IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: WAKI, NAMBUYE, KOOME, MAKHANDIA & MUSINGA, JJ.A.)

CIVIL APPEAL NO. 145 OF 2015

BETWEEN

NON-GOVERNMENTAL ORGANIZATIONS CO-ORDINATION BOARD ..... APPELLANT

AND

ERIC GITARI ..... 1ST RESPONDENT
THE HON. ATTORNEY GENERAL ..... 2ND RESPONDENT
AUDREY MBUGUA ITHIBU ..... 3RD RESPONDENT
DANIEL KANDIE ..... 4TH RESPONDENT
KENYA CHRISTIANS PROFESSIONAL FORUM ..... 5TH RESPONDENT
KATIBA INSTITUTE ..... 6TH RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Lenaola, Ngugi & Odunga, JJ.) dated 24th April 2015

in

Constitutional Petition No. 440 of 2013)
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JUDGMENT OF WAKI, JA

John Chapter 8 verse 7:-

> ***"When they kept on questioning him, he straightened up and said to them, "let anyone of you who is not without sin be the first to throw a stone at her".***

That is a familiar Bible story of profound significance. A prostitute had been found in the act of adultery. At the time of Moses, adultery was a serious moral and

criminal issue. One would be stoned to death once identified with it. I suppose it is still a serious moral issue today in our country, although we do not appear to have criminalized it despite our Judeo-Christian and Islamic heritage. If Mosaic law applied in this country, I suspect half the population would be stoned to death. But Jesus had a straight answer to the teachers of the law and Pharisees who came tempting him on Mosaic law. "***..be the first to throw a stone at her".*** None of them did. They all walked away in shame. That was about 2000 years ago. Is there a parallel to the story in this appeal?

I have had the advantage of reading in draft the judgments of my Sisters, **Nambuye** and **Koome, JJ.A**, and my Brothers, **Musinga** and **Makhandia JJ.A**. The antecedent facts and submissions of counsel have been admirably summarized in those judgments and I need not therefore rehash them. There is obvious divergence of opinion in the separate judgments which is split down the middle, thus thrusting me in the unhappy position of providing the tilt in the balance. I have the following view of the matter.

Shorn of the scary apparitions and postulates put forward by the appellant and its supporters in the event this appeal is not allowed, such as: *'homosexuality will be legalised'*; *'decadence, immorality and disease will strike our nation'; 'same sex marriages will be the order of the day'; 'sexual abuse of young people will dramatically increase'; 'murderers and other miscreants in society will be at liberty to register Associations'*; *'floodgates will be opened for paedophiles'*; *'Christian and*

Islamic values will be obliterated'; 'societal moral values will be shredded'; 'cultural rights will be trampled upon'; 'there is an international conspiracy to promote gay rights'; this appeal is really about the place of our Constitution in our lives. How far did the Kenyan people want to go in relation to national values, human liberty, freedom to associate, speak, assemble, human dignity, fair administrative actions and protection against discrimination?

I draw that distinction because, in my view, considerable time and energy was spent on urging matters that were beyond the petition placed before the High Court. The petition sought a judicial interpretation of the following matters:

> *"1. That a judicial interpretation of 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 duties under Article 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:*
>
> *a) The right of marginalized and minority groups in the Republic of Kenya to which the petitioner fall and other gay and lesbian persons.*

b) *The right of Kenyan gay and lesbian citizens to have the constitution fully implemented both in its letter as well as in spirit.*

6. *The costs of the petition."*

I am persuaded by the argument that the matter before us is not about the family unit, marriage or morals, legalization of same sex relationships, or the constitutionality of ***sections 162, 163*** and ***165*** of the **Penal Code.** Indeed, the latter issue is pending determination before the High Court, and the less said about it the better. The matter then boils down to consideration of ***Articles 27*** and **36** of the Constitution which were specifically invoked for interpretation with regard to LGBTIQ persons.

Fortunately, the Constitution itself has ring-fenced its purpose and the manner it ought to be construed. Some of the ring-fences stand out:-

After declaring its supremacy in ***Article 2***, the Constitution proceeds in ***Article 10*** to bind everyone who has to apply and interpret it or any other law, or makes public policy, to the national values spelt out therein including: human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. Equally binding are the principles of the rule of law, participation of the people, equity, inclusiveness, equality, human rights, transparency and accountability. It opens up further space for application of other principles and values obtaining in the general rules of international law and the international instruments Kenya has ratified, such as, the ***Universal Declaration on Human Rights***, the ***International Covenant on Civil and Political Rights*** (ICCPR), and the ***International Covenant on Economic, Social and Political Rights*** (ICESCR).

The Constitution goes further and lays out an expansive Bill of Rights for the purpose of recognizing and protecting human rights and fundamental freedoms in order to *'preserve the dignity of individuals and communities, promote social justice and the realization of the potential of all human beings'.* In ***Articles 20 (3)*** and ***(4)***, it gives an edict to the courts as they apply the Bill of Rights to develop the law where it does not give effect to a right; adopt the interpretation that most favours the enforcement of a right or fundamental freedom; and promote the values that underlie an open and democratic society based on human dignity, equality, equity, freedom and the spirit, purport and objects of the Bill of Rights.

Finally, in ***Article 259***, it commands the manner in which it should be interpreted, that is, *'a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance'.* It also demands that every provision of the Constitution *'shall be construed according to the doctrine of interpretation that the law is always speaking'*.

Furthermore, our own Supreme Court has been loud about the place of the Constitution, which it identified as 'a *transformative charter of good governance'*, and has severally considered the manner of its interpretation. A few examples will suffice. In one of the earliest opportunities to provide guidance on interpretation of the constitution, the Court had this to say:

> ***"Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of***

such open texture in their scope for necessary public actions. A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favor of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm." [Emphasis added].

See ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR.***

The Supreme Court has also emphasized that the Constitution must be interpreted in a manner that eschews formalism, in favour of the purposive approach. See ***In Re The Matter of the Interim Independent Electoral Commission [2011] eKLR***. In the advisory opinion matter of ***Speaker of the Senate & Another vs Attorney General & 4 Others [2013] eKLR,*** the Court laid out further principles of interpretation as follows:-

"The Supreme Court of Kenya, in the exercise of the powers vested in it by the Constitution, has a solemn duty and a clear obligation to provide firm and recognizable reference-points that the lower Courts and other institutions can rely on, when they are called upon to interpret the Constitution. Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding

interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents. The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly [capture] express the minds of the framers, and the minds and hands of the framers may also fail to properly mind the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras". [Emphasis added].

Finally, the Court has said that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit. In the case of ***Communications Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others [2014] eKLR***, Mutunga, CJ, stated:

> ***"This, in our perception, is an interpretive conundrum that is best resolved by the application of principle. This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit. In the Matter of the Kenya National Human Rights Commission, Sup. Ct. Advisory Opinion Reference No. 1 of 2012; [2014] eKLR, this Court [paragraph 26] had thus remarked:***
>
> > *"...But what is meant by a holistic interpretation of the Constitution" It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing*

circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result". [Emphasis added].

I shall be guided by the above principles as I decide on this matter.

The appeal raises several germane issues, some of which have been passionately discussed by my Brothers and Sisters. In my view, however, it is two of the issues that are dispositive of the appeal, and I proceed to discuss them.

The first issue is whether the petition filed before the High Court was competent. It is a jurisdictional issue. The objection raised was that the petition was filed in contravention of ***section 19*** of the **Non-Governmental Organizations Coordination Act, No. 19 of 1990 (NGOCA)** which requires that an organization that is aggrieved by the decision of the Board, shall appeal to the Minister before going to court. The law is, of course, clear that where there is a procedure for redress of any particular grievance presented by the Constitution or an Act of Parliament, that procedure should be exhausted before resort may be had to the courts. See ***Speaker of the National Assembly vs Karume (2008) 1 KLR 425*** and ***Geoffrey Muthinja & Another vs Samuel Muguna Henry & 1756 Others [2015] eKLR.*** It becomes necessary, therefore, to examine closely the provisions of the NGOCA.

The composition of the Board established under ***section 4*** of NGOCA is fairly extensive. It has no less than 19 high profile members as follows:

> ***"(1) The Board shall consist of-***
>
> ***(a) a chairman appointed by the President;***

(b) three members appointed by the Minister by virtue of their knowledge or experience in development and welfare management;

(c) the Permanent Secretary in the Ministry for the time being responsible for matters relating to Non-Governmental Organizations;

(d) the Permanent Secretary in the Ministry for the time being responsible for foreign affairs;

(e) the Permanent Secretary to the Treasury;

(f) the Permanent Secretary in the Ministry for the time being responsible for economic planning;

(g) the Permanent Secretary in the Ministry for the time being responsible for social services;

(h) the Attorney-General;

(i) seven members appointed by the Minister on the recommendation of the Council to represent the diverse areas of Non-Governmental Organisations' interests within the Board;

(j) the executive director appointed under section 5 (1);

(k) the chairman of the Council."

The executive Director referred to in **(j)** is *ex officio* and has no vote at any meeting.

The manner of registration of an NGO is then covered in ***section 10*** of **Part III** of the Act and it is important to reproduce the section for its full tenor and effect:-

"10. Registration of Non-Governmental Organizations

(1) Every Non-Governmental Organization shall be registered in the manner specified under this Part.

(2) Applications for registration shall be submitted to the executive director of the Bureau in the prescribed form.

(3) An application for registration shall be made by the chief officer of the proposed organization and specify-

(a) other officers of the organization;

(b) the head office and postal address of the organization;

(c) the sectors of the proposed operations;

(d) the districts, divisions and locations of the proposed activities;

(e) the proposed average annual budgets;

(f) the duration of the activities;

(g) all sources of funding;

(h) the national and international affiliation and the certificates of incorporation;

(i) such other information as the Board may prescribe.

(4) The Minister may, on the recommendation of the Board and by notice in the Gazette, exempt such Non-Governmental Organization from registration as he may determine.

(5) Application for registration under this section shall be accompanied by a certified copy of the constitution of the proposed Non-Governmental Organization." [Emphasis added].

Section 14 then deals with the basis upon which an application for registration may be refused, thus:

"14. Refusal of registration:

The Board may refuse registration of an applicant 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."

The Board may also make decisions on cancellation of registration certificates and on entry permits.

On all the matters under Part III of NGOCA where the Board makes a decision, an appeal by the aggrieved organization goes to the Minister under ***section 19***, which provides:-

> *"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".* [Emphasis added].

Now, the million dollar question is this - was there an application made under Part III of NGOCA or a decision made by the Board? I have carefully examined the record and I would answer that question in the negative. The Board as constituted under ***section 4*** never met; the application as detailed in ***section 10*** was never

submitted; and, consequently, one cannot talk about refusal of registration under ***section 14*** which would attract the procedure of appeal under ***section 19***.

All that happened in this matter is an administrative procedure that is provided for in the regulations, which must take place long before commencement of an application for registration under Part III of the Act. The procedure is in ***Regulation 8*** of the **Non-Governmental Organizations Coordination Regulations, 1992 (NGOCR),** and is referred to as ***"Approval of names"***. Without surmounting that step, there would be no ***"Application for registration"*** under ***section 10 (2)*** of the Act, as provided for in ***Regulation 9.*** The two regulations state as follows:-

> ***"8. Approval of names***
>
> ***(1) An applicant for the registration of any proposed organization shall prior to such application seek from the Director approval of the name in which the organization is to be registered.***
>
> ***(2) The application for approval under Paragraph (1) shall be in Form 2 set out in the Schedule and accompanied by the fee specified in regulation 33.***
>
> ***(3) 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."*** [Emphasis added].

"9. Application for registration

(1) ***Every application for registration under section 10 (2) of the Act*** *shall be-*

(a) in Form 3 set out in the First Schedule;

(b) typewritten;

(c) signed by the chief officer of the proposed Organization

(d) sent to the Director together with the fee specified in regulation 33;

(e) accompanied by-

(i) a copy of the minutes of the meeting of the proposed Organization authorizing the filing of the application;

(ii) a copy of the constitution of the proposed Organization duly certified by the chief officer and the secretary of the proposed Organization, specifying the maters set out in the Second Schedule;

(iii) a notification of the situation of the registered office end postal address of the proposed Organization in Form 4 set out in the First Schedule signed by the chief office of the proposed Organization.

(2) Any proposed Organization legally domiciled in Kenya with branches in countries other than Kenya shall, in addition to the copy of its constitution referred to in paragraph (1) (e), submit copies of the constitutions, deeds or statutes of such branches.

(3) The Director may upon receipt or an application under this Regulation request such further or better information on the proposed Organization as he may require." [Emphasis added].

The application for approval of a name is made to the Director and it is the Director who makes the decision to reserve or not to reserve it. The Board has nothing to do with that process and the rules do not provide for an appeal to the Board. The Board as seen earlier, comes in under Part III of the Act which is covered in ***Regulation 9***. And without a decision of the Board, there can be no appeal to the Minister. So, where does one go when an application for approval of a name is rejected?

The High Court in its decision on this issue rendered itself as follows:

> ***"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. 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."***

With respect, that reasoning is borne out by the law and I have no reason to disturb it. It was also the view of the High Court that the grounds upon which the reservation of name was rejected were top-heavy with constitutional questions which

deserved the interpretation of the High Court. I agree. For those reasons, I reject the jurisdictional objection raised by the appellant.

The second issue is whether, in rejecting the reservation of name, the Director of the appellant was in breach of ***Article 36*** of the Constitution. ***Article 36*** is about *'Freedom of association'* and provides as follows:-

> ***"(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; and***
>
> ***(b) there shall be a right to have a fair hearing before a registration is cancelled."***

The Director refused to approve the name or names suggested by the 1st respondent because, in his opinion, such name or names were repugnant to or inconsistent with the law or otherwise undesirable. He relied on ***Regulation 8 (3) (b) (ii)*** of NGOCR. More specifically, the Director was of the view that the interests to be advanced by the intended NGO would be injurious to public interest and would further criminality and immoral affairs contrary to specific provisions of the Penal Code .

There is no contestation from any side that the people in this country who answer to any of the descriptions in the acronym LBGTIQ, are 'persons'. I find it uncontroverted, therefore, that ***Article 36*** covers the persons in that group. Like

everyone else, they have a right to freedom of association which includes the right to form an association of any kind. That is the literal wording of ***Article 36 (1)*** which, in my view, has no hidden meaning. ***Article 260*** provides further clarity to the definition of 'person'. In my view, construing 'person' to refer only to the sane and law abiding people would be unduly stretching the ordinary meaning of the words used in the Constitution.

It also seems to be common ground, at any rate the proposition is not debunked, that the Penal Code does not criminalize the persons answering to the description LBGTIQ *qua* such persons. What it provides for are specific offences, more specifically, *'unnatural offences'*, *'attempts to commit unnatural offences'*; and *'indecent practices between males'*. Those are ***sections 162, 163*** and ***165*** of the **Penal Code,** respectively. Like everyone else, LBGTIQ persons are subject to the law and will be subjected to its sanctions if they contravene it. Convicting such persons before they contravene the law would, in my humble view, be retrogressive. As it is, according to their stated objectives, they intended to register the NGO 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. On the face of it, there is nothing unlawful or criminal about such objectives. But they never reached the stage

of proper consideration by the Board because the main gate to the boardroom was locked.

The argument put forward by the appellant is rather that ***Article 36*** is not absolute and is subject to the limitation under ***Article 24*** which, as relevant, provides:

> ***"24. (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, taking into account all relevant factors, including—***
>
> ***(a) the nature of the right or fundamental freedom;***
>
> ***(b) the importance of the purpose of the limitation;***
>
> ***(c) the nature and extent of the limitation;***
>
> ***(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***
>
> ***(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."*** [Emphasis added].

According to the appellant, the provisions of the Penal Code justified the rejection of the name or names submitted by the 1st respondent for reservation and, therefore, the decision of the Director was perfectly constitutional.

In dealing with this issue, the High Court reasoned as follows:-

> ***"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. 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."..... 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.

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. 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.*

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....*

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.*

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."

Again, with respect, I am persuaded by that reasoning. I would dismiss the appellant's challenge on the findings of the High Court in relation to ***Article 36*** of the Constitution.

As stated earlier, the two issues above are sufficient to dispose of this appeal. I would dismiss it. I largely agree with the reasoning of **Koome** and **Makhandia, JJ.A** who have arrived at the same conclusion. In the event, the orders of the Court are that this appeal be and is hereby dismissed. The order for costs is unanimous that each party shall bear its own costs.

As a parting shot, I have this to say in *obiter dicta*:

The issue of persons in our society who answer to the description lesbian, bisexual, gay, transsexual, intersex and queer (LBGTIQ) is rarely discussed in public.

The reasons for such coyness vary. But it cannot be doubted that it is an emotive issue. The extensive and passionate submissions made in this matter before the High Court, and before us, is testimony to the deep rooted emotions that the issue can easily arouse. It is possible for the country to close its eyes and hearts and pretend that it has no significant share of the people described as LGBTIQ. But that would be living in denial. We are no longer a closed society, but fast moving towards the 'open and democratic society based on human dignity, equality, equity, and freedom' which our Constitution envisages. We must therefore, as a nation, look at ourselves in the mirror. It will then become apparent that the time has come for the peoples' representatives in Parliament, the Executive, County Assemblies, Religious Organizations, the media, and the general populace, to engage in honest and open discussions over these human beings. In the meantime, I will not **".. *be the first to throw a stone at her* [LGBTIQ]".**

Dated and delivered at Nairobi this 22nd day of March, 2019.

P. N. WAKI

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE, KOOME, MAKHANDIA &MUSINGA-JJA)

CIVIL APPEAL NO. 145 OF 2015

BETWEEN

NON-GOVERNMENTAL ORGANISATIONS COORDINATION BOARD.....APPELLANT

VERSUS

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(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Isaac Lenaola, M. Ngugi& G.V. Odunga JJ.) Dated and Delivered on 24th April, 2015

in

H.C. Constitutional & Judicial Review Division Petition No. 440 of 2013)

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JUDGMENT OF NAMBUYE, JA

The appeal arises from the Judgment of the High Court (**Isaac Lenaola J. as he was then)** and **Mumbi Ngugi& G.V. Odunga, JJ**) dated the 24th day of April, 2015.

The background to the appeal is that, the 1st respondent floated three names under which he sought to register a non-governmental organization (proposed NGO) with the appellant,seeking to address human rights abuses and violations suffered by the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer persons (LGBTIQ) in this Country, and which request was rejected by the

appellant's Director precipitating the petition dated the 2nd September, 2013.In summary, the 1st respondent's contention was, *inter alia,* that, his right to freedom of association, dignity, equality and right not to be discriminated against had been violated by the said rejection; that the justification presented by the appellant for infringing on his rights were ill conceived; that conflation of **sections 162,163** and **165** of the Penal Code and the activities of the proposed NGO was flawed; that the refusal to register the proposed NGO amounted to an in human and degrading treatment as it ostracized the LGBTIQ persons as criminals with no right to associate in any manner. It also amounted to a denial of the right to equality before the law, freedom of expression and freedom to access information.

