged that two men, suspected of being a gay couple, were evicted from their home by their landlord because of their sexual orientation.²⁹ - 11 May 2015: A tabloid newspaper in Kenya began printing lists of what it claimed as 'top homos' in an attempt to 'out' gay people. The article was accompanied by ten front page photos, included a number of LGBT rights activists.³⁰ - 31 March 2015: According to a report documenting several testimonies, LGBTI people fleeing Uganda were attacked, poisoned, threatened and forced into sex work in the world's third largest refugee camp in Kenya. The police reportedly didn't want to work on such cases.³¹ - Reports from Kenya are plentiful with accounts of persecution and violence. Whilst one 2013 report suggests that such incidents have in recent years become less common and that Kenyan people are becoming increasingly tolerant, the same report warns of the recent re-emergence of persecutory acts against gay people.³² - 2014: The United States Human Rights Country Report revealed that Police frequently harassed, intimidated, or physically abused LGBT individuals in custody

	<p>and that violence and discrimination against LGBT individuals was widespread.³³</p> <ul style="list-style-type: none"> - 2014: During 2014 an ‘anti-gay’ caucus was formed in parliament. The National Assembly majority leader stated that homosexuality was as serious an issue as terrorism but resisted calls for new anti-LGBT legislation. Several NGOs conducted anti-LGBT political campaigns, including one that announced a drive to collect one million signatures on a petition against homosexuality. While these campaigns resulted in scattered demonstrations, they did not attract widespread support.³⁴ - 20 March 2014: A report found that hundreds of gay men have left major Kenyan Cities for fear of persecution. The article also suggests that many MSM now ‘avoid public health facilities’.³⁵ - 17 July 2013: A number of violent acts against gay men were recorded following a report stating some Kenyan towns to have the highest number of gay men in the world. Within one week, separate reports emerged of men having had their throats cut with a machete (one of whom died), a sexual assault and an attack with a hammer, a call for violence against sex workers in Mombasa, beatings and blackmail.³⁶ - 17 May 2013: Protestors of the Kenyan anti-gay law had their permit revoked just before a planned IDOHOT march. According to reports, the protestors were stopped because they were seen to be ‘<i>promoting homosexuality</i>’.³⁷ - 2011: A report by the Kenyan Human Rights Commission details many instances of persecution. The report recounts instances of harassment by state officials, exclusion by families, physical violence, death threats and blackmail: ‘<i>LGBTI sex workers, mostly MSMs are often asked for bribes and sexual favours by male police officers in exchange for their freedom and security.</i>’³⁸
Legislative News	<ul style="list-style-type: none"> - 2015: (UPR) During Kenya’s 2nd UPR cycle, a number of stakeholders,³⁹ international treaty bodies⁴⁰ and States⁴¹ recommended that Kenya decriminalise sexual relations between consenting adults of the same sex and put an end to the social stigmatisation of homosexuality. The recommendations from States calling for Kenya to decriminalise sexual relations between consenting adults of the same sex were rejected by Kenya. However, Kenya supported the recommendation made by Sweden, which advocated for Kenya to adopt a comprehensive anti-discrimination law affording protection to all individuals, irrespective of their sexual orientation or gender identity. During the 2010 UPR cycle, Kenya refused recommendations to decriminalise same-sex sexual activity and to take active measures to provide for the protection of LGBTI people.⁴² - 24 April 2015: The High Court in Kenya found that the failure by a government agency to register an LGBTI rights NGO, the National Gay and Lesbian Human Rights

Commission (NGLHRC), on the basis that homosexuality is criminalised in the East African country, was unconstitutional. The responsible agency, the NGO Coordination Board, was ordered to register the NGO.⁴³ The High Court found that Article 36 of the Constitution grants ‘every person’ the right to form an association ‘of any kind’ regardless of their gender or sexual orientation and that the Penal Code does not criminalise homosexuality, but rather certain sexual acts ‘against the order of nature’, which is not defined, nor does it contain any provision that limits the freedom of association of individuals on the basis of their sexual orientation. In response to arguments concerning religion and morality, the Court held that religious and moral beliefs could not be a basis for limiting rights. With respect to Article 27 of the Constitution that protects the right to equality and non-discrimination, the Court found that Article 27 includes discrimination on basis of sexual orientation based on the breadth of that article and a holistic reading of the Constitution which emphasizes inclusiveness, human dignity and equality (as the Court put it ‘*to allow discrimination based on sexual orientation would be counter to these constitutional principles.*’). The NGO Coordination Board and the Attorney General filed notice of their intention to appeal the decision on 29 April 2015. In June 2015, the NGO Coordination Board filed its memorandum of appeal. No hearing date has as yet been set for the appeal.

