

# Eric Gitari v. NGO Co-ordination Board & 3 others

*Case digest of Eric Gitari v NGO  
Co-ordination Board & 3 others  
at the Supreme Court of Kenya*

Human  
Dignity  
Trust

*Prepared March 2023*

## CASE DIGEST

### **Eric Gitari v NGO Co-ordination Board & 3 others**

**Civil Appeal No. 16 of 2019**

**Kenya Supreme Court**

**24 February 2023**

**Appellant:** Non-Governmental Organisations Co-ordination Board

**First Respondent:** Eric Gitari

**Second Respondent:** The Attorney General

**Third Respondent:** Audrey Mbugua Ithibu

**Fourth Respondent:** Daniel Kandie

**Fifth Respondent:** Kenya Christian Professionals Forum

**Amicus Curiae:** Katiba Institute

**Coram:** P. M. Mwilu Deputy Chief Justice & Vice President  
of the Supreme Ct

M. K. Ibrahim Justice of the Supreme Court

S.C. Wanjala Justice of the Supreme Court

Njoki Ndungu Justice of the Supreme Court

W. Ouko Justice of the Supreme Court

**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:**

1. The First Respondent, Eric Gitari, sought to register a non-governmental organisation ('NGO') with the First Appellant, the Non-Governmental Organizations Coordination Board ('NGO Board'). The NGO would seek to address human rights abuses suffered by LGBTIQ people.
2. In accordance with the requirements for the registration of an NGO, the First Respondent sought to reserve with the NGO Board the names Gay and Lesbian Human Rights Council and several variations, which all retained the words 'gay' and 'lesbian'. He was advised by the NGO Board that all the proposed names were unacceptable.
3. After two further rejected attempts at reservation, the Respondent sought a meeting with an officer of the legal department of the NGO Board, who informed him that any association bearing the names gay and lesbian could not be registered by the NGO Board because the association was furthering criminality and immoral affairs.
4. When the officer declined to confirm these reasons in writing, the First Respondent reapplied for the name reservation.
5. The NGO Board responded, advising that under sections 162, 163 and 165 of the Penal Code gay and lesbian liaisons are criminalised, and that this was the basis for rejection of the proposed names. The NGO Board relied on 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'.
6. The First Respondent 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.
7. The Appellant contended that the First Respondent's right to freedom of association had not been infringed and, if it has been limited, such limitation would 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.
8. In its judgment of 24 April 2015, the High Court held that Article 36 of the

Constitution, which grants “every person” the right to form an association “of any kind”, includes all people regardless of gender or sexual orientation (para 73). The Penal Code does not criminalise homosexuality per se but rather certain sexual acts which are not defined (114), and does not contain any provision limiting the freedom of association based on sexual orientation (115). The Court held that moral or religious beliefs cannot be the basis for limiting rights (121), and the Constitution affords protection to those with minority views, regardless of the views of the majority (123).

9. The High Court stated that the rejection of the name of the proposed NGO, and by extension its refusal to register it, is a limitation on the First Respondent’s freedom of association under Article 36 which the NGO Board could not justify in accordance with the requirements of the Constitution. Article 27 protects the right to equality and non-discrimination of “every person” (131), and although sexual orientation is not explicitly listed as a prohibited ground of discrimination, the list is not exhaustive (132). Allowing discrimination on this ground would not be conducive to the principles of the Constitution (137), and as such the NGO Board violated the respondent’s right to non-discrimination.
10. The Appellant challenged the decision of the High Court to the Court of Appeal. The Court of Appeal dismissed that appeal by its judgment of 22 March 2019.
11. It is that decision which was under appeal by the Appellant in this matter before the Supreme Court.

### **Remedies sought:**

To dismiss the appeal of the judgment of the Court of Appeal of 22 March 2019, which itself dismissed the appeal of the judgment of the High Court of 24 April 2015 and to therefore uphold the remedies granted by the High Court, namely:

1. A declaration 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 Article 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.
4. 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.

**Issues:**

1. Whether the First Respondent was required to exhaust the internal dispute resolution mechanism under the NGO Coordination Act.
2. Whether the decision of the Appellant not to reserve the names of the proposed organisation violated Article 36 of the Constitution.
3. Whether the decision of the appellant was discriminatory of the respondents and therefore violated Article 27(4) of the Constitution.

**Held:**

1. The First Respondent was not required to exhaust the internal dispute resolution, because a dispute arising from the reservation of a name (which is all the First Respondent had managed to try to do) is not one of the decisions envisaged to attract internal dispute resolution mechanism provided for under Section 19 of the NGO Coordination Act. Reservation of name is a step toward the registration of an organisation, but it does not constitute registration.
2. This meant that the First Respondent had properly filed his case at the High Court in 2014.