On account of all the above assertions the first respondent sought: ***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;adeclaration that the appellant contravened the provisions of Articles 36 of the Constitution in failing to accord just and fair treatment to LGBTIQ persons living in Kenya seeking registration of an association of their choice; a declaration that the 1st respondent was 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 appellant to strictly comply with its constitutional duty under Article 27 and 36 of the Constitution to which it was bound; a declaration that the failure by the appellant to comply with their constitutional duties under Article 36 infringed on; the rights of marginalized and minority groups in the Republic of Kenya to which the 1st respondent and other LGBTIQ persons fell; the right of Kenyan***

LGBTIQ citizens to have the constitution fully implemented both in its letter as well in spirit in their favour; and the costs of the petition.

The appellant opposed the petition contending, *inter alia,* that the petition was premature for the first respondent's failure to exhaust the provisions of section 19 of the Act before seeking the Court's intervention; that the appellant acted within its powers under the Act when it rejected to register the proposed NGO; that its action was well founded in**Article45** of the Constitution of Kenya, 2010, **Article 16** of the 1948 Universal Declaration of Human Rights (UDHR);**Article 17(3), 27** and **29(7)** of the African Charter of Human and Peoples' Rights (ACHPR);that allowing the registration of the proposed NGO would have amounted to promoting prohibited criminal acts prejudicial to the promotion of good morals which in the appellant's view was a legitimate aspect of public interest.

The Judgment made no mention of the content of pleadings filed by the 2nd respondent if any. The above position notwithstanding, it is evident from the record that the 2nd respondent supported the appellant's opposition to the 1st respondent's petition at the High Court, and is now supporting the appellant's appeal before this Court.

The 3rd and 4th respondents opposed the petition on the grounds that registering the proposed NGO, would result in blurring the distinction between Lesbian, Gay and Bisexual persons (LGB) and the transgender and intersex persons (TI).

The 5th respondent also opposed the petition contending, *inter alia*, that the appellant acted within its mandate under the Act to reject the registration of the proposed NGO whose objective was to promote homosexuality an activity outlawed by provisions of the Penal Code; that any real or perceived violation of rights of homosexuals fell for protection under **Article 59(2)(d)**of the Constitution which mandates the Kenya National Commission on Human Rights to monitor violation of human rights and seek vindication of those violations within the existing constitutional and legal frameworks for such redress.

The 6th respondent on the other hand, supported the petition contending *inter alia* that by declining registration of the proposed NGO, the appellant violated the 1st respondent's right to freedom of association and fair administrative action; that the provisions of law relied upon by the appellant to reject registration of the proposed NGO were irrelevant for purposes of**Article 24** of the Constitution. Neither did these meet the threshold in **Article 24** of the Constitution and that the objectives of the proposed NGO had nothing to do with the promotion of carnal knowledge among its members.

The petition was canvassed by way of written submissions and case law relied upon by the parties. The learned trial Judges after assessing and analyzing the record,identified issues for determination and considering these in light of the record, proceeded to draw out conclusions thereon.On the construction of **sections 14, 19, 32** and **Regulation 8,** of the Act the Judges ruled that they were properly seized of the matter especially when it was evident from the record that, the 1st respondent was never advised of any right of appeal he may have had upon the appellant's refusal to register the proposed NGO. Second thatthe board

itself was in favour of having the matter resolved through the court's intervention as the issues raised in the petition were of significant public importance requiring authoritative judicial guidance.

On the right to freedom of Association, under **Article 36** of the Constitution,the Judges ruled, *inter alia,* that the right to freedom of Association covers "every person" and any kind of association and could only be reasonably and justifiably limited by law; that an individual human being regardless of his or her gender or sexual orientation is a person; that Article 20(3) and (4) of the constitution enjoins the Court to adopt an interpretation of **Article 36** of the Constitution that favours the enforcement of a right or fundamental freedom; that **Article 20 (1)** of the constitution, provides that the bill of rights applies to all persons,while **Article 259 (2)** of the Constitution enjoins the interpretation of the constitution in a manner that advances human rights and freedoms. In light of the above observations, the Judges concluded that the term "every person" in **Article 36,** properly construed does not exclude homosexuals.

Construing and applying Article 20 of the universal Declarations of Human Rights (UDHR) and **Article 22** of the International Covenant on civil and political rights (ICCPR) to the record concluded that, these provisions clearly include all individuals.There was therefor nothing in them to indicate that sexual orientation is a matter that removes one from the ambit of protection by the above instruments ratified by Kenya's and applicable under **Article 2 (5) & 2(6)**of the constitution.

Upon carrying out an in-depth review of case law on the subject from around the globe, a legal text by **Mbondenyi, Morris Kiwinda, Ambani** & **John**

Osogo titled "the new Constitution of Kenya: Principles, Governance and Human Rights; the African Commission of Human and Peoples Rights Resolution on the Right to freedom of Association adopted by the African Commission on Human and Peoples Rights at its 11th Ordinary session, the Judges ruled *inter alia*, that the Constitution and the right to associate are not selective and that the right to associate is a right that is guaranteed to, and applies, to "everyone" regardless of the popularity of the objects of the association.

After reviewing further case law on the subject and the United Nations Human Rights council resolution No. 15/21 of 2001, the Judges ruled that the persons whose human rights and interests the proposed NGO sought to protect were not a popular or accepted group in Kenyan society and that the proposed registration of such an NGO was perceived as bringing moral decadence into society, which would in turn, herald the breakdown of society.

The Judges then reviewed the salient features of the opposing positions in the supporting documents, reminded themselves of their role as a court of law namely, to apply the law without fear, favour or prejudice, revisited the objectives of the proposed NGO, Article 1 and 5 of the united Nations General Assembly Resolution A/Res/53/144 of 8th March, 1999 on the declaration on the right and responsibility of individuals, groups and others in society to promote and protect universally recognized Human rights and fundamental freedoms, and ruled that however reprehensible the appellant viewed the sexual orientation of the would be beneficiaries of the proposed NGO, it must accord them the human rights which are guaranteed by the constitution to "all persons", by virtue of their being

human, and that the action of the board amounted to an infringement on the 1st respondent's right to associate guaranteed under **Article 36** of the constitution.

The Judges reviewed case law, **Articles 24 (1) & (2)** of the Constitution, appreciated that the freedom of association is not absolute, as it can be limited by law, subject to the limitation meeting the prerequisites in the test to be applied namely, that of reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom.

Reverting to the record, the judges made observations that the appellant had placed reliance on section **162,163** and **165** of the Penal Code which, though outlaw carnal knowledge against the order of nature,do not criminalize homosexuality; that the fact that the State does not set out to prosecute people who confess to be lesbian or homosexual in the Judges' view, was a clear manifestation, that such sexual orientation is not necessarily criminalized, as what is deemed to be Criminal is sexual conduct against the order of nature and which conduct is not defined; that the penal code does not criminalize the right of association of people based on their sexual orientation. That there are sufficient safe guards within the law should the proposed NGO transgress the law; that the absence of sexual orientation in **Article 27(4)** as one of the grounds for non-discrimination does not assist the appellant as the word used therein is "including," which in the Judges view, leaves room for appropriate interpretation to include other grounds as the context and circumstances permit.

The Judges also discounted the application of strong moral and religious beliefs as a ground for limiting the enjoyment of rights as these are not laws as contemplated by the constitution; that freedom to profess religious beliefs

encompasses freedom not to do so. Also a right not to subscribe to any religious belief and also not to have religious beliefs of others imposed on him.

The Judges also reviewed case law, **Article 21(1), 2 (3), 27, 20(4), 259** &**10 (2)**; and ruled that the appellant as a statutory body was duty bound in the exercise of its mandate as above to address the needs of the vulnerable in society; that the right to equality and non-discrimination enshrined in **Article 2**7, applies to "everyone"; that since the grounds listed therein are not exhaustive, the use of the word "includes" but is not limited to" are wide enough to cover non-discrimination on account of sexual orientation; that by the appellant refusing to register the proposed NGO because, it considers that the groups whose interests the proposed NGO seeks to advocate were not morally acceptable in Kenyan society, arrogated to itself contrary to the constitution, the power to determine which person or persons whose right are guaranteed under the constitution are worthy of constitutional protection contrary to the national values and principles enshrined in **Article 10** of the constitution.

In the Judges' view, 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. It would also be contrary to **Article 259(2)** of the Constitution which requires that the constitution be interpreted in a manner that advances the enjoyment of human rights and freedoms. On the totality of the above reasoning, the Judges concluded that the right to equality before the law would not be advanced if people were denied the right not to be discriminated against based on their

sexual orientation and allowed the petition but directed each party bears their own costs.

The appellant was aggrieved with that decision and filed this appeal citing eleven (11) grounds of appeal. It is the appellant's complaint that the learned Judges erred in law and fact:

1. ***By identifying lesbian, gay, bisexual, transgender and queer as innate attributes of various persons without any or any sufficient evidence in support, and by failing to recognize that these attributes were the consequences of behavioural traits which the society has a right and duty to regulate for the sake of the common good.***

2. ***When they held that the refusal to register the 1st respondent's proposed NGO was not a decision contemplated under section 19 of the NGO Act for which an appeal lies to the Minister.***

3. ***In failing to recognize the limits of the right of association, and the fact that the right is enjoyed by persons qua persons and not based on any attribute they may determine for themselves.***

4. ***In finding that the right of association extended to the proposed NGO of the 1st respondent.***

5. ***By adopting and applying ratio from South Africa without recognizing the distinct and divergent constitutional background of the said country.***

6. ***By disregarding the religious preference in the constitution of Kenya, 2010, and the preambular influence that must be applied in interpreting and applying the various constitutional provisions in issue.***

7. ***By failing to uphold the provisions of the Penal Code that outlaw homosexual behavior, as well as any aiding, abetting, counseling, procuring and other related and inchoate crimes.***

8. ***By effectively reading into the constitution's non-discrimination clause the ground of sexual orientation.***

9. ***By misunderstanding and misapplying the limitation clause in article 24 of the constitutions of Kenya, 2010.***

10. ***By rejecting the legitimate role of the moral purpose or public policy test in determining whether to accept registration or proposed applications for associations of persons.***

11. ***By granting the declarations sought and the order of mandamus in the Decree appealed against.***

The appeal was canvassed by way of written submissions fully adopted, orally highlighted by learned counsel for the parties and supported by lists of authorities. Learned counsel **Mr. Charles Kanjama** leading **Mr. A. Simiyu** appeared for the appellant; **Waikwa Wanyoike** held brief for **Mrs. Ligunya** for the 1st respondent. He also appeared for the 6threspondent. **Eric Obura** appeared for the 2nd respondent, while **Harrison Kinyanjui** appeared for the 5th respondent. There was no appearance for **Mr. Ojiambo** who is on record for the 3rd and 4th respondents.The Court being satisfied that the office of **Mr. Ojiambo** had been duly served on 5th June, 2018, for the hearing, allowed learned counsel present for the parties to prosecute the appeal.

Supporting the appeal, **Mr. Kanjama** urged us to fault the trial Court for issuing a declaration which supported the formation of an association which, among other objectives, would seek for the promotion of Gay and Lesbian

behavior and confer rights based on same sex sexual behavior in Kenya; that the ICCPR in its preamble recognizes that human rights derive from the inherent dignity of the human person. A position likewise recognized in *Article***19(2)** of the Constitution of Kenya which provides that the purpose of recognition and protecting human rights and fundamental freedoms is to preserve the dignity of a human being. In counsels' view, dignity in this Article can only refer to the inherent or *innate* quality of a human being. On that account, counsel faulted the Judges for their failure to substantiate based on concrete evidence that sexual orientation was based on inherent factors which go to the core of a human being; and for interpreting the word "every person" to accommodate people's behavior and sexual preferences as opposed to safeguarding the freedom from discrimination for persons based on their attributes of being human beings; and that discrimination on ground of "sex' does not include sexual orientation but *innate* attributes/constituent of a human being.

On the refusal to register the proposed NGO, counsel submitted that since the appellant's action was undertaken pursuant to provisions of the Act, the resulting decision was therefore appealable to the Minster, and on that account, counsel faulted the Judges for their failure to uphold the appellant's objection that the 1st respondent's petition was premature.

On the right of Association, the Judges were faulted as their finding went against the spirit and letter of sections **162,163** and **165** of the Penal Code all of which criminalize homosexuality; for the failure to appreciate that the rights as guaranteed under the constitution do not extent to the formation of groups which promote criminal activities; that the Judges failed to properly appreciate

that those rights are guaranteed to persons by virtue of their being human beings and not by virtue of their being in possession of certain attributes, they determine for themselves; that the definition of "all persons" does not mean equality of all life styles or all relationships notwithstanding, that the said right is not absolute but qualified as it is subject to the legitimate limitations provided for in the law among which fall those prohibited under the above provisions of the Penal Code.

On the adoption and application of the South African model on the promotion of LGBTIQ Rights, counsel faulted the Judgesfor the failure to exercise caution in the adoption and application of imported judicial precedents as the constitutional backgrounds of those jurisdictions were not only distinct but also divergent from that which obtains in Kenya. That **Article 45** of the Constitution of Kenya recognizes the family unit as the natural and fundamental unit of society and the necessary basis of social order, while in contrast, the South Africa Post-apartheid constitution was the first in the world to outlaw discrimination based on sexual orientation and thereby legalized same sex marriages. It was therefore counsel's view that by taking the above approach, the Judges erroneously ignored religious, moral, cultural and social values of the Kenyan society as enshrined in **Article 10** of the Constitution.

On non-discrimination, counsel submitted that the grounds for non-discrimination set out in **Article 27(4)** of the constitution do not include sexual orientation.

To buttress the above submissions, the appellant relied on various excerpts from legal texts and journals, **Speaker of the National Assembly versus James Njenga Karume [192] eKLR, Jacqueline Kasha Nabagesera & 3 others versus**

Attorney General of Uganda & another (Uganda Misc. Cause No, 033 of 2012) **Bowers versus Hardwick 478 V.S. 186** [1986] **Judges &Magistrates Vetting Board and 2 others versus Centre for Human Rights & Democracy & 11 others [2014]** eKLR, **Seventh Day Adventists Church (EAST Africa) Limited versus Minister for Education and 3 others [2014] eKLR**; all in support of the submission *inter alia,* that the right to dignity refers to the inherent or *innate* quality of a human being; that where there is a clear procedure for redress of any particular grievance prescribed either by the constitution or an Act of Parliament, that procedure should be followed; that equality before the law is subject to the existing law and where the law prohibits certain acts,no persons can in law be permitted to promote those acts; that when considering and applying jurisprudence from other jurisdictions, courts have to exercise caution against having recourse to such imported jurisprudence, especially those arising from jurisdictions with a different constitutional background to that which informs the constitutional values of the Kenyan society.

Supporting the appeal, **Mr. Erick Obura** for the 2nd respondent, submitted that **Article 36(1)** of the constitution guarantees to every person a right to freedom of association, which includes a right to form, join or participate in the activities of an association of any kind, save that the right conferred by **Article 36** of the Constitution is not absolute as the same may legally be limited by law.

Counsel disagreed with the position held by the Judges that **sections 162,163** and **165,** of the Penal Code do not criminalize homosexuality or the state of being homosexual but only criminalizes acts against the order of nature which according to them are not defined in law. In counsel's view, the constitution is

clear in **Article 45** that, the family is the fundamental unit of society.The same must therefore be protected against anything that threatens its existence.That international law is also explicition this position as it recognizes and protects heterosexual marriages. It therefore follows that promotion of morals is widely recognized as a legitimate aspect of public interest which in counsel view, can also justify restriction.

To buttress the above submission, counsel cited in his written submissions the United Nations Human Rights Committee's decision in **Joslin versus New Zealand Communication No.902/1999) 17th July, 2002);**in support of the submission that **Article 16(1) (2)** and **(3)** of the UDHR, recognizes marriage as the union of man and wife, which accords with the cultural values of the Kenyan people and therefore provided sufficient justification for the appellant's refusal to register the proposed NGO, bent on promoting acts prohibited by the penal Code.

Mr. Harrison Kinyanjui for the 5th respondent also supported the appeal. On want of jurisdiction, counsel submitted that, the proper procedure for the 1strespondent to take to redress the appellant's rejection to register the proposed NGO, should have been for him to invoke the procedure stipulated in **section 19** of the Act, and appeal to the Minister and not to convert his grievance into a constitutional issue and seek the court's intervention.

Turning to the merits of the appeal, counsel faulted the Judges for failing to properly appreciate the objectives of the intended association which in counsel's view, would include expressing themselves sexually outside the heterosexual norm permitted by law. Secondly, it was not true as contended by the 1st

respondent and wrongly appreciated by the Judges that they had no platform through which they could champion their rights as **Article 59(3)** of the constitution, gave them a plat form through the **Kenya National Human Rights and Equality Commission;** that thesexual orientation intended to be articulated through the proposed NGO and which was sanctioned by the Judges and which is not covered under **Article 27,**falls squarely into the crimes provided for in sections **162, 163** and **165** of the Penal Code; that permitting the registration of the proposed NGO and to allow the activities proposed in the objectives of the proposed NGO, would be tantamount to allowing a clear flouting of the law with impunity. Lastly, that declaration number 1 in the impugned decision which was never sought for by the 1st respondent and was therefore granted by the court on own motion contrary to the cardinal principle, that a party is bound by its own pleadings should not be allowed to stand.

To buttress the above submission, counsel cited in his written submissions the case of **Owners of Motor Vessel Lilian "S" versus Caltex Oil Kenya Limited[1989] KLR1,** for the reiteration of the cardinal principle on what does or does not amount to want of jurisdiction, the case of **Diana Kethi Kilonzo & Another Versus Ahmed Isack & Another [2014] eKLR Africog Versus IEBC [2013] eKLR, Kones versus Republic and Another exparte Kimani wa Nyoike Civil Appeal No. 94 of 2005, Speaker of the National Assembly versus Karine [2008] 1KLR (EP) 425,** among others; for the reiteration of the principle that, where there is a clear procedure for redressing a particular grievance, that procedure should be exhausted before seeking the Court's intervention. Also cited was the persuasive authority of **Kanane versus the State [2003] (2) NLR67 CA** for the reiteration of the submission that the appellant should not have been faulted by the High Court

for refusing to register an association bent on promoting criminal activities outlawed by the Penal Code.