- **December 2014:** The High Court of Kenya ordered the government to issue a birth certificate to a five-year-old intersex child after hospital staff put a question mark next to the box designating gender on a form to record the 2009 birth of the baby. The court also ordered the Attorney General to name a body that would take responsibility for conducting a census of intersex Kenyans and to develop guidelines and policies for their recognition and support. The court found no particular violations of the child’s fundamental rights by any authority or person.⁴⁴
- **August 2014:** Members of Kenya parliamentary Committee on Justice and Legal Affairs rejected the introduction of a bill similar to the Anti-Homosexuality Bill in Uganda. The bill had been introduced by the Republican Liberty Party and would have imposed harsh new penalties for same-sex relations. According to news reports, the bill was rejected because the proposal was unconstitutional, improperly introduced to parliament and in violation of Kenya’s international obligations.⁴⁵
- **July 2014:** The High Court of Kenya ordered the NGO Coordination Board to register a transgender advocacy group, the Transgender Education and Advocacy (TEA), finding that the Board had discriminated against the TEA and denied the organisation its right to freedom of association on the basis of gender or sex, which was unconstitutional, and its inaction in refusing to register the TEA constituted an unreasonable exercise of discretion.⁴⁶

- ¹ The law is : <http://www.kenyalaw.org/Downloads/GreyBook/8.%20The%20Penal%20Code.pdf>
- ² Kenya Penal Code, Chapter 63, s.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 or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years.'
- ³ Kenya Penal Code, Chapter 63, s.163: 'Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years.'
- ⁴ Kenya Penal Code, Chapter 63, s.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.'
- ⁵ US Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2014: Kenya, 2014*, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2014&dldid=236370> accessed on 24 August 2015
- ⁶ CNN, *President Kenyatta on gay rights in Kenya* (18 October 2015) <http://cnnpressroom.blogs.cnn.com/2015/10/18/president-kenyatta-on-gay-rights-in-kenya/>
- ⁷ Nyamai, F., 'Anglicans probe more gay priests', *Daily Nation*, 8 September 2015, <http://www.nation.co.ke/news/Anglicans-probe--more-gay-priests/-/1056/2863418/-/o7ti13/-/index.html> accessed on 23 September 2015
- ⁸ Westcott, L., 'Kenyan Leaders Respond to Obama's Support for LGBT Rights', *Newsweek*, 27 July 2015, <http://www.newsweek.com/kenyan-leaders-respond-obamas-support-lgbt-rights-357563> accessed on 25 August 2015
- ⁹ 'Kenyatta dismisses gay rights issue ahead of Obama visit', *News24*, 21 July 2015, <http://www.news24.com/Africa/News/Kenyatta-dismisses-gay-rights-issue-ahead-of-Obama-visit-20150721> accessed on 25 August 2015
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- ¹¹ Odula, T., 'Low turnout marks anti-gay demonstration in Kenya', *Associated Press*, 6 July 2015, <http://bigstory.ap.org/article/94a7f889adec47fe987c3b5eca4c15e4/low-turnout-marks-anti-gay-demonstration-kenya> accessed on 25 August 2015
- ¹² Njung'eh, J., 'Church won't accept laws that allow homosexuality', *News 24*, 13 May 2015, <http://m.news24.com/kenya/MyNews24/Church-wont-accept-laws-that-allow-homosexuality-20150513>
- ¹³ Kemei, T., 'Christians should love gay people as they are children of God, says Catholic priest', *Daily Nation*, 26 May 2015, <http://www.nation.co.ke/counties/tolerate-gay-people-Fr-Ambrose-Kimutai/-/1107872/2730204/-/cc2lup/-/index.html> accessed on 25 August 2015
- ¹⁴ 'As Kenya deputy president says 'no room' for gays, what other African leaders have said', *Mail & Guardian Africa*, 4 May 2015 <http://mgafrica.com/article/2015-05-04-as-kenya-deputy-president-says-no-room-for-gays-what-other-african-leaders-have-said>
- ¹⁵ Wanja, M., 'Anglican Church opposes registration of lobby for gays and lesbians', *Daily Nation*, 29 April 2015, <http://www.nation.co.ke/counties/nakuru/gays-and-lesbians-lobby-Wabukala-opposes/-/1183314/2701250/-/922skqz/-/index.html>
- ¹⁶ See. A/HRC/RES/27/32
- ¹⁷ Kenya Human Rights Commission et al., *Civil Society Coalition on Kenya's 2nd Universal Periodic Review* (14 June 2014), para. 40 - 41 <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRKEStakeholdersInfoS21.aspx>
- ¹⁸ Nichols, S., 'Kenyan film director argues "Homosexuality is not un-African, homophobia is"', *Pink News*, 1 May 2014, <http://www.pinknews.co.uk/2014/05/01/kenyan-film-director-argues-homosexuality-is-not-un-african-homophobia-is/> accessed 19 on July 2014
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- ²¹ Chimamanda, N.A., 'Binyavanga Wainaina', *Time*, 23 April 2014 <<http://time.com/70795/binyavanga-wainaina-time-100/>> accessed on 19 July 2014
- ²² McConnell, T., 'Amid increasing persecution of gays in Africa, author Binyavanga Wainaina comes out', *Global Post*, 20 January 2014, <<http://www.globalpost.com/dispatch/news/regions/africa/140120/amid-persecution-gays-africa-author-binyavanga-wainaina-comes-out>> accessed on 19 July 2014
- ²³ KTN Kenya, 'Homosexuality in Africa - Interview with Sophia Wanuna', 21 January 2014 <<https://www.youtube.com/watch?v=HlByUaQoTSo&feature=share>> accessed on 19 July 2014
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³⁸ Kenyan Human Rights Commission, *The Outlawed Among Us: A Study of the LGBTI Community's Search For Equality and Non-Discrimination in Kenya*, 2011 <http://www.khrc.or.ke/resources/publications/doc_download/14-the-outlawed-amongst-us.html> accessed on 19 July 2014