3. It would be unconstitutional to limit the right to associate, through denial of registration of an association, purely on the basis of the sexual orientation of the applicants. In making this finding, the court had particular regard to the fact “that the Constitution requires State organs, State officers, public officers to uphold national values and principles of governance such as human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized. In addition, the Constitution, in Article 21 (1) provides that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. Moreover, Article 21(3) imposes an obligation on all State organs and all public officers to address the needs of vulnerable groups within society including members of minorities and marginalised communities. Given that the right to freedom of association is a human right, vital to the functioning of any democratic society as well as an essential prerequisite enjoyment of other fundamental rights and freedoms, we hold that this right is inherent in everyone irrespective of whether the views they are seeking to promote are popular or not.”
4. The Court found that “the use of the word “sex” under Article 27(4) does not connote the act of sex per se but refers to the sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex or otherwise. Further we find that the word “including” under the same article is not exhaustive, but only illustrative and would also comprise “freedom from discrimination based on a person’s sexual orientation.” We, therefore, agree with the finding of the High Court to wit, an interpretation of non-discrimination which excludes people based on their sexual orientation would 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.”
5. Costs were awarded to the First Respondent.

## **Domestic decisions referenced:**

- Lawrence Nduttu & 6000 other v Kenya Breweries Ltd & another, SC. Pet. No. 3 of 2012
- Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) SC. Petition No. 3 of 2016; [2019] eKLR
- R v National Environmental Management Authority, CA No. 84 of 2010; [2011] eKLR
- Anthony Miano & others v Attorney General & others, HC Petition No. E343 of 2020; [2021] eKLR
- Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others SC Petition No. 4 of 2014; [2014] eKLR
- Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others SC Petition No. 3 of 2016; [2019] eKLR
- United Millers Limited v. Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others, SC Petition (Application) No. 4 of 2021; [2021] eKLR
- Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR
- Shollei v Judicial Service Commission & another (Petition 34 of 2014) [2022] KESC 5 (KLR)
- Jack Mukhongo Munialo & 12 others v Attorney General & 2 others, HC Petition No 182 of 2017; [2017] eKLR
- EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae), HC Petition 150 & 234 of 2016 (Consolidated) (2019) eKLR
- Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another, SC. Pet. No. 3 of 2012; [2012] eKLR
- William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties), High Court Constitutional Petition Nos. 159 of 2018 & 201 of 2019; [2020] eKLR

- Speaker of National Assembly v Njenga Karume [2008] 1KLR 425
- Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others, SC Petition No. 3 of 2016; [2019] eKLR
- United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others, SC Petition (Application) No. 4 of 2021; [2021] eKLR
- Fleur Investments Limited v Commissioner of Domestic Taxes & another, Civil Appeal No. 158 of 2017; [2018] eKLR
- Dry Associates Limited v Capital Markets Authority and Another Interested Party Crown Berger (K) Ltd, Petition 328 of 2011; [2012] eKLR
- Kenya National Commission on Human Rights, Advisory Opinion Reference No. 1 of 2012; [2014] eKLR

**Decisions from courts in other jurisdictions referenced:**

- R. v Oakes [1986] 1 S.C.R 103 (Canada)
- S v Makwanyane and another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (South Africa)
- Gay Alliance of Students v Mathews, United States Court of Appeal (4th Cir. 1976) (United States)
- The People v Siyah Pembe Üçgen Izmir Association (“Black Pink Triangle”), Izmir Court of First Instance No. 6 (Turkey)
- Attorney General of Botswana v Thuto Rammoge and 19 Others, Civil Appeal No. 128 of 2014 (Botswana)
- Associated Provincial Picture Houses v Wednesbury Corporation, [1948] 1 K.B. 223 (England)
- Regina v Secretary of State for The Home Department, Ex Parte Daly [2001] UKHL 26 (UK)
- R. (on the application of Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence, [2003] EWCA Civ 473 (England)
- Breen v Amalgamated Engineering Union [1971] 2 QB 175 (England)
- Suresh Kumar Koushal v Naz Foundation, Civil Appeal No. 10972 of 2013 (India)
- Navtej Singh Johar v Union of India, AIR 2018 SC 4321 (India)

- Letsweletse Motshidiemang v Attorney General, High Court Civil Case No. MAHGB-000591-16 (Botswana)
- Kanane v The State, [2003] 2 BLR 67 (CA) (Botswana)

**Decisions of international courts and bodies referenced:**

- Sidiropoulos and Others v Greece (57/1997/841/1047) (ECtHR)
- Zhdanov and Others v Russia (Application No. 12200/08, 35949/11 and 58282/12) (ECtHR)
- Salgueiro da Silva Mouta v Portugal, judgment of 21 December 1999 (ECtHR)
- Toonen v Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) (UN HRC)

**Treaties, legislation, resolutions and declarations referenced:**

- Siracusa Principles on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights
- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights
- The African Charter on Human and Peoples' Rights
- Equality Act 2010 (UK)
- Buggery Act, 1533 (UK) has been over the years replaced by the
- Marriage (Same-Sex Couples) Act, 2013 (England and Wales)
- Scottish Marriage and Civil Partnership (Scotland) Act, 2014 (Scotland)
- Northern Ireland (Executive Formation etc) Act, 2019 (Northern Ireland)
- South African Constitution
- Civil Union Act, 2006 (South Africa)
- Human Rights Act, 1994 (Canada)
- Human Rights (Sexual Conduct) Act, 1994 (Australia)
- Labour Law, (law nr. 23/2007) (Mozambique)