Opposing the appeal on behalf of the first respondent, learned counsel **Waikwa Wanyoike** adopted the written submission filed by the 1st respondent without highlighting the same. In summary, the first respondent submitted that the refusal of the appellant to register the proposed NGO, constituted a blatant restriction on the 1st respondent's constitutional rights as enshrined in **Article 27, 28, 33** and **36** of the constitution; that under **Article 24(3)** of the Constitution, the burden of proof demonstrating that the restriction on each pleaded constitutional rights was necessary and justifiable rested on the appellant, which according to the first respondent, the appellant failed to discharge before the High Court; that nowhere in the judgment did the Judges ever discuss whether being an LGBTIQ is an *innate* attribute.

The 1st respondent submitted that no procedure existed for appeal of the appellant's administrative decision rejecting the first respondent's proposed NGOs names. The 1st respondent cannot therefore be faulted for seeking the courts intervention.

On the alleged wrong adoption and application of foreign jurisprudence, especially that of the South African Constitutional Court model, the 1st respondent submitted that, these were referred to merely as comparative jurisprudence and that the reasoning arrived at by the Judges was reached after the Judges independently considered all other relevant factors and arrived at the conclusion that, the first respondent's right to freedom of association had been violated.

That a proper interpretation and appreciation of both the preamble, **Article 8** and **32** of the Constitution leaves no doubt that the preamble celebrates the Ethnic, cultural and religious diversity of the nation meaning, no religion has primacy over the other. It guarantees to everyone, the right to freedom of conscience, religion, thought, belief and opinion. The Judges were therefore not only justified but also correct in their finding that freedom of religion encompasses the right not to subscribe to any religious belief, and not to have the religious beliefs of others imposed on one.

It was the 1st respondent's submission that, the issue before the High Court was not whether homosexual persons have a right to engage in criminalized homosexual behavior under the penal code, but whether homosexual persons have a right to form an association for whatever purpose; that the High Court properly recognized that while the penal code criminalizes certain sexual acts against the order of nature, the Penal Code does not criminalize homosexuality in general. Neither, does the penal code criminalize the right of association of people based on their sexual orientation. That the High Court in the impugned Judgment, did not fail to uphold the provisionsof the penal code that outlaw homosexual behavior but it found that those provisions did not limit the first respondent's right of association.

To buttress the above submission, the 1st respondent cited the Supreme Court of India Petition Number 76 of 2016 **Navtej Singh Johar & others versus Union of India** (Johar case**),** through secretary Minister of Law and Justice decriminalizing **section 377** of the Indian Penal Code which is equivalent of sections **162,163** and **165** of the Kenyan Penal Code on unconstitutional thereby

decriminalizing consensual, adult same sex sexual conduct in India,to buttress the High Courts' holding that:

> ***(a) The fundamental rights protected by the Constitution applied regardless of the popularity of the persons in issue, and it was a core constitutional doctrine and that the Constitution reigned supreme regardless of popular or majoritarian views (Lenaola J et al at [89,92,93,123]);***
>
> ***(b) Once LGBTIQ persons were recognized as human beings they were to be accorded " the human rights which are guaranteed by the Constitution to all person, by virtue of their being human, in order to protect their dignity as human as stated in Article 19(2)" (Lenaola J et al at [104]);***
>
> ***(c) The list of prohibited grounds of discrimination was not a closed, exhaustive list such that the absence of an express reference to the term "sexual orientation" did not mean that differential treatment by reference to sexual orientation was permissible (Lenaola J et al at [102], 132]);***
>
> ***(d) The wording of the equality and non-discrimination provisions in Article 27 of the Constitution applied to "every person" and the principles of equality, dignity and non-discrimination run throughout the Constitution" and the "commitment to equality in the Constitution" was "overwhelmingly clear" (Lenaola J et al at [131,133,135]);***
>
> ***(e) The Court was "constitutionality 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 "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. An in 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."

Mr. Waikwa Wanyoike, for the 6th respondent also in opposing the appeal, submitted that whether being an LGBTIQ was an *innate* attribute was never discussed by the Judges and it should therefore be ignored as being irrelevant; that although, **section 19** of the Act provides for an internal mechanism for appeal of decisions of the Board to the Minister and if not satisfied with the Minister's decision to appeal to the High Court, the High Court however, under **Article 165(3) (a)** and (**b**) of the constitution has unlimited original jurisdiction in criminal and civil matters and the jurisdiction to determine whether a right or fundamental freedom in the bill of rights has been denied, infringed or threatened. The High Court therefore had jurisdiction to determine the issues the first respondent had raised in his petition.It cannot therefore be faulted for assuming that jurisdiction.

Counsel submitted that **Article 24(1)** of the Constitution guarantees to every person the enjoyment of the rights to the greatest extent no matter the circumstances. It therefore follows that since persons falling into the LGBTIQ group are persons, they are entitled to enjoy those rights as well; that the Judges cannot be faulted for having recourse to International Covenants, and jurisprudence generated by the United Nations Human Rights Committee, African Commission on Human and Peoples rights and other courts around the Globe interpreting those instruments as these form part of the Kenyan Municipal law by virtue of **Article2(5)**&**2(6)** of the constitution especially those touching on the universality of human rights.

Counsel submitted that, although the preamble to the Constitution acknowledges the supremacy of the Almighty God, **Article 8** qualifies that supremacy by making provision that there shall be no State religion. Counsel submitted that the appellant misapprehended the law in determining that **sections 162,163** and **165** of the penal code criminalizes gay and lesbian liaisons and therefore should not allow such persons to register an association as in counsels' view, there is no connection between the activities prohibited by the said provisions and the request the 1st respondent had made to have an LGBTIQ group registered; and that the appellant also failed to demonstrate how registration of the proposed NGO would have contributed to the aiding, abetting, counseling and promoting homosexuality and other related inchoate crimes.

On the Judges reading sexual orientation into the non-discrimination clause, counsel submitted that the factors of non-discrimination provided for in **Article 27(4)** are not conclusive and given the universality of human rights as earlier submitted, the Judges cannot be faulted for drawing inspiration from jurisprudence from other jurisdictions with similar constitutional provisions and applying it to inform their own decision that sexual orientation was a consideration that fell under that provision for purposes of non-discrimination.

To buttress the above submission, counsel cited the case of **Attorney General versus Thuto Rammoge & others CA C.G.B. 128-14,5 S. versus Makwanyane CCT/3/94, Vried versus Alberta [1998] ISCR493, National Coalition** for**Gay and Lesbian Equality and another versus Minister of Justice and other (CCT11/98, John Geddes Lawrence and Tyron Garner Versus Texas 539 US. 558 [2003], Angladlad LGBT Party versus Commission on Election, G.R. No. 190582,**

Supreme Court of the Republic of Philippines (8th April, 2010), all in support of the submission that, every human being regardless of his or her gender or sexual orientation is a person:; that a courts' obligation when interpreting the constitution owes fidelity to the constitution regardless of what the public opinion may be. That the right to dignity is a cornerstone of the constitution; that existence of a law that punishes a person on account of sexual orientation degrades and devalues such a person; that moral disapproval of a group cannot be a legitimate reason for denying them enjoyment of a right.

After close of submissions on the appeal and the matter reserved for judgment, learned counsel **Mrs. Ligunya** for the 1st respondent, applied informally to Court to have the matter reopened for her to include the **Johar case** as part of the list of authorities for the 1st respondent and to give the other parties an opportunity to express their views on the impact of the decision in the said **Johar case** on issues in controversy in this appeal. Counsel then adopted the unanimous decision in the said **Johar case** to support the 1st respondent position in this appeal.

Learned counsel **Mr. Kanjama** for the appellant, filed supplementary written submissions which he fully adopted and highlighted. Counsel submits that, with regard to the **Johar case,** the decision therein is based on a philosophy on individualism which in counsel's view, has no application in the Kenyan constitutional framework which is homegrown, rooted in its native soil and owes its validity and authority to local legal factors. Relying on the case of **Nelson Andayi Havi versus Law Society of Kenya & 3 others, [2018] eKLR,** counsel urged that in the said case, the High Court gave a correct approach to the interpretation of the constitution when the High Court emphasized that the interpretation of the constitution in Kenya should be geared towards realizing its

purpose, values and principles stipulated in **Article 259(1)** of the Constitution; that among the purposes of the Constitution of Kenya are to protect national, cultural and religious values in order to protect the wellbeing of the individuals, the family, community and the nation as provided for in the preamble to the constitution.

That, the issue of legalizing homosexuality was expressly rejected by the Kenyan people at the time of the enactment of the constitution and in its place, **Article 45** of the Constitution of Kenya which expressly protects the right of the family and recognizes marriage as a union of two adults of the opposite sex was entrenched. On account of the above, submissions, counsel urged us to hold that, allowing the registration of the proposed NGO would be tantamount to developing jurisprudence to give effect to aright or fundamental freedom which does not exist; and that we should fault the Judges for misunderstanding the right of association as regards the proposed NGO through which the 1st respondent intends to further the equality of the LGBTIQ persons in Kenya, which in counsels view literally amounts to acts of homosexuality which are criminal and contrary to the law; that if such acts were to be allowed to be practiced openly and with impunity, these would destroy the entire social fabric of the Kenyan people.

Counsel submits that before the decision in the **Johar case**, the appellant had based its submission on the decision in **Suresh Kamar Koushal & another versus Naz Foundation & others [2014] 15CCI**, particularly to demonstrate that **section 377** of the Penal Code of India was not ambiguous, a position reversed by the decision in the **Johar case**. Relying on the Supreme Court decision in **Jasbir Singh Rai & 3 others versus Tar Lochan Singh Rai & 4 others [2013] eKLR**, counsel invited us to heed the caution given by the Supreme Court, in the above case, wherein the Supreme Court stated that foreign jurisprudence should be properly appreciated and applied with caution. Citing the **Judges and Magistrates Vetting Board & 2 others versus Centre for Human Right, & Democracy & 11 others (supra), Communication Commission of Kenya & 5 others versus Royal Media Services Ltd & 5 others and Gatirau Peter Munya versus Dickson**

Mwenda Kithinji & 2 others [2014] eKLR, counsel urged us to heed the call of the Supreme Court that the Constitution should be interpreted in a holistic manner while at the same time taking into consideration the historical background to the constitutional ideals and values entrenched therein.

After carrying out a survey of the contextual differences between the Constitutions of Kenya and India, counsel urged us to be guided by the principle enshrined in Article **19(2) (b)** of the Constitution for the ideal that, the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of an individual, the community and to promote social justice and the realization of the potential of all human beings; that the family is the natural and fundamental unit of society and the necessary basis of social order and should enjoy the recognition and protection of the state; that it is the duty of every citizen to value and preserve the rich heritage of our composite culture and lastly to acknowledge the supremacy of the Almighty God of all creations.

Applying the above ideals to the reasoning and conclusions in the **Johar case,** counsel submitted that **Article 24** of the Constitution is the anchor provision of the entire bill of rights. Counsel cited the case of **Republic versus Danson Mgunya [2016] eKLR,** as approved in **Republic versus Ahmed Abdolfathi Mohamed [2018] eKLR** and invited us to be guided by the guidance of the Supreme Court in the above case and bear in mind that justice cuts both ways, and also stressed the importance of interpreting the Constitution in a manner that uphold its values and principles, advances the rule of law and contributes to good governance. That all what this means is that we should uphold the public interest by outlawing homosexuality behavior due to its harmful effects on the common good of the Kenyan society.

Turning to limitation, counsel reiterated the earlier submission and urged us to find that the provision in **sections 162** and **165** of the Penal Code meets the tests in **Article 24(1)** of the Constitution on the parameter for limiting the enjoyment of a right

or fundamental freedom. The importance of the limitation in counsels' view, is that, it is for the protection of the societal values and the moral fabric of the Nation that is the foundation of the Kenyan people.

In reference to the right to human dignity, counsel submitted that they affirm the respondents' position that the acts described in **section 162** of the Penal Code and which are described as unnatural, are in themselves regardless of consent degrading. Counsel set out what in his view are the underlying issues in the decision in the **Johar case** and submitted that the ideals expounded in the said decision are different from the ideals set out in the Constitution of Kenya. Similarly, counsel urged us to reject what was termed as the **Yogyakarta Principles** and reiterated that no evidence was produced in the Court to show that sexual orientation is *innate.*

Referring extensively to excerpts from Journals and other research materials as well as case law from across the globe, counsel submitted that the Constitution of Kenya in seeking to protect the minority and marginalized in **Article 56** of the Constitution does not refer to minority status based on behavior or freely chosen attributes but minority status based on inherent characteristics. After carrying out a survey of the Kenyan and other foreign jurisprudence on the subject, counsel urged us to treat the decision in the **Johar case** with the caution it deserves because, in counsel's view, that decision does not affect the ideals entrenched in the Kenyan Constitution or the grand compromise between individual rights and public interest captured in the provisions of the Kenyan Constituon.

Mr. Obura for the 2nd respondent associated himself fully with the submissions advanced on behalf of the appellant with nothing useful to add.

Mr. Ochiel for the 6th respondent agrees that the decision in the **Johar case** is only of persuasive value; that there is need for the exercise of caution when seeking to rely on foreign jurisprudence; that it is only that which is relevant to the Kenyas local situation that needs to be borrowed.

Turning to a comparative analysis of the relevant constitutional provisions in both the Indian and the Kenyan Constitutions, counsel submitted that both Constitutions have restrictions on the enjoyment of rights provided for in both constitutions; save that in the Kenyan context, the burden is on the person seeking to restrict the enjoyment of the right to justify the restriction

This is a first appeal. My mandate is to re-appraise; re-assess and re-analyze the evidence on the record before me and arrive at my own conclusions on the matter and give reasons either way. (See the case of **Sumaria & Another versus Allied Industries Limited [2007] 2KLR1).** I am also reminded that I should be slow in moving to interfere with a finding of fact by a trial Court unless I am satisfied that it was based on no evidence, or based on a misapprehension of the evidence or the judge had been shown demonstrably to have acted on a wrong principle in reaching the finding he/she did. (See also **Musera versus Mwechelesi & Another [2007] 2KLR 159)**.

I have considered the record in light of the above mandate and the rival submissions and case law relied upon by the parties in support of their opposing positions. The issues that fall for my consideration are the same as those raised by the appellant, save that these will be condensed into two namely:

(1) ***Want of jurisdiction.***
(2) ***Whether the applicable provisions of the Constitution were properly construed to crystalize the right of association in the 1st respondent.***

On want of jurisdiction, it is now trite law that jurisdiction is everything; that without jurisdiction, a court of law has no mandate to proceed further with the determination of any matter before it; that where the issue of jurisdiction is raised, it has to be determined first and once a court of law comes to the conclusion that it has no jurisdiction, it has to down its tools. Further that jurisdiction is donated either by a Charter, constitution or legislation. Therefore, parties have no mandate to confer jurisdiction on a court of law where non-exists. See the case of the **Owners of Motor Vessel Lilian versus Caltex Oil Kenya Limited** (supra).

It is not disputed that when the 1st respondent presented his request to the appellant for the registration of the proposed NGO and the appellant's Director declined to accede to that request both of these actions were undertaken pursuant to the provisions of the Act. The content of the communication dated 25th March, 2013 which precipitated the petition resulting in this appeal was issued in exercise of the Directors mandate donated by **Regulation 8(3) (a) (b)** of the Appellant's Regulations 1992. It provides:-

> ***"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 organization 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 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 un desirable."

It is also not disputed that the issue of want of jurisdiction was also raised before the High Court and was discounted for the reasons already highlighted above. It was correctly found by the Judges that it is **section 32** of the Act that donates power to the Minister to make regulations among others for prescribing the information to be supplied in every application for registration. I have perused the provisions of the Act, and I find that section 3 establishes the Board. The composition of the Board is provided for in **section 4**, while **section 5** establishes the office of an Executive Director whose role is that of the head of the Bureau and is also responsible for the day today management of the business of the Board in his capacity as its secretary.

Section 14 of the Act is the substantive provision governing refusal of registration. It only talks of three instances when the board could refuse registration. Regulation 8(3) dealing with refusal of registration of an NGO under the Act is the one whose applicability was interrogated by the board. I find no other provision donating power to the Director to act under **section 14**. Absence of a specific provision in the Act donating distinct functions to the Executive Director as opposed to those mandated to the Board on the one hand, and absence of regulation(s) underwhich the Board, could discharge its functions under **section 14** of the Act, independently of that donated to the Director under **Regulation 8(3)**, the only plausible inference that I can draw from the above position is that, the action of the executive Director Under **Regulation 8(3)** fell

under **section 14** of the Act. They are therefore functions discharged under **section 5** of the Act on behalf of the Board by the Director in his capacity as the executive officer of the Board. They were therefore amenable to the **section 19(1) (2) & (3**) procedures. These provide:-

> ***"(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 of an appeal.***

The words "Any organization" in this section refers to organizations that fall for registration under the Act namely NGOs. Section 2 of the Act defines an NGO as:-

> ***"Non-governmental organization" mean a private voluntary grouping of individuals or associations, not operated for profit or for other commercial purposes, but which have organized themselves nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development, charity or research in the areas inclusive of, but not restricted to health, relief, agriculture, education, industry and the supply of amenities and services"***

What I have on record is the 1st respondents request for the registration of an NGO. This therefore falls into the above definition. What was in contest were the names and objectives of the proposed NGO. There was therefore nothing constitutional in issue as at that point in time. The constitutional issues only arose in the petition after the 1st respondent's request for the registration of the proposed NGO was turned down severally by the appellant.

As already highlighted above, the entries on the record of 22nd January, 2014 indeed indicate that both parties agreed that, issues raised in the petition touched on the rights of Gays and Lesbians in Kenya and that those issues were of considerable public interest and yet novel in Kenyan jurisprudence and needed the services of a three Judge bench to determine the same. It is the above consensus that paved the way for the matter to be set down for hearing. The above observation notwithstanding, I still reiterate my earlier finding that the genesis of the 1st respondent's petition was a purely administrative action executed by the Director on behalf of the Board declining registration of the 1st respondent's proposed NGO with no constitutional underpinnings at that point in time. It was therefore amenable to the **section 19** of the Act procedures which procedures ought to have been invoked and exhausted before seeking the court's intervention, notwithstanding, the undisputed constitutional mandate bestowed on the High Court. It was therefore tainted and it is my view that, had the Judges properly construed and applied the above provisions as I have done, they would have downed their tools on account of the petition being premature, rerouted the 1st respondent to exhaust the procedures under **section 19** of the Act before seeking a judicial pronouncement on the constitutional issues raised in the petition. Issue of the appellant's failure to notify the 1st respondent of a right of appeal upon rejection of his request for registration of the proposed NGO, did not arise as none is provided for either in the Act or in the regulation.

The above finding disposes of the appeal which in my view is for allowing. However, should I be wrong in my interpretation and appreciation of the above provisions of the Act, I find it prudent to proceed and determine the 2nd issue.

It is not disputed that, it is the interpretation of the provisions cited by the 1st respondent in his petition as access provisions for the reliefs sought in the petition and the application of that interpretation to the supporting opposing facts and drawing conclusions thereon, that gave rise to the complaints raised in the appellant's memorandum of appeal initially of eleven (11) grounds but currently condensed into two.