³⁹ Commonwealth Human Rights Initiative; Human Rights Watch; Equal Rights Trust; International Service for Human Rights; Sexual Rights Initiative, Ottawa; Gay and Lesbian Coalition of Kenya; National Gay and Lesbian Human Rights Commission; Coalition of African Lesbians; The Kenya National Commission on Human Rights; The National Coalition on Human Rights Defenders; The Coalition on Violence Against Women; The Refugee Consortium of Kenya; Ogiek Peoples' Development; Endorois Welfare Council; National Victims and Survivors Network; International Centre for Transitional Justice; The International Federation for Human Rights; International Displacement and Monitoring Centre; the Kenyan Section of the International Commission of Jurists; East African Center for Human Rights; ARTICLE 19; Transgender Education and Advocacy; CRADLE - The Children's Foundation; Federation of Women Lawyers -Kenya; Centre for Minority Rights Development; Protection International and ESP among others - see UNHRC, *Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21*, (27 October 2014) UN Doc A/HRC/WG.6/21/KEN/3

⁴⁰ Human Rights Committee, see UN HRC, *Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21*, (12 November 2014), UN Doc A/HRC/WG.6/21/KEN/2

⁴¹ France, Slovenia, Chile, Denmark and Poland - See: UNHRC, *Report of the Working Group on the Universal Periodic Review*, 26 March 2015, UN Doc A/HRC/29/10

⁴² UNHRC, *Report of the Working Group on the Universal Periodic Review*, (17 June 2010) UN Doc A/HRC/15/8

⁴³ *Eric Gitari v Non-Governmental Organisations Co-Ordination Board and others* [2015] eKLR (Petition No. 440 of 2013) - Text of the judgment at: <http://kenyalaw.org/caselaw/cases/view/108412/>

⁴⁴ *Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others* [2014] eKLR (Judgment of 5 December 2014), : <http://kenyalaw.org/caselaw/cases/view/104234/>

⁴⁵ Stewart, C., 'Hostile reception for Kenyan bill to stone gays', *Erasing 76 Crimes*, 18 August 2014, <http://76crimes.com/2014/08/18/hostile-reception-for-kenyan-bill-to-stone-gays/> accessed on 25 August 2015

⁴⁶ *Republic v Non-Governmental Organizations Co-ordination Board & Another Ex-parte Transgender Education And Advocacy & 3 Others* [2014] ECLR (Judgment of 23 July 2014), : <http://kenyalaw.org/caselaw/cases/view/100341/>