The approach the Judges took was first of all, to identify the proper threshold that governs constitutional interpretation. The assessment highlighted above is a clear demonstration that, the trial Judges bore in mind the correct threshold in the interpretation of the constitutional provisions they were called upon to interpret. As to whether that threshold was properly applied to the opposing positions herein, is what I now proceed to interrogate and make findings thereon.

Issues as to whether being an LGBTIQ is *innate* or otherwise was never interrogated by the Judges. I will therefore steer clear of it notwithstanding, the extensive submissions advanced on it by the appellant. I however agree that the meaning to be ascribed to the word "person" should be as defined in **Article 260** of the Constitution. I also agree that all human beings, subject to the Kenyan constitutional prescriptions are entitled to protection of the constitutional guarantees enshrined therein but subject to limitations provided for either under the said Constitution or the law.

On the right entrenched in Article **36** of the constitution, I agree with the view held by the Judges that it enshrines the right to freedom of association; that the same is guaranteed to every person. It is a right to form, join and participate

in the activities of an association of any kind whose registration cannot constitutionally be refused, rejected or withheld arbitrarily or unreasonably, save that such withdrawal or withholding of registration is subject to the right of fair hearing.

On **Articles 20** of the UDHR and 22 of the ICCPR, I agree that these instruments were properly applied to the proceedings pursuant to the provision of **Article 2(5) &2(6**) of the Constitution as Kenya had ratified both of them. I find the construction and application of these provisions as carried out by the Judges was in order as it was correctly found by the Judges that these instruments also provide clearly that they apply to "all persons". I also reiterate that the word "person" used in the said instrument carry's the meaning ascribed to it in Article 260 of the constitution.

The Judges also correctly reviewed legal texts, decisions and resolutions of the United Nations, human Rights Committee and the African Commission of Human and Peoples rights, pursuant to which the Judges ruled that the right to associate is not selective, and that this right applies to everyone, save that the enjoyment of the same is subject to the limitation provided for both in the Constitution and the law of the land.

In addition to the above, the Judges also reviewed jurisprudence from around the globe on the subject, and ruled that from the Constitution and international instruments reviewed by them as well as Resolutions from Human Rights Commissions around the globe on the right of association, they are explicit that these apply regardless of the popularity or otherwise of the association; that from the content of the opposing submissions, it was apparent that the group whose rights of association the proposed NGO sought to champion was not

popular or acceptable going by the reasons the appellant and those supporting the appeal gave for declining registration as it was viewed as a group that would promote decadence in society. A position well founded both on the facts and submissions of all the parties in opposition to the petition at the High Court and who are now in support of the appeal before this Court.

The Judges then reminded themselves of their role as a court,namely, to apply the law without fear, favour, prejudice, irrespective of any beliefs held by parties to the litigation and bearing the above role in mind, proceeded to make findings and correctly so in my view that the duty of the board was to act in accordance with the constitutional mandate bestowed upon it; that what the first respondent sought to champion through the proposed NGO was the right to associate and not the right to champion criminal activities. The sustainability of this view will depends on my determination as to whether the intended activities fell within the **sections 162,163** and **165** of the Penal Code. With regard to this, the Judges simply stated that the acts provided for in the said provisions were not defined. It is my view that the Judges ought to have made a definitive determination as to whether these fell into the sexual orientation category or not because this has been the borne throughout the proceeding both before the High Court and now before this Court.

Turning to the views held by Kenyans as a society, it was correctly appreciated by the Judges that Kenya as a society, if it were to recognize that LGBTIQ persons are human beings and which in the Judges view, the board expressly recognized as much through the averments in the replying affidavit, however, reprehensible it found their sexual orientation, it will be obligated to accord them human rights which are guaranteed by the constitution by virtue of

their being human beings in order to protect their dignity as may be. Save that by virtue of the same prescriptions in the Constitution, such according of human rights must be within the limits permitted for either by the constitution itself for the law. Second, such a protection falls for rights either crystalized and entrenched in the Constitution itself or laws made thereunder.

The Judges next reviewed the content of the appellant's letter of 23rd march, 2013 containing the reasons for the appellant's refusal to register the proposed NGO, the applicant's replying affidavit filed in response to the 1st respondent's petition in light of the objectives, the 1st respondent had put forth as objectives of the proposed NGO and concluded that the board had interfered with the 1st respondent's right to associate under **Article 36** of the Constitution. The correctness of this finding is dependent on the determination as to whether sexual orientation on the basis of which the Judges crystalized the right of association in the 1st respondent falls into the acts prohibited by **sections 162, 163** and **165** of the Penal Code.

On justification of the 1st respondent's right to freedom of Association, the Judges reviewed case law and Article **24(1), (2)** and (**3**) of the Constitution, and correctly appreciated in my view that the right of association guaranteed to the 1st respondent under **Article 36** is not absolute. It can be limited. The test being namely, first that the limitation is by law. Secondly, that such limitation though by law must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Thirdly, that such limitations have to take into consideration all the relevant factors namely the nature of the right, purpose of the limitation and the nature and extent of the limitation.

Fourthly, the need to ensure that the enjoyment of rights and fundamental freedoms by an individual does not prejudice the right and fundamental freedoms of others. Fifthly, the need to examine closely the relation between the limitation and its purpose, and whether there are less restrictive means of achieving that purpose. Sixthly, in the case of the limitation by statute, there must be an express intention to limit that right or fundamental freedom and the nature and extent of the limitation. There is also the need for the provision to be clear and specific about the right and or freedom to be limited and the nature and extent of such limitation. Further that such limitation has to ensure that there is no derogation from the core and essential content of the legislation. There is also an obligation placed on the party wishing to limit the right to sufficiently demonstrate to the court or tribunal or some other authority that the requirement of this Article have been complied with.

Upon reviewing and construing **sections 162, 163** and **165** of the Penal Code, in light of the above prescriptions on the limitation of enjoyment of the right of association, the Judges ruled that these provisions outlawed carnal knowledge against the order of nature; that they do not criminalize homosexuality but only certain acts against the order of nature, which is not defined in the penal code. Second, that the fact that the state does not criminalizes persons who profess to be homosexual and lesbian is in itself a clear manifestation that sexual orientation is not necessarily criminalized and that there are sufficient safeguards within the law should the proposed NGO transgress the law.

The appellant and those supporting the appellant's position relied on the above Penal Code provisions as basis for justification for withholding the

registration of the proposed NGO, and subsequent opposition to the 1st respondent's petition seeking to enforce the registration. As already observed above, the Judges refrained from making definitive findings on the proper definition of homosexuality and whether that definition fits "conduct against the order of nature" legislated against in those provisions. No reason was given by the Judges for refraining from doing so. However, I cannot loose sight of the mention in the submissions of the parties that there is a matter pending determination before the High Court over the constitutionality of those provisions.

The Judges in my view, correctly appreciated that sexual orientation is not one of the exceptions to limitation of rights under **Article 27(4),** but in their view, the operative word used in the said Article is "including"; that construing that word in light of the intent and purport of the principles governing the interpretation or the construction of the constitution with a view to availing the enjoyment of the right would crystalize the right of non-discrimination for the enjoyment of the rights of association by persons with sexual orientation. It is my view that, although, it was correctly observed by the Judges that the guiding principles on interpretation is that it should favour the enjoyment of the right, what the Judges however failed to appreciate as I have already pointed out above, is that such enjoyment has to be within the limits permissible in law. Meaning that non-discrimination on account of sexual orientation, can only be accorded and enjoyed on condition that what "sexual orientation" means and what people who believe in it, practice, does not fall within the acts prohibited in **sections 162, 163** and **165** of the Penal Code. Going by the views expressed by the opposing positions of the parties in their respective pleadings and submissions highlighted above, enjoyment of the right of non-discrimination on

account of sexual orientation, would only be dependent on a clear definition as to whether sexual orientation falls into the category of conduct against "the order of nature" legislated against in the aforesaid penal code provisions. A position the Judges made no definitive findings on it as already alluded to above. They simply stated that as at now it is not covered under the current prohibitions in the said provisions.

The Judges then reviewed the reasons the appellant gave for rejecting the registration of the proposed NGO, discounted them and ruled that there was lack of demonstration of basis for the limitation; that the 1st respondent had sufficiently demonstrated on the facts that there was lack of basis for the limitation; that the moment the first respondent demonstrated sufficiently that there was no basis for the limitation, the burden shifted onto the appellant to demonstrate justification with reference to the law that allows it to infringe on that right; and which in the Judge's view, the appellant had not discharged. As already observed above, this was dependent on the definition that "sexual orientation" has nothing to do with the prohibited acts against the order of nature and which as I have alluded to above, the Judges failed to define.

The Judges also considered and discounted strong moral and religious beliefs as a ground for limiting the enjoyment of rights based on ones sexual orientation as these are not laws contemplated by the constitution which is explicit that freedom to profess a religious belief enshrined in **Article 32** of the constitution, encompasses the freedom not to impose those beliefs on others. It therefore follows that the appellant by limiting the enjoyment of these rights through the proposed NGO on the basis of strong Christian and Moslem religious beliefs limited the 1st respondent's enjoyment of those rights without any

justification and therefore in breach of its constitutional mandate, ruled the Judges. In arriving at the above conclusion, the Judges failed to distill the values of the freedom of religion guaranteed in **Article 32** of the constitution and how these are either distinct or interface with those enshrined in Article 10 of the constitution before discounting their application to the issues in controversy before them.

The Judges construed the constitutional provisions on non-discrimination namely, **Article 21(1) (2) &(3); 20(4); 259 & 10(2)** of the constitution and ruled that the appellant as a statutory body was duty bound to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the bill of rights, and that as a court of law, the Judges were enjoined and correctly so in my view, to interpret the bill of rights with a view to promoting the values that under lie an open and democratic society based on human dignity, equality, equity and freedom; that in light of the above principles, the appellant as a statutory body was duty bound to address the objectives put forth by the 1st respondent in the proposed NGO with a view to allowing the exercise of the right of association by LGBTIQ groups by according them an opportunity to form an association of any kind and with any one.

In response to this finding, I reiterate my earlier stand that the Judges correctly laid basis that the provision on the interpretation of the constitution, advocates for an interpretation that favours the enjoyment of the right or fundamental freedom sought to be protected or enforced. It was however, necessary for the Judges to provide a basis for holding that the persons whose rights the first respondent sought to champion their rights through the proposed NGO fell into the category of the vulnerable within the context of the Kenyan

society. In the absence of such demonstration, the appellant cannot be faulted for holding the view that the LGBTIQ group did not fall into the category of the vulnerable in the context of the Kenyan society, but in the context of persons whose attributes are outlawed under the Penal Code.

The Judges reiterated and correctly so in my view, that the right of non-discrimination enshrined in **Article 27(4)** applies to everyone and although sexual orientation is not explicitly indicated therein as a ground for non-discrimination, it can be read into those other categories by applying the word "includes"; that the prohibition against non-discrimination applies to both direct and indirect discrimination; that it covers "any person" which leaves room for non-discrimination on the ground of sexual orientation; that the appellant by rejecting to register the proposed NGO on the basis of proposed objectives which according to the appellant were not morally acceptable in Kenyan society, arrogated to itself a power it did not possess; that in doing so, the appellant failed to uphold the national values guaranteed in, **Article 10**; that an interpretation of the Constitution permitting the exclusion of people based on sexual orientation would be an affront to the principles of human dignity, inclusiveness and equality. It would also be contrary to the prerequisites in **Article 259(2)** which enjoins courts of law to interpret the constitution in a manner that advances the enjoyment of human rights.

In light of the totality of the above reasoning, I reiterate my earlier finding above that, the right in **Article 36** guaranteed to "every person" is not absolute but subject to limitation. Second, that it is correct that the word "includes", in **Article 27(4)** can be construed and applied to include "sexual orientation" as one of the categories for non-discrimination; save that as already held above, this was

subject to the Judges making a definitive finding that "sexual orientation", on the basis of which they had crystalized the right of association in favour of the LGBTIQ persons in Kenya, through a judicial pronouncement as one of the elements for non-discrimination under **Article 27(4)**, does not fall into the category of acts prohibited under **sections 162, 163** and **165** of the Penal Code, namely, "conduct against the order of nature". The case law, especially, that from the Supreme Court of India, Canada and South Africa as highlighted above, and which in the Judges view, provided persuasive guidelines on how a court of law should approach that issue and which in my view were based on constitutional legislative backgrounds distinct from those obtaining in Kenya, make the crystallization of this right merely aspirational in so far as the current Kenyan society is concerned.

My reasons for saying so is because, the South African and Canadian Models have the constitutional as well as legislative backups, while the Indian Model struck out from its Penal Code provisions similar to those under which the appellant acted to decline registration for the proposed NGO. As already mentioned above, in the absence of either a striking out of those provisions, from the Penal Code or have " sexual orientation" entrenched in **Article 27(4**) of the Constitution, the Judicial pronouncement by the Judges on the basis of which they accorded the 1st respondent the right of non-discrimination on account "of sexual orientation" has not in my view, crystalized that right in the 1st respondent's favour.

From the above assessment, protection of a right or fundamental freedom is dependent on either an entrenchment of such a right in the constitution or through a legislation. The constitution itself has provided for methods for such an

entrenchment. **Articles 255 (2)** makes provision for an amendment to the constitution **through** a referendum; **Article 256,** through legislation; and **Article 257** through popular initiative. None of these cover a judicial pronouncement. It is therefore my finding that the issue as to whether "sexual orientation" falls into the elements for non-discrimination enshrined in **Article 27(4)** as found by the Judges, has to be put to the Kenyan people through any of the above methods with a view to entrenching it in the Constitution in order for it to crystalize the right accorded to the 1st respondent by the impugned Judgment. Short of the above in my view, it only amounts to an aspirational right.

The upshot of all the above assessment is that, I find merit in the appeal. It is accordingly allowed. The Judgment of the High Court dated 24th April, 2015 is set aside save for the order that each party to bear own costs which I affirm.

Dated and delivered at Nairobi this .....day of ..... 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: WAKI, NAMBUYE, KOOME, MAKHANDIA & MUSINGA JJ.A)

CIVIL APPEAL NO. 145 OF 2015

NON- GOVERNMENT ORGANIZATION CO-ORDINATION BOARD.....APPELLANT

VERSUS

ERIC GITARI .....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT
AUDREY MBUGUA ITHIBU.....3RD RESPONDENT
KENYA CHRISTIAN PROFESSIONALS FORUM.....4TH RESPONDENT
KATIBA INSTITUTE.....5TH RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya of Nairobi by Lenaola, J. (as he then was), (Mumbi Ngugi & Odunga JJ) delivered on 24th April 2015

in

Petition No. 440 of 2013)
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JUDGMENT OF KOOME, JA

[1] This appeal raises a hot issue touching on constitutional interpretation of the right to; freedom of association, non- discrimination, human dignity, rights of minority and equality before the law in respect of persons belonging to lesbian, gay, bisexual, transgender, intersex and queer groups (LGBTIQ). Though as the matter progressed during the hearing in the High court, the central issue became whether an association of gays and lesbians can be registered in Kenya. The issue of Bisexual, Transgender and queer seems not to have progressed much.

[2] On the other hand, the Non-Governmental Co-ordination Board (appellant), supported by the Attorney General (2nd respondent) and Kenya Christian Professional Forum (5th respondent) took a divergent stance as they argued quite eloquently that allowing registration of an association of gays and lesbian would set Kenya on a "*slippery slope*". They argued that the decision of the High court unless set aside, had the potential of upsetting the entire fabric of the society by challenging entrenched family values in **Article 45(2)** of the Constitution which limits marriage to two consenting persons of the opposite sex and upset the societal moral values. Another key line of argument taken by the appellant was that refusal to approve the names for registration of the proposed NGO, had nothing to do with the fundamental rights protected by the Constitution; there is limitation to the said rights and at best, refusal was in compliance with the provisions of **Section 19(1)** of the Non-Government Organization Co-ordination **Act No 19 of 1990** which provides an appeal mechanism to the Minister. Lastly the right of association could not be extended to the proposed NGO because the Penal Code outlaw homosexual behaviour and other related crimes and it is akin to registering associations of criminals such as murderers and paedophiles.

[3] This is a glimpse of the background information; Eric Gitari, the 1st respondent, (Eric) deposed in an affidavit supporting the petition that he was working as a lawyer at the Kenya Human Rights Commission as a programme assistant from the year 2010. Together with his colleagues, they carried out

research and documented human rights violations targeted at the LGBTIQ persons in Kenya on account of their real or perceived sexual orientation and gender identity. They published a report titled '**The outlawed amongst us**'. According to Eric, the report showed that Kenyans who belonged to LGBTIQ community were often 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 and gender identity. This is what prompted him to apply to register a non- governmental organization (hereafter referred to as "proposed NGO") with the Non- Governmental Organization Co-ordination Board the appellant (hereafter referred to as the NGO Board) to enable such people meet over that human rights protection.

[4] That sometimes on or about 2nd April, 2012, Eric applied to reserve names for registration of an NGO. The names proposed were National Gay and Lesbian Human Rights Commission and other variations such as 'Collective' 'Observatory' and 'Association' instead of 'Commission'. After some back and forth, Eric's request was turned down for reasons that the NGO Board could not register a gay and lesbian association. Out of the two reasons given for the refusal and the one that seems to answer the request by Eric was that the name of the proposed NGO in the opinion of the director was repugnant to, or inconsistent with a law or otherwise undesirable as it will seek to protect gay and lesbian persons. This was pursuant to **regulation 8(3)(b).** Consequently by its letter

dated 25th March, 2013 the Board set out the basis of its rejection, quoting **Section 162** of the Penal Code which it said "**criminalises gay and lesbian liaisons**" and also because the proposed names were "inconsistent with any law or is otherwise undesirable"

[5] That is what precipitated the petition before the High court which sought, *inter alia*, a determination of the provisions of several Articles of the Constitution, in particular Article 36 in the following manner;-

1. **"That a judicial interpretation of 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. **A declaration that the failure by the respondents to comply with their constitutional duties under Article 36 infringes on;**

    i. **The right of marginalized 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 as in spirit**

iii. **The costs of the petition."**

[6] The petition was strenuously opposed by the appellant, who relied on an affidavit sworn by Mr. Lindon Otieno, their legal affairs manager. The appellant was categorical that the petition was premature, as the 1st respondent failed to exhaust internal remedies under the NGO Act; that there was no breach of the 1st respondent's right to associate with others and the infringement of his rights if any was justifiable. The appellant's position was supported by the 2nd and 5th respondents.

[7] Upon hearing the parties, the learned judges of the High court comprising a Bench of three, found the petition was meritorious, allowed the same and granted the following declarations and orders which are the subject matter of this appeal;-

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 of association by being able to form an association.

iv. We hereby issue an order of Mandamus direction the Board to strictly comply with the constitutional duty under **Article 27** and **36** of the Constitution and the relevant

provisions of the Non- Governmental Organizations Co-ordination Act.

[8] Being dissatisfied with the above, the appellant filed the instant appeal which is predicated on some 11 grounds of appeal. I will summarize them as I think they are cross cutting or overlapping in the manner in which they were presented before us. The learned judges erred in law and fact by;-

i. Identifying lesbian, gay, bisexual, transgender, and queer as innate attributes of various persons without any or any sufficient evidence in support, and by failing to recognize that these attributes were the consequences of behaviour traits which the society has a right and duty to regulate for the sake of the common good.

ii. By holding that a refusal to register the 1st respondent's proposed NGO was not a decision contemplated under **section 19** of the NGO Act for which an appeal lies to the minister.

iii. Failing to recognize the limits of the right of association, and the fact that the right is enjoyed by persons qua persons and not based on any attributes they may determine for themselves.

iv. By finding that the right of association extended to the proposed NGO of the 1st respondent.

v. By adopting and applying ratio from South Africa without recognizing the distinct and divergent constitutional background of the said country.

vi. Disregarding the religious preference of the Penal Code that outlaw homosexual behaviour, as well as any aiding, abetting, counselling, procuring and other related and inchoate crimes.

vii. By effectively reading into the Constitution's non-discrimination clause the ground of sexual orientation.

viii. By misunderstanding and misapplying the limitation clause in **Article 24** of the Constitution of Kenya, 2010.

ix. By rejecting the legitimate role of the moral purpose of public policy test in determining whether to accept registration of proposed applications for association of persons.

x. By rejecting the legitimate role of the moral purpose or public policy test in determining whether to accept registration of proposed applications for associations of persons.

xi. By granting various declarations sought and the order of mandamus in the decree appealed against.

[9] During the plenary hearing, Mr. Kanjama learned counsel for the appellant relied on his written submissions and made some oral highlights to elaborate further on the above grounds. Counsel urged us to address the questions whether the Bill of Rights enshrined in **Chapter 4** of the Constitution of Kenya 2010 applies to persons by virtue of being persons/human beings or by virtue of having certain attributes or behavioral characteristics which they may have determined for themselves. Counsel gave examples of various things that certain people may prefer, certain foods, or tax evasion or dislikes of football regardless of their legality and wondered whether they can form a basis for enjoying human rights. He went on to state that **Article 27 (4)** of the Constitution provides the recognized grounds of discrimination as including **'race, sex, pregnancy, marital status,**

health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth' .

[10] He pointed out that **'sexual orientation'** is not listed as one of the prohibited grounds of discrimination meaning that persons who are gays and lesbians cannot claim protection against discrimination under the above. According to him, being gay or lesbian is not an innate or inborn condition but a lifestyle the gays and lesbians have chosen for themselves. Therefore it does not pass muster any ' any ground' which can only be interpreted *ejusdem generis* as including only inherent and stable rights of individuals or community.

[11] Counsel for the appellant also faulted the trial court for holding that the Board was not dealing with an application for registration of the proposed NGO, but with the question of whether or not the name(s) that the 1st respondent sought to reserve were acceptable. The court found the Board in rejecting the application relied on **Regulation 8(3) (b) (ii),** which meant it was not a decision as contemplated under **section 19** of the NGO Act where an appeal would lie to the Minister. Counsel submitted that the appellant has the power to refuse registration of any proposed association if satisfied that its proposed activities or procedures are not in the national interest as stipulated in **Section 14(1)** of the NGO Act. In his submission, the proposed NGO sought to, amongst other things, promote and perpetrate homosexual activities, which are criminal and unlawful in this country. Counsel was emphatic that where a statute clearly established a dispute resolution

procedure, it should be followed according to the dicta in the case of;- **SPEAKER OF THE NATIONAL ASSEMBLY VS JAMES NJENGA KARUME** (1992) eKLR where it was held

> **"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."**

[12] Arguing grounds Nos. 3 and 9 as to who enjoys the right of association and whether there are limits under **Article 24 (2)** of the Constitution, counsel challenged the holding by the court that the Board was obliged to demonstrate through legislation that the freedom to associate for persons known as LGBTIQ's is limited due to their sexual orientation. According to counsel, this holding was contrary to the provisions of **Sections 162, 163** and **165** of the Penal Code which criminalizes acts of homosexuality; by implication therefore the right of association cannot extend to formation of organizations or groups which will promote acts that have been criminalized by law. The Penal Code in his view was sufficient legislation that limited the rights of association by gays and lesbians. Counsel went on to submit that although **Article 36** of the Constitution provides a right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind, this right applies to persons qua persons and **"every person"** could not include the LGBTIQ community. To buttress this point counsel made reference to the Ugandan case

of **JACQUELINE KASHA NABAGESERA &3 OTHERS VS ATTORNEY GENERAL & ANOTHER** (Uganda Misc Cause No. 033 of 2012)

[13] On the types of rights that have limitations, counsel for the appellant cited **Article 5** of the European Convention on Human rights that provides, absolute rights as those rights that cannot be abrogated; these are freedom from torture, prohibition of slavery and forced labour. In the Kenyan context, absolute rights would in addition to the above include a fair trial and the right to an order of habeas corpus. In his view, qualified rights can be interfered with in order to protect the rights of other individuals or the public interest. The majority of rights in the Human Rights Act are qualified rights under **Article 24 (1).** The registration of the proposed NGO would carry out activities that are not in the national interest or against the law. For example the said NGO would advocate for persons to carry out sodomitical acts that is tantamount to amending the Constitution through the back door to include 'sexual orientation' a pervasion that has no place in the Kenyan culture. Counsel argued very strongly that homosexuality is not only reprehensible in the Kenyan culture, but was also a recognized crime under the Penal Code even though the law does not explicitly define the offences created therein as "canal knowledge against the order of nature" as homosexual acts, counsel stated that homosexuality goes against the order of nature being sexual liaisons between people of same sex.

[14] Counsel for the appellant posed the rhetorical question of why the appellant would register the proposed NGO whose objectives would be to promote homosexuality that would be a transgression against the law. This would encourage other organizations to register themselves to pursue commission of other criminal acts or protect such offenders, in contradiction to the Penal Code. Such registration would also go contrary to the provisions of **Article 45** of the Constitution that recognizes the family unit as the natural and fundamental unit of the society and the necessary basis of social order. It is common ground that family unit arise from the union of two consenting adults of the opposite sex. The judges were faulted for relying on decided cases from South Africa which has a complex and diverse history regarding LGBTIQ rights. This having been influenced by their unique history of colonialism and the attendant effects of apartheid that gave rise to a human rights movement that outlawed discrimination based on sexual orientation. Kenya though a secular country, recognizes the supremacy of the Almighty God and it is highly religious and the two dominant religions, Christianity and Islam, both abhor homosexuality.

[15] Counsel for the appellant submitted that the Kenyan circumstances are different as homosexuality is considered a taboo and repugnant to the cultural values and morality which the courts cannot ignore as they are the key pillars of social cohesion. Further the judges overstepped their mandate by including 'sexual orientation' as a ground upon which discrimination is outlawed. Counsel

urged us to interpret the Bill of Rights holistically, taking the communitarian perspective; there is a distinction between traditional western understanding of human rights and the African conception which adopts a communitarian approach. Counsel referred to the Supreme Court decision in the case of **Judges and Magistrates Vetting Board and Another vs The Centre for Human Rights and Democracy and 11 others** [2014] eKLR where Mutunga CJ stated that the Constitution has to be interpreted holistically, within its context, and in its spirit which is;-

> **"... the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result."**

[16] Further arguments were allowed on 25th October, 2018 as counsel for the 1st respondent sought to rely on what she termed as recent development of the law based on an Indian Supreme court case of;- **Navtej Singh Johar & Others vs Union of India Criminal Case No 76 of 2016** (Johar case). Commenting on the said case Mr. Kanjama argued that there was another case that substantively challenges the constitutionality of **Section 162** of the Penal Code that outlaws forms of sexual relations that are against the order of nature that is pending determination before the High court. In his view delving in the issues of the constitutionality of the said provisions of the Penal Code would prejudice the

pending matter. Nonetheless counsel went on to submit that the Indian Constitution is different from the Kenyan one because it does not define family and culture as the foundations of the nation; also the preamble affirms the Sovereign Socialist Secular Democratic Republic of India which in counsel's view has no preference for religion. Moreover the Government of India was not party to the **Johar** case and it publicly retained a neutral stance; also the proceedings did not involve trial by affidavits evidence nor witness evidence which would have assisted the court to assess the negative effect of homosexual behavior on the psychological well – being of the individuals engaging in it, or to the public health.

[17] The other further arguments by Mr. Kanjama reiterate the matters that he had argued before by commenting of several articles that postulate different principles on how the subject of LGBTIQ's is viewed from a global perspective including an article authored by himself. In a nut shell he urged us to balance the rights to privacy and dignity within the limitation clause and finally that justice cuts both ways so that the rights of the majority should not be prejudiced. Counsel urged us to allow the appeal and uphold the constitutional morality as opposed to public popular morality as in Johar case.

[18] This appeal was supported by Mr. Obura for the 2nd respondent, the Attorney General. While associating himself fully with the submissions by Mr. Kanjama for the appellant counsel also relied on his written submissions and made some

brief highlights. Counsel emphasized that the provisions of **Sections 162, 163** and **165** of the Penal Code, clearly outlaw same sex unions and in his view the NGO Board was justified to deny the 1st respondent registration of the proposed NGO. Such registration would go contrary to the provisions of **Article 45** of the Constitution that protects the family as a fundamental unit of the society that should enjoy the protection of the law. Counsel went on to submit that the intentions of the proposed NGO was to get registered and eventually seek to legalize same sex marriages that is going to undermine the family unit and entrenched cultural values that are also recognized under **Article 16 (1)** of the Universal Declaration of Human Rights (UDHR) which provides 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. They are entitled to equal rights as to marriage, during marriage and at its dissolution"**

[19] Counsel for the state argued that whereas the 1st respondent and the intended NGO want to express their rights of expression, association and assembly, in doing so they will be promoting prohibited acts which amounts to actions prejudicial to public interest which can justify restrictions because homosexuality is largely considered a taboo that is repugnant to the cultural values and morality of the Kenyan people. The Kenyan people are deeply religious, they believe in God and registration of LGBTIQ's would be an intrusion of the family unit, and at best a disruption of an institution as old as life. Kenya also acknowledges the supremacy of the Almighty God, a value that cannot be compromised by

subjective and ever changing popular versions of rights, diversity and non-discrimination of homosexuality that would encourage immorality. Counsel urged us to allow the appeal.

[20] Rising on his feet to also support the appeal was Mr. Kinyanjui, learned counsel for the Kenya Christian Professional Forum (5th respondent). Counsel also associated himself with the above submissions by Mr. Kanjama and Obura, he also relied on his written submissions which he highlighted. In the written submissions counsel challenged the impugned judgment on two main grounds; that is lack of jurisdiction and misapprehension of the Constitution. He advanced the argument that under **Section 19(3)** of the NGO Act, the decision of the director in rejecting the names was not final and ought to have been appealed against to the Minister. In this regard therefore the suit before the High court was premature as the 1st respondent did not exhaust all the appeal mechanisms. Counsel referred to several authorities to buttress this argument. The case of **Speaker of the National Assembly vs Karume** [2008] 1 KLR (EP) 425 where it was held 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. Counsel also cited the provisions of **Section 9(2)** of the **Fair Administrative Action Act** that enjoins courts not to review an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other

written law are first exhausted. Although **subsection (4)** of the same Act provides consideration of special circumstances that would entitle an applicant an exemption from an obligation to exhaust those internal mechanisms in the interest of justice, none were established in this case.

[21] The second ground urged by Mr. Kinyanjui is generally that the impugned judgment misinterpreted the provisions of **Articles 36** of the Constitution. According to counsel, the rights of LGBTIQ's cannot be expressed outside heterosexual bounds. In any event there is a constitutional body, the National Human Rights and Equality Commission, who should address all issues of human rights violations and there was no evidence presented to demonstrate the issues were placed before them and they were negligent in addressing them. In his view, the objects of the proposed NGO were in furtherance of criminal activities namely homosexuality or related sexual deviant behaviors, contrary to **Sections 162** and **165** of the Penal Code. Counsel cited a Botswana case of **Kanane vs State** 2003 (2) BLR 67 (CA) which was challenging some provisions of the Penal Code enacted during the colonial time as outdated. Counsel paused the question of whether the NGO Board can be forced to register an association of rapists, murderers and pedophiles.

[22] During plenary hearing Mr. Kinyanjui argued that there is an international pressure for acceptance of what he termed 'diabolic' cultures emanating from the West. That movement, represented by the 1st respondent, has recognized its

inability to change legislation but is now actively engaging courts for their radical views to gather traction and finally bring practices that undermine the morality of the society which is its rubric. Counsel cited the Old Testament Book of **Leviticus 18; 22** which states that 'God forbids a man lying with another man'. Further, in **1st Corinthians 6** it is written 'no person who is a homosexual will inherit the Kingdom of God'. He went on to state that the Kikuyu culture does not tolerate homosexuality and those found to have contravened the cultural norms were exterminated by being rolled from the hill in a bee hive as a punishment. Thus in his view, this dispute which was an administrative issue could not have metamorphosed merely due to its diabolic nature to a matter of constitutional moment such that the NGO Board could not deal with it. Counsel urged us to allow the appeal.

[23] Opposing the appeal was Mrs Ligunya, learned counsel for the 1st respondent. She filed written submissions which she relied on entirely as she was absent during the plenary hearing. Counsel started by explaining what she termed as misstatements by the appellant that the proposed NGO seeks and will promote and perpetuate criminal activities. Counsel argued this was incorrect as it is not part of the stated aims or purposes of the proposed NGO to in any way violate, or encourage the violation of the law. These arguments according to counsel are speculative assertions that cannot be proven or subjected to a legal reasoning as they are predicated on assumptions that when one is gay or lesbian they are

criminals or have a propensity to commit crime more than the other members of the society. Commenting on the provisions of **Article 27** of the Constitution, counsel argued that the prohibited grounds of discrimination are non-exhaustive and the categories are not closed or limited by the listed grounds. Also constitutional rights that are restricted for not conforming to certain unspecified conceptions of morality by generally anchoring them on religious or cultural grounds cannot qualify for limitation. Counsel cited **Article 8** of the Constitution that provides that there shall be no State religion as well as 32 that gives every person the right to freedom of conscience, religion, thought, belief and opinion. Thus religious beliefs of others cannot be imposed on one, and a person may not be denied the enjoyment of any right because of another person's belief or religion.

[24] Responding on the ground of appeal that the suit was premature as the NGO Act provides an internal mechanism of an appeal to the Minister which was not exhausted, Mrs. Ligunya was categorical that the Board lacked a specific regulation to deal with appeals on refusal of approval of a name; the Board also did not advise the 1st respondent to appeal but suggested that he should approach the court to clarify the issue. Also the High court explained there must be a clear mechanism for the redress of any particular grievance and since no procedure existed at all to deal with the refusal to approve names, this was a fit case to seek a constitutional interpretation of denial of rights. In any event given the position

taken by the Board, sending the matter back to them would be 'run-around' exercise in futility. The 1st respondent deposed in the supporting affidavit (which was not denied) that he was advised by Mr Mugo that the Board would not register organizations aimed at protecting gay and lesbian individuals. Moreover the issues presented by the 1st respondent before the High court were of significant public importance requiring authoritative judicial pronouncement.

[25] On the limits attached to right of association, and the arguments that rights are enjoyed by persons qua persons and not based on any attribute a person may determine for herself or himself, counsel for the 1st respondent submitted that the High court was right to hold that freedom of association can be restricted where such restriction is justified. In the instant case, the 1st respondent applied for registration of an association of LGBTIQ so that they may associate by virtue of being human beings. The right of association belongs to everybody their sexual orientation notwithstanding. The restriction that is envisaged under **Article 24 (1)** can only limit a fundamental right only when the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom; taking into account a series of factors including the nature of the right or fundamental freedom, the importance and the purpose of the limitation; its nature and extent; the need to avoid prejudicing the rights and fundamental freedoms of others and the question whether there are less restrictive means to achieve the purpose of the limitation. Consequently there must be a legal reason

for the limitation and according to counsel the provisions of the Penal Code does not criminalize homosexuality or the state of being homosexual, but only certain sexual acts " canal knowledge against the order of nature". The appellant did not indicate which of the stated objectives of the proposed NGO they were objecting to or which ones were going to promote the offences in the Penal Code.

[26] On application of the law from South Africa and other jurisdictions without recognizing the distinct and divergent constitutional background of the said country, counsel for the 1st respondent stated that the judges of the High court did not adopt or apply the decisions in the said cases but made reference to the jurisprudence in South Africa as well as from other jurisdictions including the International tribunals as part of the comparative analysis which is a normal practice in courts when dealing with constitutional matters. The court also relied on the Kenyan decisions of **John Harun Mwau & 3 Others v Attorney General & 2 others** Petition No. 65 of 2011 where it was held that public opinion no matter how strong cannot be the basis for making a court decision. That courts have a duty to interpret the Constitution and uphold its provisions without fear or favour and without regard to popular opinion. On the religious preference of the Constitution, counsel submitted that **Article 8** is clear that Kenya is a secular country. The constitution recognizes the supremacy of the Almighty God of all creation but does not identify with any religion let alone grant any preference to one religion over another. Indeed according to the 1st respondent's counsel

Article 21 demands the State to address the needs of vulnerable groups within the society.

[27] On whether the registration of LGBTIQ's contravened the provisions of the Penal Code, counsel made reference of the objectives of the proposed NGO which in her view did not include promotion of any prohibited acts. It would in a nutshell be dedicated to lawful purposes such as research, reporting, advocacy and social welfare of the LGBTIQ's. These activities are entirely outside what is prohibited by the Penal Code. Counsel termed the submission by the appellant that the proposed NGO possess a danger and would promote homosexuality as wholly speculative and hypothetical reasoning which cannot be used to deny a party their constitutional right. Counsel urged us to dismiss the appeal

[28] While this matter was pending for judgment counsel for the 1st appellant filed an authority by the Supreme Court of India, the **'Johar case'**, and due to the public interest nature of the issues raised herein, the Court convened again on 25th October, 2018 for further submissions. Mrs Lugunya pointed out that in the **Johar** case, the Supreme Court of India held that criminalization of consensual homosexual conduct prohibited by **S. 377** of the Indian Penal Code (the equivalent of s, 162 of the Kenyan Penal Code) violated the Indian Constitution in a series of respects; the rights protected under **Article 14** (Equality before the law), **Article 15** (personal liberty, including respect to dignity, privacy and health. Three members of the said Court also found that since the Constitution generally

outlawed discrimination of grounds of 'sex' was read to include 'sexual orientation'. Although counsel conceded that in this appeal the determination of the constitutional validity of **S. 162** of the Penal Code was not quite a germane one as there is a another separate suit pending in the High court challenging the its constitutionality; the case was relevant to demonstrate the trends in the development of the law within the Commonwealth countries. Counsel submitted there was relevance to draw from the approach to constitutional interpretation adopted by the Supreme Court of India in matters of equality, and non-discrimination. That a constitution is a living instrument whose interpretation should factor in modern democratic systems and the evolving nature of rights to liberty and equality and the role of courts as guardians of fundamental rights including the rights of minorities and vulnerable groups that must be protected especially by the courts.

[29] The appeal was also opposed by Mr. Wanyoike, learned counsel for Katiba Institute (4th respondent). Counsel relied on their written submissions and made some oral highlights during the plenary hearing. Counsel started by stating the case was not about marriage or morals, but it is about the right to association and non-discrimination and equality before the law in regard to persons who belong to lesbian, gay, bisexual, transgender, intersex and queer groups. Counsel supported the impugned judgment which critically examined the rights of persons wishing to associate not just among the LGBTIQ but also the non- LGBTIQ who

would wish to associate with them to deepen their understanding of them through a legally recognized organization. Also the case was not about legalization of same sex relations, including marriages or constitutionality of **Sections 162, 163,** and **165** of the Penal Code as argued by the appellants. The arguments by the appellant tried to stretch the scope of the case beyond what was presented in the High court. According to Mr. Wanyoike, the High court properly interpreted the definition of a person as an individual human being which also includes a company, an association or other body of persons whether incorporated or unincorporated.

[30] Further counsel submitted that under **Article 20 (1)** every person is entitled to enjoy rights to the greatest extent consistent with the nature of the right or fundamental freedom; the provisions of the Bill of Rights are entitlements of every person including all individuals no matter the circumstances; also in applying a provision of the Bill of Rights a court is obliged to give effect to right or fundamental freedom and to adopt an interpretation that most favours the enforcement and realization of those rights. The persons who are LGBTIQ are also persons and there is no justification to deny them a right to associate. The freedom to associate is recognized in International covenants, the United Nations Human Rights Committee, the African Commission on Human and Peoples' Rights and jurisprudence from other jurisdictions such as Botswana, Uganda, and recently India that outlawed some sections of their Penal Code. Commenting on

the limitation clause under **Article 24** of the Constitution counsel submitted that the argument that actions by homosexuals are criminalized under the Penal Code cannot be used to justify the limitation of a fundamental right of association. The Penal Code does not state that it is a criminal offence to be gay or lesbian. The registration of the proposed NGO as association was with a view to carry out the stated objectives. It had nothing to do with the matters prohibited in the said law. Counsel urged us to dismiss the appeal as the 1st appellant was able to demonstrate before the High court that his right to associate was violated by the refusal by the appellant to reserve a name to unable him register an organization to carry out the stated objectives. If the association were to breach the law, it would be dealt with accordingly like any other person or entity that breaks the law.

[31] Looking at the summary of what was submitted before us by counsel, either for or against the appeal, it would not be an overstatement to say the matter was highly contentious. There was no common approach to the issues which fell for determination. Submissions broached a wide spectrum of issues, touching on morality, institution of family, religion, culture various studies and researches carried out on whether homosexuality is genetic or an acquired behavior, to law, constitutionality of gay and lesbians' rights to International law and jurisprudence. I have nonetheless considered the pleadings, the impugned judgement, oral and written submissions and the entire record of appeal and in my humble view the issues that fall for my determination are three. Whether the

1st respondent was entitled to invoke the constitutional petition when his application for reservation of the proposed names was turned down by the appellant or he was supposed to first exhaust the internal appeal mechanism to the Director or the Minister, whether the registration of the proposed NGO contravened the provisions of the **Sections 162, 163** and **165** of the Penal Code and lastly whether the right to form an association as provided under **Article 36** of the Constitution is a limited right pursuant to **Article 24.**

[32] It is also appropriate to say the arguments on morality, religion, culture are none issues in this matter as they were based on assumptions that if the proposed NGO were to be registered, it would run counter to religious, cultural and moral values of this country. In my view the central issue is about right to associate by LGBTIQ and whether the freedom of association as it relates to them is limited because of the provisions of the Penal Code. I would wish not to delve on matters of morality because what forms the morality of this nation is basically what is spelt out in various Articles of the Constitution especially Article 10 of the Constitution. Key of the values that are spelt out in **Article 10** as National values and principles of governance are human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

[33] Mr. Kinyanjui argued very strongly that matters of religion were critical because the dominant religions in this country abhor homosexuality and so are

most cultures, he urged us to allow the appeal so as to uphold the majoritarian view. Counsel was so emphatic while making several references to the Bible and some cultures where homosexual people were exterminated through a painful death. I did not understand counsel to be arguing that in modern day, homosexuals should be killed because this cannot happen. Counsel was nonetheless clearly arguing that homosexuals must not be allowed any space at all to associate, they must be isolated or banished and ignored for they only have themselves to blame for their chosen acts that are an abomination.

[34] The arguments based on the verses quoted from the Bible by Mr. Kinyanjui in my humble view are also one sided. The same Bible is also replete with numerous verses, which time and space may not allow me to give the details. Save to say it is indisputable that the same Bible categorically states that all people are created by God in His own image; His love abounds; it is unfailing and calls every individual, be they criminals, homosexuals or murderers to come to Him as they are, for they will find peace, and refuge; that one should love their neighbor as oneself, and so on. How then would the same God wish to have people He created in his own image be denied basic rights accorded to others, isolated and stigmatized? It is for these reasons I would wish to leave those arguments at that, while noting the provisions of **Article 32** of the Constitution also give everybody freedom of conscience, religion, belief and opinion. More

importantly, a person shall not be compelled to act or engage in any act that is contrary to that person's belief or religion.

[35] That said, whichever way one looks at this appeal and the issues raised, they all boil down to rights guaranteed in the Constitution. Luckily there seems to be no controversy regardeing the principles that should guide the Court in interpreting the Constitution. **Article 259** of the Constitution demands that it (the Constitution) should be interpreted ***in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance***. It also demands that every provision of the Constitution ***"shall be construed according to the doctrine of interpretation that the law is always speaking."*** See the decision by the Supreme Court of Kenya In **Re The Matter of the Interim Independent Electoral Commission [2011] eKLR**, which re-affirmed that the Constitution must be;-

> ***"Purposively interpreted"*** **in** ***"a manner that eschews formalism, in favour of the purposive approach."***

Also the Supreme Court decision in the case of **Communications Commission of Kenya & 5 Others v Royal Media Services Ltd, & 5 others** [2014] eKLR, per Mutunga, CJ;

> **"This, in our perception, is an interpretive conundrum that is best resolved by the application of principle. This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a**

holistic manner, within its context, and in its spirit. In the *Matter of the Kenya National Human Rights Commission,* Sup. Ct. Advisory Opinion Reference No. 1 of 2012;[2014] eKLR, this Court [paragraph 26] had thus remarked:

***"...But what is meant by a holistic interpretation of the Constitution" It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result"* [emphasis supplied].**

[36] Bearing in mind the above guiding principles, I will deal with the first issue; whether the 1st respondent as petitioner was required to exhaust the internal mechanism provided under **Section 19 of the NGO Coordination Act** which provides;-

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".

[37] The specific challenge was on the findings by the learned judges that; an appeal to the Minister is only provided upon refusal of registration of an NGO and not for refusal to **reserve a name**; that the statute has not prescribed internal appeal mechanism or remedy for refusal to approve a name and the fact that the Board did not advise the 1st respondent to appeal as it appeared to hold the view that the matter of the proposed registration of the NGO should be resolved by the court. The learned Judges of the High court in my view analyzed the various provisions of the NGO Act and the attendant Regulations, they so fastidiously examined Part III of the NGO Act which deals with the processes and requirements for registration of an NGO and found that, and rightly so, it makes provisions of the prescribed form to use when applying for registration. That is the information and documents to include in an application for registration of an NGO and that the application should be addressed to the Executive Director of the Board. The judges also considered **Section 14** of the same part 111 of the Act that empowers the Board to refuse registration of the proposed organization 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.***

[38] The learned Judges found that in this case, the Board was not dealing with the proposed registration of an NGO but with the question of whether the name(s)

that the 1st respondent was seeking to reserve for a proposed NGO were available and acceptable. In other words, they drew a distinction between an application for approval of name and application for registration once a name has been reserved and approved. In this regard they relied on the provisions of **Regulation 8** of the NGO Co-ordination Regulations 1992 which provides the process for approval of names for registration of an NGO 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."*

This is what the judges concluded in a pertinent paragraph of the impugned judgment.

> **"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.

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.

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".

[39] I find no legal justification to disagree with these findings and I will give my own reasons. The NGO Act and the regulations have not provided an internal appeal mechanism for applicants to follow when a name is refused for reservation to register an NGO. If certainly there existed a procedure, the Board should have advised the 1st respondent to place an appeal before the Board or the Minister; since the procedure provided was for refusal of a registration and not a name. A procedural question would arise whether an appeal was to the Board or to the Minister. More importantly there are also sworn depositions by the 1st respondent where he stated as follows;

"That upon third rejection, I sought meeting with one of the staffs in the legal department of the NGO Board, one Mr Mugo who told me that I was not the first to try registering a gay and lesbian association and that any association bearing gays and lesbian could not be registered by the NGO Board

because the association were furthering criminality and immoral affairs.

That I requested him to put these reasons in writing and further guide me on criteria to acceptability of names which writing he declined but asked me to drop the names gay and lesbian in our proposed name of association which I refused.

...

That after sending this, my legal counsel informed me that she had a tele conversation with the legal officer of the NGO Board, Mr Lindon, who informed her that we should seek guidance from the courts on whether the NGO Board could allow gay and lesbian association to enjoy governmental recognition on an equal basis with other associations through registration"

[40] These depositions were not controverted, therefore the Board having made up its mind that the proposed NGO did not meet the test, it is most obvious that sending the 1st respondent back to exhaust an appeal where the procedure is not even set up, where the Board has strongly expressed its prejudicial view against the proposed NGO would be an exercise in futility. Lastly, just like the learned judges I am in agreement that courts are the ultimate bastion and custodian of the Constitution. It was generally agreed even by the Board, that the matters of LGBTIQ right to associate invoked the interpretation of the Constitution, for determination by court. It is for these reasons, I find the facts demonstrated in this case different from the case of; **Speaker of the National Assembly vs James Njenga Karume** (suppra) and what is provided for under the Fair Administrative Act. The matters raised as demonstrated by the appellant's decision to reject the

name transcended a mere administrative act and touched on constitutional interpretation by court.

[41] Is the 1st respondent's proposed NGO covered under the provisions of **Article 36** of the Constitution? First of all, is the definition of '**every person"** as stated therein encompassing persons who are gays and lesbians? This is what **Article 36** provides;-

> *"(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; and*
>
> *(b) there shall be a right to have a fair hearing before a registration is cancelled"*

[42] A rhetorical question was asked by the 1st respondent whether gays and lesbian people pass the test of being a person. Undeniably the 1st respondent sought a declaration that he is a person for purposes of **Article 36** of the Constitution and so are the gays and lesbians. It was also accepted by the appellant through the affidavit of Mr. Otieno that the 1st respondent fell within the definition of a person as per the provisions of **Article 260** of the Constitution. However counsel for the appellant was very categorical in his submission that the freedom of association envisaged above, applies to persons qua persons and

in this regard he cited the Ugandan case of **Jacqueline Kasha Nabagesera & 3 Others vs Attorney General & Another** (Uganda Misc Cause No 033 of 2012 where Musota J., is reported to have said;-

> **"...It is my considered view and I agree with learned counsel for the respondent that the ordinary meaning of persons being equal before and 'under the law' in that Article is that all persons must always be equal subject to the existing law even when exercising their rights. Where the law prohibits homosexual acts and persons knowingly promote those acts, they are acting contrary to the law. Such persons cannot allege that the actions taken to prevent their breach of the law amount to denial of "equal protection" of the law because the law abiding people were not equally restricted..."**

[43] I have tried to contextualize this argument within the framework of the Constitution of Kenya 2010 by asking myself whether by being gay or lesbian without more is a criminal offence. This question was also posed to counsel during the hearing and it was agreed it is not an offence for one to be gay or lesbian. What is detestable and an offence is engaging in carnal knowledge against the order of nature. In other words even if somebody stood on a high platform and declared that he or she is a gay or lesbian without more, they will not have committed an offence contrary to the provisions of **Section 163, 163** and **165** 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 or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years:...

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.

[44] Parties were in agreement that there is a separate suit dealing with the interpretation of the above sections of the Penal Code. It is that forum in my view that will interpret the meaning of 'carnal knowledge against the order of nature' and acts of gross indecency. The question however that has continued to linger at the back of my mind is whether it is only gays and lesbians who are predisposed to commit the aforesaid offences. Can heterosexuals commit the same offences? Who supervises consenting adults including heterosexuals on how they go about such personal matters as sexual intercourse? Moreover one has to commit the offences prohibited in the Penal Code so as to be regarded a criminal. If the offence is carnal knowledge against the order of nature, is it only committed by homosexuals? Nay! Anybody is capable of committing those offences, they could

be gays, lesbians call them LGBTIQ and even heterosexuals. Reported cases abound where persons who are not LGBTIQ have been charged and convicted of heinous offences of rape, defilement and other sexual offences including beastiality. I would wish some research could be carried out to find out from the convicted offenders, how many are LGBTIQ. It is not fair in my view to generalize and stigmatize LGBTIQ persons as the only ones who are prone or predisposed to commit the above offences. Let every offender be dwelt with as an individual.

[45] If a homosexual person commits an offence, he will be arrested and dealt with according to the law, so is a heterosexual. For these reasons I am not persuaded the said provisions of the Penal Code were enacted to criminalize homosexuality, or the state of being homosexual otherwise it would have stated so. As detailed above, those offences in the Penal Code can be committed by anybody their sexual orientation notwithstanding and to say it is only gays and lesbians who commit them is to subject them to differential treatment.

[46] Are rights granted under **Article 36** limited by the provisions of Article 24 (1) of the Constitution in so far as associations of LGBTIQ is concerned? According to counsel for the appellant these rights are not absolute and he bolstered this argument by citing **Article 3** of the **European Convention** on human rights which should be read together with **Article 29(d)** of the

Constitution. According to counsel qualified rights can be limited in specific circumstances to protect the rights of other individuals or the public interest.

Under **Article 24 (1)** of the Constitution;-

> **"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 taking into account all the relevant factors, including-**
>
> **a) The nature of the right or fundamental freedom;**
> **b) The importance of the purpose of the limitation**
> **c) The nature and extent of the limitation**
> **d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
> **e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose**
>
> **...**
>
> **(3) The state or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied"**

[47] Freedom of association where citizens are free to assemble and express their opinions in politics, religion, art, name it, is universally accepted as vital for a pluralist and open democratic society. This was appreciated by the learned judges as they made reference to the African Commission on Human and Peoples' Rights decision which 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."***

Also 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."***

[48] The Board denied the reservation of the names proposed for registration of the 1st respondents' association because in its view the interests to be advanced would be against and injurious to public interest and would run afoul with the provisions of the Penal Code. I have already demonstrated that it is not homosexuals who are capable of breaking the law, denying them the full enjoyment of their rights which are enjoyed by other individuals because of public opinion that detests gays and lesbians is outright discrimination. The deposition by Mr. Otieno on behalf of the Board admits gays and lesbians are human beings but his gripe with them is their acquired behaviour which may endanger human survival. This is what he stated in his own words;-

> ***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."

[49] I understand the Board to be saying that gays and lesbians will corrupt and endanger the society especially the hallowed institution of family. Nonetheless the Board did not present any evidence to demonstrate that the evil that abound in the society today, from corruption, to murders, rapes including within the families are brought about by LGBTIQ. Nor did they provide evidence to show persons who commit offences under Sections 162, 163, and 165 of the Penal Code are LGBTIQ. Counsel for the appellant and even the Attorney General isolated the family as one institution whose **'human *survival'*** would be threatened if the proposed NGO was registered. My humble view of the matter is that the institution of marriage cannot be threatened by an association of LGBTIQ; marriage is anchored in the Constitution, and it as an institution that one enters out of choice. Moreover there are many people who enter it and leave it, not because they are LGBTIQ; others enter marriage and choose not to procreate and others do not enter marriage at all and they are not LGBTIQ. There are people who are heterosexuals and they do not engage in sex of any kind out of choice, it

is also possible there are homosexuals or LGBTIQ people who do not engage in sex also out of choice.

[50] Looking at the proposed objectives of the proposed NGO, the 1st respondent was not seeking to be registered so as to discuss matters sex, same sex marriage or encourage commission of crimes. These words cannot be imported to their objectives because they were not stated. What was indicated is to do, 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.***"

[51] 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 the proposed NGO would not be protected by the Constitution and the law would take its cause. It is arbitrary to speculate and categorize LGBTIQ as persons who have the propensity to destroy a society by contravening the provisions of the Constitution or the Penal Code, or as a group bent on ruining the institution of marriage or culture.

[52] For the aforesaid reasons, I find no merit in this appeal as overturning the impugned judgment would undermine the gains made over the years in promoting, protecting and building a culture of respect and tolerance of differences that abound in the society. Allowing the appeal would be stereotyping people and expecting everybody to be the same size fits all. Like the old adage says 'we are made from the same cloth but cut in different shapes and sizes' this society is not akin to the 'Animal Farm' by George Orwell. The Constitution is the equalizer, it allows everybody to be and if some people are sinners, God will deal with them, no one can judge for Him. If others break the law, the law will take its own course against the law breakers, no one can judge them until that happens. The Constitution is the ultimate guide and liberator from the shackles of all kinds of discrimination. Its bold provisions also domesticate the International human rights law which can be called to aid in the event of a gap within our very own indigenous and rich jurisprudence.

[53] Accordingly and for the aforesaid reasons this appeal is dismissed, I make no order as to costs this being a public interest matter, the order that commends itself is for each party to bear their own costs

Dated and delivered at Nairobi this 22nd day of March, 2019.

M. K. KOOME

.....

JUDGE OF APPEAL

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI

(CORAM: WAKI, NAMBUYE, KOOME, MAKHANDIA & MUSINGA, JJ.A)

CIVIL APPEAL NO. 145 OF 2015

BETWEEN

NON-GOVERNMENTAL ORGANISATIONS
CO-ORDINATION BOARD..... APPELLANT

AND

ERIC GITARI .....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT
AUDREY MBUGUA ITHIBU.....3RD RESPONDENT
DANIEL KANDIE.....4TH RESPONDENT
KENYA CHRISTIAN PROFESSIONAL FORUM .....5TH RESPONDENT
KATIBA INSTITUTE.....6TH RESPONDENT

(Being an appeal against the Judgment and Orders of the High Court of Kenya at Nairobi (I. Lenaola, M. Ngugi & G.V. Odunga, JJ.) dated 24th April 2015

in

Constitutional Petition No. 440 of 2013)
****

JUDGMENT OF ASIKE MAKHANDIA, JA

Article 1 of the Universal Declaration of Human Rights (UDHR) is in the context of this case apt. It neatly sums up what lies at the core of this appeal. This Article recognizes that all human beings are born free and equal in dignity. Thus, strip someone of their dignity and you strip off their essence of being a human being.

Dignity since the beginning of the era of human rights has become the foundation of all other rights. It amounts to the recognition that the sole purpose for protecting, promoting and fulfilling human rights is the acknowledgement that all human beings must be accorded respect.

The concept of dignity for all men and women involves the development of opportunities which allow people to realize full human potential within positive social relationships. It is the quest for dignity, equality and equal recognition and protection before the law that made the 1st respondent in this appeal file the petition, subject of this appeal in the High Court.

The facts in this appeal are fairly straight forward and not in dispute. The 1st respondent, **Eric Gitari,** is a lawyer by profession. He claims to have worked on equality for lesbian, gay, bisexual, transgender, intersex and queer ("LGBTIQ") persons in Kenya since 2010. He applied to the Non-Governmental Organisations Coordination Board *"the appellant"*, seeking to reserve the names; Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy; Gay and Lesbian Human Rights Organization, for purposes of registration of a non-governmental organization (NGO).

The broad and core objectives of the proposed NGO was stipulated as the advancement of human rights. Specifically, it was claimed that the proposed NGO would seek to address the violence and human rights abuses suffered by the LGBTIQ community.

The appellant informed the 1st respondent that the names he had sought to reserve for purposes of registration were unacceptable and was therefore advised to review them.

On 19th March 2013, the 1st respondent 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 1st respondent through his advocate sent a letter to the Board dated 19th March 2013 seeking to know why his earlier application had been rejected.

By a letter dated 25th March 2013, the appellant wrote to the 1st respondent's advocate 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. The appellant relied on regulation 8(3)(b)(ii) of the NGO Regulations of 1992 as the basis for rejecting the request. This regulation provides that the Director of the Board can reject an application if *"such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable."*

In his last attempt he proffered the following names; **National Gay and Lesbian Human Rights Commission, National Coalition of Gay and Lesbians in Kenya** and **National Gay and Lesbian Human Rights Association**. This too received the same response that the names were unacceptable. It was then that the 1st respondent sought a meeting with the

appellant. He met one Mr. Mugo, a member of the legal department of the appellant, who advised him that any application to register an NGO bearing the names gay and lesbian could not be registered by the appellant because the association would be furthering criminality and immoral affairs. The 1st respondent requested Mr. Mugo to put these reasons in writing but he declined. He however, requested the 1st respondent to drop the names 'gay' and 'lesbian' in the proposed NGO name but he declined to do so.

Following the refusal by the appellant to register the proposed NGO in the names the 1st respondent intended, the 1st respondent instructed his advocates on record to seek written reasons for the appellant's rejection of the application. The advocate further explained that the 1st respondent was not seeking to further criminalise conduct but was seeking to promote the equality of LGBTIQ persons in Kenya.

In a letter dated 25th March 2013, the appellant set out the basis for its rejection of the 1st respondent's application; that section 162 of the Penal code criminalises gay or lesbian liaisons; that regulation 8(3)(b) (ii) obliges the Director of the appellant to notify an applicant that a name would not be approved on the grounds that it is already in use, is "*inconsistent with any law or is otherwise undesirable*". The appellant further stated that sexual orientation was not listed as a prohibited ground of discrimination in Article 27(4) of the Constitution, nor was same sex marriage permitted in the constitution. The

appellant urged the 1st respondent to review the proposed name and provide the appellant with the objects of the proposed NGO.

In response to that letter, the 1st respondent in a letter dated 17th June 2013, forwarded the objectives and articles of the proposed NGO to the appellant 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. As a result, the 1st respondent filed a petition in the High Court challenging the decision of the appellant claiming that the failure of the appellant to comply with its constitutional duty violated the appellant's and other gay and lesbian persons in Kenya the freedom of association.

The petition was canvassed in the High Court before **Lenaola, J** (as he then was), **Ngugi and Odunga, JJ**. The learned judges found that the petition raised three issues: first, whether the 1st respondent had exhausted internal remedies; second, whether persons who belong to LGBTIQ groups have a right to form associations in accordance with the law, and lastly, if the answer was in the affirmative; whether the decision of the appellant to decline the registration of the proposed NGO because of the choice of the name was in violation of the 1st respondent's rights to equality and freedom of association.

In their judgment delivered on 24th April 2015, the learned judges found that the 1st respondent did not have any other known remedy in law that he would have used to have his grievances addressed. On the second issue, the learned judges found that the acts of the appellant in rejecting the 1st respondent's names for the proposed NGO and by extension its refusal to

register the proposed NGO amounted to a limitation of the 1st respondent's rights to freedom of association. On the last issue, the learned judges found that the appellant violated the 1st respondent'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 a result of the aforesaid findings; the learned judges issued the following declarations and orders;

a) 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.

b) 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.

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

d) 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.

These are the findings and the orders that precipitated this appeal. In the Memorandum of Appeal dated 10 June 2015, the appellant set forth the following grounds:

"1). THAT the learned judges erred in law and fact by identifying lesbian, gay, bisexual, transgender and queer as innate attributes of various persons without any or sufficient evidence in support, and by failing to recognize that these attributes were the consequences of behavioural traits which the society has right to regulate for the sake of the common good.

2). THAT the learned judges erred in law when they held that the refusal to register the 1st respondent's proposed NGO was not a decision contemplated under section 19 of the NGO Act for which an appeal lies to the Minister.

3). THAT the learned judges erred in law in failing to recognize the limits of the right of association and the fact that the right is enjoyed by persons qua persons and not based on any attribute they may determine for themselves.

4). THAT the learned judges erred in law in finding that the right of association extended to the proposed NGO of the 1st respondent.

5). THAT the learned judges erred in law by adopting and applying ratio from South Africa without recognizing the distinct and divergent constitutional background of the said country.

6). THAT the learned judges erred in law by disregarding the religious preference in the Constitution of Kenya, 2010, and the preambular influence that must be applied in interpreting and applying the various constitutional provisions in issue.

7). THAT the learned judges erred in law by failing to uphold the provision of the Penal Code that outlaw homosexual behavior, as well as any aiding, abetting, counselling, procuring and other related and inchoate crimes.

8). THAT the learned judges erred in law and in fact by effectively reading into the Constitution non-discrimination clause on the ground of sexual orientation.

9). THAT the learned judges erred in law by misunderstanding and misapplying the limitation clause in Article 24 of the Constitution of Kenya, 2010.

10). THAT the learned judges erred in law and in fact by rejecting the legitimate role of the moral purpose or public policy test in determining whether to accept registration of proposed applications for associations of persons.

11). THAT the learned judges erred in law and fact by granting the declarations sought and the order of mandamus in the decree appealed against."

The appeal was canvassed through written submissions as well as oral highlights. On the first ground of appeal, **Mr. Kanjama,** learned counsel for the appellant submitted that the High Court erred by failing to recognize that the Bill of Rights in the Constitution applies to human beings by virtue of them being human and not because of certain attributes which they may have determined for themselves. The High Court in affirming the 1st respondent's right to associate, identified LGBTIQ persons as having their sexual orientation based on inherent factors which go to their core as human beings, without basing the decision on any concrete evidence as no such evidence was availed by the 1st respondent. It was counsel's submission that homosexuality was not caused by genes or prenatal conditions. He submitted that the High Court erred by recognizing the words 'every person' as accommodating people's behavior and sexual preferences as opposed to safeguarding the freedom from discrimination of persons based on their being human beings.

On the second ground of appeal, counsel submitted that the appellant has a statutory obligation to refuse registration of any proposed association if satisfied that its proposed activities are not in national interest. In the appellant's view, the refusal to register the proposed NGO was on grounds that it would promote and perpetrate homosexual activities which are criminal and unlawful. He contended that having been aggrieved by the decision to register the NGO, the 1st respondent ought to have appealed to the Minister (Cabinet Secretary) responsible for matters relating to NGO as provided for by section 19 of the NGO Act. It was counsel's submission that where a statute has established a dispute resolution procedure, then that procedure must be strictly followed in resolving the dispute. On this submission, counsel relied on the case of Speaker of the National Assembly v James Njenga Karume (1992) eKLR. It was Mr. Kanjama's submission therefore that the learned judges misdirected themselves in hearing and determining the 1st respondent's petition whose grievance ought to have been determined by the Minister in the first instance.

On the third, fourth and ninth grounds of appeal, Mr. Kanjama argued that Sections 162, 163 and 165 of the Penal Code criminalizes acts of homosexuality. In his view therefore, the freedom of association cannot extend to formation of organizations or groups which will promote acts that have been criminalized by law. He further argued that Article 36 of the Constitution applied to persons *qua person*. He submitted that the provision does not apply to persons who belong to the LGBTIQ community, whose attributes are based on

sexual preferences and inclinations they have determined as opposed to inherent attribute of being a human being.

It was his further submission that the freedom of association does not extend to the 1st respondent's proposed NGO. Article 24 of the Constitution limits certain rights. He submitted that the High Court erred by interpreting Article 24 of the constitution in a manner that accords the 1st respondent a right to associate irrespective of the fact that the NGO would perpetuate the rights of the LGBTIQ persons against the express provisions of the Penal Code. He argued that the 1st respondent does not have the right to associate with activities that are criminal and hence this right is limited by law. And that the mere recognition of the 1st respondent's freedom to associate amounts to indirect legitimization of acts which are illegal in Kenya.

On the fifth and sixth grounds of appeal, counsel contended that the High Court erred in adopting and applying decided cases from South Africa in Kenya, whose constitutional background is distinct and divergent from Kenya. He pointed out that the Constitution at Article 45 recognizes the family unit as the natural and fundamental unit of the society thus enjoying recognition and protection from the state. That the Constitution recognizes marriage as between two people of the opposite sex. He added that homosexuality in Kenya is considered a taboo and is repugnant to the cultural values and morality. In converse, he submitted that South African Constitution outlaws discrimination based on sexual orientation that has as a result legalized same sex marriages. It was therefore his submission that the High Court erred in failing to recognize

the unique features of the Kenyan society and in particular the unique preambular reference to God in the Constitution. In counsel's view, while interpreting the Constitution, the court had an obligation to consider the religious, moral, cultural and social values.

On the last ground of appeal, Mr. Kanjama submitted that Article 27(4) of the constitution stipulates the grounds for discrimination and sexual orientation is not listed as one of them. He thus argued that the High Court overstepped its ambit in interpreting Article 27(4) to include sexual orientation as a ground on which the state shall not discriminate against.

In conclusion, Mr. Kanjama urged the Court to consider the role of public policy and morality in the governance of a society. In his view, laws do not operate in a vacuum and must be supported with social efforts. He warned against disallowing the appeal as that would amount to a 'slippery slope' where this appeal could be used to legalize same sex marriages and ideally promote homosexuality. He therefore urged us to allow the appeal and set aside the High Court's decision in its entirety.

The 1st respondent opposed the appeal through **Mr. Waikwa**, learned counsel, who held brief for **Mrs. Ligunya,** learned counsel for the 1st respondent. Mr. Waikwa also appeared for the 6th respondent. He started off by clarifying that the appeal was not about legalizing same sex marriage or homosexual conduct rather it was based on the right of persons who are of the LGBTIQ sexual orientation to associate freely. He submitted that fundamental rights are enjoyed by every person. He claimed that the 1st respondent's

proposed NGO was not aimed at encouraging or supporting the contravention of the criminal law rather it was aimed at advancing the interests of LGBTIQ persons through among other things research and documentation, impartial reporting, effective use of the media, strategic litigation and targeted advocacy.

On the ground that the High Court erred in identifying LGBTIQ as innate attributes without sufficient evidence on the same, Mr. Waikwa submitted that the High Court did not identify sexual orientation as an innate attribute and the court did not deal with that issue at all. He argued that the court found that LGBTIQ individuals were entitled to the rights in the Constitution by virtue of them being human beings and deserving of the rights in the Bill of Rights which belong to each individual.

In response to the argument that the 1st respondent failed to exhaust remedies availed under the NGO Coordination Act, counsel submitted that the petition concerns the enforcement and interpretation of the Constitution that could only be determined by the High Court as opposed to the Minister.

It was counsel's further submission that the right of association is enjoyed by all persons by virtue of them being human beings irrespective of any sexual orientation. Article 24 of the Constitution could not be used arbitrarily to restrict fundamental rights and freedoms. He submitted that there was no legal provision which amounted to a restriction on the right to freedom of association within the meaning of Article 24(1) of the Constitution. And in any event, any purported limitation of the right of association in the context of this

appeal would fail the test of reasonableness and justification as provided for in Article 24(1) and (2).

On the submission that the High Court erred by disregarding the religious preferences in the Constitution, Mr. Waikwa submitted that the Constitution does not contain any religious preferences. That Article 8 of the Constitution prohibits any state religion and Article 32 provides for the right to exercise freedom of conscience, religion, thought, belief and opinion. According to the 1st respondent therefore the preamble to the Constitution only acknowledges the supremacy of the Almighty God of all creation but does not grant preference to any religious beliefs or morals. It was his position therefore that the NGO Board could not deny the right of the LGBTIQ to associate based on religious views.

He went on to submit that exercising his right to form an association does not in any way violate the provisions of the Penal Code. He argued that the objectives of the proposed NGO do not include the promotion of any prohibited acts whatsoever and are confined to lawful purposes such as research, advocacy, reporting and social welfare for the LGBTIQ. In addition, he submitted that the Penal Code does not criminalize sexual orientation but sexual conduct.

Mr. Waikwa further submitted that the grounds of discrimination enumerated in Article 27(4) of the Constitution were not exhaustive. That the High Court had a responsibility for determining which other grounds beyond those expressly provided for are prohibited by the constitution.

For these reasons, the 1st respondent urged the Court to dismiss the appeal in its entirety and uphold the judgment of the High Court.

The 2nd respondent supported the appeal. His case was presented by **Mr. Obura**, learned State Counsel. He submitted that the right of association is not an absolute right and it could be limited by the application of Article 24 of the constitution. He opined that the proposed NGO was meant to advance criminal acts prohibited under the Penal Code and therefore the appellant acted in accordance with the law by refusing to register the proposed NGO.

According to counsel, if the court allowed the registration of the proposed NGO, it would amount to legal recognition of homosexuality in Kenya, as a result giving effect to the same sex marriages in violation of Article 45 of the constitution. The 2nd respondent argued that the proposed NGO aims at destroying the cultural values of Kenyans and should be prohibited based on public interest. That homosexuality destroys society and families and increases immorality. He submitted that the Penal Code criminalizes homosexual conduct and by the petition, the 1st respondent had attempted to legalize same sex practices through the back door. He thus urged the Court to allow the appeal in its entirety.

The 3rd and 4th respondents were not represented at the hearing nor did they file written submissions.

The 5th respondent supported the appeal. **Mr. Kinyanjui** reiterated the appellant's position and added that the 1st respondent had failed to utilize the mechanism and procedure provided for in section 19(3) of the NGO

Regulations. He urged the Court to find that the 1st respondent had failed to exhaust the mechanisms laid down in the statute and as such the dispute was not ripe for adjudication. He urged us to allow the appeal.

The 6th respondent in opposing the appeal through Mr. Waikwa submitted that the High Court had jurisdiction to determine the violation of fundamental rights and freedoms and the mechanisms established under section 19 of the NGO Coordination Act do not oust the High Court's jurisdiction to determine the petition. On the right to associate, it was his submission that this right extends to any person by dint of the provisions of Article 20(1) of the Constitution.

On the appellant's submission that the High Court erred in failing to uphold the religious preferences in the preamble of the Constitution, he submitted that the Constitution does not recognize any particular religion. And that in interpreting the constitution, the court is to be guided by the national values stated in Article 10 of the constitution.

It was his further submission that the grounds listed in Article 27 of the Constitution are not exhaustive. Further, that the right to associate and the protection from discrimination is not limited by law and any purported limitation does not comply with the requirements of Article 24 of the constitution. He contended that morality and religion are irrelevant considerations in the limitations of the right to associate. For that submission he relied on the South African Case National Coalition for Gay and Lesbian Equality and another v Minister of Justice and Others (1998) ZACC 15. Also

on the Republic of Philippine case - **AngLadlad LGBT Party v Commission on Elections, G.R No. 190582,** where it was held that the denial of AngLadlad registration on purely moral grounds amounted to more of a dislike and disapproval of homosexuals, rather than for any substantial public interest.

After the bench hearing this appeal retired to consider and craft the judgment in this appeal, an unusual and exceptional phenomenon occurred. The 1st respondent through the Registrar of this Court took the unprecedented course of seeking to re-open the hearing of the appeal on the basis of a decision of the **Indian Supreme Court in Navtej, Singh Johar and others v Union of India, Write petition (Criminal) No. 76 of 2016** where the court declared section 377 of the Indian Penal Code unconstitutional. Section 377 is a direct analogue of section 162 of the Kenyan Penal Code. Though unprecedented, we nonetheless acceded to the request as none of the parties opposed the request and in view of the public interest in the matter as well as weighty constitutional issues raised. Consequently, this bench reconvened on 25th October 2018 to hear the parties' submissions on the *Johar's case*.

This time round Mrs. Ligunya appeared and relied on her written submissions which were to the effect that, firstly, fundamental rights protected by the Constitution apply regardless of popular of majoritarian views. Second, LGBTIQ are persons recognized as human beings and are entitled to their fundamental rights and freedoms. That the Constitution is a living document that speaks to the evolving nature of the rights in the Constitution. Third, the court has an obligation to curb any attempt by the majority to usurp the rights

of the minority and to provide redress whenever there is a violation of fundamental rights and freedoms.

On *Johar's case*, she submitted that the Supreme Court of India determined that criminalization of consensual homosexual conduct pursuant to section 377 of the Indian Penal Code, same as section 162 of our Penal Code violated the Indian Constitution with regard to the rights protected under Article 14 (equality before the law), Article 15 (personal liberty, dignity, privacy and health). Counsel urged us to be guided by the constitutional interpretation adopted by the Indian Supreme Court in matters, equality and non-discrimination. To counsel, the case was relevant as it demonstrated the trends in the development of the law within the Commonwealth countries.

Counsel for the appellant also filed written submissions on the issue. He submitted that there were contextual differences between the constitution of Kenya and India. Such differences included the age of the Constitution and level of public participation in the drafting of the same, differences in theories of constitutional interpretation, that whereas the Kenyan Constitution is more susceptible to the original public meaning while the Indian Constitution is more on legal analysis. The Kenyan Constitution was based on a liberal individual philosophy with an African communication philosophy and Indian Constitution was influenced heavily by the western liberal philosophy propounded by **John Stuart Mill.** Lastly, he submitted that the Kenyan Constitution protects family, culture and religion which rights are not expressly provided for in the Indian Constitution.

Counsel further submitted that the *Johar's case* was guided by Jeremy utilitarianism and John Stuart Mill's libertarianism which are flawed philosophies. According to counsel, the problem with the philosophy that guided the decision in the *Johar's case* was that it ignored the fact that society is harmed by other acts that do not necessarily cause direct physical pain to a specific person. In counsel's view, homosexual behavior was as destructive as any other form of abuse.

It was counsel's further submission that international law is deeply unsettled and divided over the issue of legalizing homosexuality. In addition, he submitted that the court found that sexual orientation is innate to a human being and is an important attribute of one's personality and identity despite lack of evidence being produced in court to show sexual orientation is innate. It was his submissions that homosexuality is not innate and does not compel behavior. In conclusion, counsel urged this court to treat the *Johar's case* decision with caution.

Having considered the record of appeal, the memorandum of appeal, the oral and written submissions as well as the authorities that were cited, I must start by stating that in considering these rival and equally persuasive arguments, I bear in mind, like this Court did in **Selle & Anor vs. Associated Motor Boat Co. Limited and Others** [1968] EA 123 and pursuant to rule 29(1) (a) of the rules of this Court, that an appeal to this Court from a trial by the High Court is by way of a retrial except that I have not had the opportunity of

seeing, and hearing the witnesses. Just like in a retrial, the appellate court is required to reconsider the evidence on record, evaluate itself and draw its own independent conclusions.

Let me first clarify what this appeal is all about. It was correctly in my view observed by the High Court that this case is not about marriage or morals. The facts of the case as pleaded by the 1st respondent demonstrate that the case concerns the enforcement of the rights of association, non-discrimination and equality before the law with regard to persons who identify themselves as LGBTIQ.

Having said that, it is also clear to me that the case is not about legalization of the same sex relations and the constitutionality of sections 162 and 165 of the Penal Code. Mr. Kanjama accurately pointed out that there is a substantive case, being **PT 150 and 234 of 2016** pending in the High Court that seeks to challenge the constitutionality of the provisions of section 162 and 165 of the Penal Code. The High Court is therefore best placed to determine the issue. I will therefore not delve into the matter.

I think it is also important to state at this point that having read the *Johar's case*, it emerges that the crux of that case was on the decriminalization of same sex consensual sex matters within the armpit of section 162 and 165 of the Penal Code; hence best left for determination by the High Court in *PT 150 and 234 OF 2016* as well. The *Johar's case* therefore has very little if any relevance in this appeal. I will only refer to it in the instances that it is relevant if at all.

The appeal 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 LGBTIQ group. In my view, the grounds of appeal can be collapsed into two core issues for determination as follows:

(a) **Whether the 1st respondent had an obligation to exhaust the remedies available under the NGO Coordination Act.**

(b) **Whether the appellant's decision not to allow the registration of the proposed NGO violates the 1st respondent's right of association, freedom from discrimination and equality.**

On the first issue, two important facts are not in dispute. First, the NGO Coordination Act provides the procedure for a party dissatisfied with a decision of the appellant made under the Act to appeal to the Minister. Second that, this mechanism was not utilized by the 1st respondent. The appellant submitted that the 1st respondent had not exhausted the available remedy under the Act before approaching the High Court. It was therefore the appellant's submission that the petition in the High Court was not ripe for determination. On his part, the 1st respondent contended that the NGO Coordination Act did not provide him with a procedure that would sufficiently address his grievances.

It is settled principle of law that where a statute provides mechanisms for the resolution of disputes, the procedures and processes set out in the said statute must be exhausted before a party is allowed to come knocking on the doors of the courts. See **Speaker of the National Assembly v Karume (2008) 1 KLR 425** where this Court emphatically stated *inter alia*;

"in our view there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance presented by the constitution or an act of parliament that procedure should be strictly followed..."

See also Diana Kethi Kilonzo & Anor v Ahmed Isack & Anor [2014] eKLR and Africog v IEBC [2013] eKLR.

Section 19 of the NGO Coordination Act provides for a procedure to be used by a party dissatisfied with a decision of Board made under the Act to appeal to the minister. It provides:

> *"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.*
>
> *(4) 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*
>
> *(b) the decision or the High Court shall be final."*

In this appeal, the appellant was not dealing with the registration of the proposed NGO but the question as to whether or not the proposed names that

the 1st respondent sought to reserve for the registration of the proposed NGO were acceptable. To that extent, the applicable provision was Regulation 8 as opposed to Part III of the Act that deals with the process and requirements for registration of NGOs. I say so because, the 1st respondent did not get an opportunity to make an application for registration of his proposed NGO to the board. All he did was to apply to reserve the name of his proposed NGO. Regulation 8 provides for 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 center 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."*

The facts of this appeal demonstrate that the Board placed reliance on Regulation 8(3)(b)(ii) and advised the 1st respondent that the names sought to be reserved for the registration of the proposed NGO were not acceptable in the opinion of the Director. There is nothing in the Regulations that provides

an aggrieved applicant a right to appeal a decision made in terms of regulation 8(3)(b)(ii) for refusal of a name by which an organization can be registered. Section 19 of the Act applies to substantive decisions concerning the actual registration or refusal for registration. Section 19 is invoked once the Board has made a decision in regard to the actual registration. After three attempts to register the proposed NGO – each with different variations in the names; and receiving the same response that the names were unacceptable; it is on record that the Board urged the 1st respondent to review the proposed name and provide the Board with the objects of the proposed NGO. The facts demonstrate that a decision had not been made in respect to the registration of 1st respondent proposed NGO. The mechanism provided for in section 19 was therefore not applicable in the circumstances of the case.

In any event, the 1st respondent instituted the petition in the High Court alleging a violation of his right to associate, protection from discrimination and equality allegedly on the advice of the appellant. Article 165 of the Constitution provides that the High Court has the jurisdiction to interpret the Constitution and determine a claim for the enforcement of fundamental rights and freedoms. In the High Court, it was also not in dispute that the appellant's officers advised the 1st respondent to seek the guidance of the court on whether the appellant could allow LGBTIQ associations to enjoy government recognition on an equal basis with other associations through registration. The Minister does not have the power to enforce the Constitution or interpret whether any conduct was in violation of the Constitution. I would add that the respondent,

in any event, was entitled to seek remedy that was efficacious and I do not think that pursuing an appeal to the Minister will have afforded the 1st respondent such remedy. I therefore find that the petition was properly before the High Court.

On the second core issue; while it was not contested that 'person' as used in Article 260 of the Constitution includes a company or association or other body of persons whether incorporated or unincorporated, the appellant contends that the High Court erred by failing to recognize that the right of association is enjoyed by *persons qua persons* and not based on any attribute that persons may determine for themselves. It was the appellant's submission that sexual preference is not innate and thus is a preference made by an individual.

At this juncture, I must clarify that as I understand it, this appeal or even the petition at the High Court was not about sexual orientation and whether or not sexual orientation is innate or not. In the High Court, the appellant alleged that special rights do not accrue to persons who have made conscious decision to be gay or lesbian because homosexual lifestyle is an acquired behavior that has nothing to do with genetic makeup. The court treated this submission as a matter of opinion that had not been established. Indeed, and correctly so, the High Court did not get into that arena of determining whether or not being LGBTIQ is an innate attribute. I do not propose to get in there as well.

I agree with the High Court's findings that the 1st respondent is entitled to fundamental rights and freedoms provided for in the constitution by virtue of him being a human being irrespective of his sexual orientation. His rights

and freedoms can only be curtailed in accordance with the law. Indeed, world over, the sole purpose for protecting, promoting and fulfilling human rights is the acknowledgement that all human beings must be accorded respect irrespective of their membership to particular groups or other status. In the circumstances, I do not find any merit in the submission that a human being may be denied fundamental rights and freedoms because of how that person chooses to live his sexual life. It matters not which attributes persons have determined for themselves. The only test is whether those attributes violate any law.

I now turn to examine whether the decision of the appellant to refuse the names for the proposed NGO was a violation of the right of association, freedom from discrimination and equality before the law of the 1st respondent. The appellant claimed that it had a problem with the names proposed for the NGO on the grounds that it would further an illegality. I understand the appellant's position to be that the names suggested were for a certain target group who allegedly engage in illegal activities contrary to section 162 and 165 of the Penal Code. The appellant rejected the objects of the proposed NGO on the same ground. The question therefore is whether the decision of the appellant violated the 1st respondent freedom of association.

Article 36 of the constitution guarantees freedom of association in the following terms;

"36 (i) *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.*

(ii) *A person shall not be compelled to join and association of any kind.*

(iii) *Any legislation that requires registration of an association of any kind shall provide that_*

(a) Registration may not be withheld or withdrawn unreasonably."

Article 36 of the constitution extends to every person's right to form an association of any kind. This right can only be limited in terms of law to the extent that the limitation is reasonable and justifiable in an open and democratic society as provided for in Article 24(1) of the Constitution. Subject to the limitations, a person's rights under Article 36 extends to all human beings without discrimination, whatever their ethnicity, religion, sex, place of origin or any other status such as age, disability, health status, sexual orientation or gender identity. I agree with the High Court's finding that Article 36 extends to all individuals and juristic persons and that sexual orientation does not in any way bar an individual from exercising his right under Article 36 of the constitution. In **Civil Liberties Organisation v Nigeria, Communication No 101/93**, the African Commission found that the freedom of association is an individual right. The state has an obligation to refrain from interfering with the formation of association and there must be mechanisms that allow citizens to join without state interference in associations to enable them attain various ends.

By refusing to accept the names for the proposed NGO, the appellant violated the 1st respondent's freedom of association. It matters not the views of

the appellant that the name of the association was not desirable. In a society as diverse as Kenya, there is need for tolerance. I say so well aware of the preambular provisions in the Constitution that acknowledge the supremacy of the Almighty God of all creation. Further, the constitution recognizes the right of persons to profess religious beliefs and to articulate such beliefs including the belief that homosexuality is a taboo that violates the religious teachings. However, the Constitution does not permit the people who hold such beliefs to trod on those who do not or subscribe to a different way of life. They too have the right not to hold such religious beliefs. It cannot therefore be proper to limit the freedom of association on the basis of popular opinion based on certain religious beliefs that the Board believes amounts to moral and religious convictions of most Kenyans.I do not see how the Bible and Quran verses as well as the studies on homosexuality relied on by the appellant would help its case. Religious texts are neither a source of law in Kenya nor form the basis for denying fundamental rights and obligations.

For avoidance of doubt, and because of the submission made by the appellant that the High Court erred in rejecting the role of morals or public policy in determining whether to register the proposed NGO, I am clear in my mind that morality and religion are irrelevant considerations. The decision of the appellant to refuse to accept the proposed names of the NGO, in my view amounts more to a statement of dislike and disapproval of homosexuals rather than a tool to further any substantial public interest. It is true that a Constitution is to some extent founded on morals and convictions of a people,

but what is not true is that a constitution is not founded on division and exclusion.

In interpreting the provisions of the constitution, I am guided by the provisions of Article 10 of the Constitution that sets out the national values and principles. Such values include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized which are central in the interpretation of the bill of rights.

The 1st respondent seeks to have an association registered that would protect the human rights of those who belong to the LGBTIQ. I did not hear the 1st respondent claim that the proposed organization would promote homosexual sexual conduct in furtherance of criminal conduct as alleged by the appellant. I also did not hear the 1st respondent allege that the proposed NGO would seek to legalize same sex marriage as the appellant is apprehensive about. It is not lost to me that the legalization of same sex marriage can only be possible through the enforcement of Article 45 of the Constitution. Again, for clarity purposes, the case before us does not concern in any way Article 45 of the Constitution. It must be understood that the 1st respondent only sought to exercise his freedom to associate in an organization recognised by law.

In any democratic society, there will always be a marginalized group incapable of protecting their rights through the democratic process. Once we, as a society understand there are people, whose sexual orientation is different from the norm and human rights belong to all persons by virtue of them being human beings, it will be easier to respect their fundamental rights and

freedoms. I do not understand the Bill of Rights as meant to protect only the individuals that we like and leave unprotected those we find morally objectionable or reprehensible. In any case, Article 10 of the Constitution obliges us to protect the marginalized.

This finding must perforce also dispose in similar fashion, the question of discrimination and equality before the law.

I will now address the question on limitation of rights. The 1st respondent sought to register an NGO that would inter-alia conduct accurate fact finding, 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 LGBTIQ communities living in Kenya. I have found that the appellant has a right to seek to register such an organization. Thus far, the appellant has not been able to prove that the alleged objects of the proposed organization are not in accordance with the law. Accordingly, the 1st respondent's right to form an association can only be limited within the parameters provided for in Article 24 of the constitution.

Article 24 of the Constitution provides for the limitation of rights and freedoms as follows;

> *"24. (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, taking into account all relevant factors, including––*
>
> *(a) the nature of the right or fundamental freedom;*
>
> *(b) the importance of the purpose of the limitation;*
>
> *(c) the nature and extent of the limitation;*

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

The appellant claims that section 162 and 165 of the Penal Code limits the freedom of association. Section 162 of the Penal Code is to the effect that;

"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..."

Section 165 of the Penal Code criminalises what is termed as the commission of acts of 'gross indecency' between males;

"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.

I am in agreement with the High Court that the provisions of section 162 and 165 the Penal Code do not criminalize the state of being homosexual but sexual acts that are against the order of nature. I also agree with the interpretation of the High Court that section 162 and 165 of the Penal Code does not prevent people to form an association based on their sexual orientation. It is clear therefore that the appellants have misapprehended the

law in determining that sections 162 and 165 of the Penal Code 'criminalises gays and lesbians' liaisons' and therefore should not allow such persons to register an association. I find that there is no connection between the activities prohibited by section 162 and 165 and the request by the 1st respondent to register a LGBTIQ organization that would promote the rights of people who belong to that community. I therefore find that there is no law that limits the freedom of association. There is therefore no need to undertake an inquiry on the remaining criteria established under Article 24 of the Constitution.

Lastly, the appellant contends that the High Court erred in finding that sexual orientation amounts to a ground against discrimination in Article 27 of the Constitution. Article 27(4) states;

> **"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."**

I agree with the High Court's finding that Article 27 (4) does not include 'sexual orientation' as a prohibited ground of discrimination. I am also in agreement that the word 'including' in Article 27(4) is not exhaustive of the grounds listed there. Article 259(4)(b) defines the word 'including' as meaning 'includes, but is not limited to'. In the circumstances, I do not find any merit in the submission that the High Court was guided by the South African constitution that includes 'sexual orientation' as a prohibited ground. A purposive interpretation of the grounds listed in Article 27(4) is to the effect

that they are not exhaustive. The Court will therefore have to determine on a case to case basis other grounds that may form part of Article 27(4) whenever called upon to.

I have determined all the issues that the appeal raised. I have found that the 1st respondent's right to form an association was violated by the refusal of the appellant to accept the names of the proposed NGO. The appellant has failed to establish any grounds to justify the limitation of the right to associate. The appeal lacks merit and is accordingly dismissed.

Each party shall bear its own costs.

Dated and delivered at Nairobi this 22nd day of March, 2019.

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: WAKI, NAMBUYE, KOOME, MAKHANDIA & MUSINGA, JJ.A.)

CIVIL APPEAL NO. 145 OF 2015

BETWEEN

NON-GOVERNMENTAL ORGANIZATIONS CO-ORDINATION BOARD ..... APPELLANT

AND

ERIC GITARI ..... 1ST RESPONDENT
ATTORNEY GENERAL ..... 2ND RESPONDENT
AUDREY MBUGUA ITHIBU ..... 3RD RESPONDENT
DANIEL KANDIE ..... 4TH RESPONDENT
KENYA CHRISTIAN PROFESSIONAL FORUM ..... 5TH RESPONDENT
KATIBA INSTITUTE ..... 6TH RESPONDENT

(Being an appeal against the Judgment and Orders of the High Court of Kenya at Nairobi (Lenaola, Ngugi & Odunga, JJ.) dated 24th April 2015

in

Constitutional Petition No. 440 of 2013)
****

JUDGMENT OF MUSINGA, JA

Introduction

At the heart of this appeal is whether the Non-Governmental Organizations Co-ordination Board, the appellant, should be compelled to register a non-governmental organization (NGO) whose main object is to address the violence and human rights abuses suffered by gay and lesbian community

in Kenya, as sought by a Kenyan gay male, a lawyer by profession, **Eric Gitari**, the 1st respondent; as described by his advocate. For reasons that I shall shortly set out, the appellant declined to do so, thus prompting the 1st respondent to file a petition in the Constitutional and Judicial Review Division of the High Court at Nairobi. That court allowed the petition, giving rise to this appeal. A first appeal to this Court is by way of a retrial but the appellate court should always bear in mind that unlike the trial court, it did not have the opportunity of seeing and hearing the witnesses and must therefore give due allowance for that. This being a retrial, I am therefore under an obligation to reconsider the evidence that was adduced before the High Court, evaluate it and come to my own conclusion. See **SELLE & ANOTHER v ASSOCIATED MOTOR BOAT COMPANY LIMITED & OTHERS [1968] E.A. 123.**

The Petitioner's case before the High Court

2. Sometimes in April 2012 the 1st respondent, who has widely researched on Lesbian, Transgender, Intersex and Queer (LGBTIQ) people, wrote to the appellant seeking reservation of the following names:

(i) National Gay and Lesbian Human Rights Commission,
(ii) National Coalition of Gays and Lesbians in Kenya,
(iii) National Gay and Lesbian Human Rights Association.

3. The names were rejected by the appellant and the 1st respondent was advised to review them.

4. Through his Advocates, Ligunya Sande Associates, the 1st respondent wrote to the appellant on 19th March, 2013 and sought reasons for rejection of the proposed names. The 1st respondent also reviewed the names to read: Gay and Lesbian Human Rights Commission; Gay and Lesbian Human Rights Council; and Gay and Lesbian Human Rights Collective. The appellant responded to the said letter, advising that **sections 162, 163 and 165** of the **Penal Code** criminalize gay and lesbian liaisons as the same go against the order of nature. The appellant further stated that **regulation 8(3)(b)** of the **Non-Governmental Organizations Co-ordination Regulations of 1992 (NGOs Regulations)** allows and empowers it to reject any name reservations on the grounds that they are either identical or substantially similar or is formulated to bring confusion with an already existing name or is otherwise repugnant or inconsistent with any law or is undesirable.

5. In his reply, the 1st respondent set out the objectives of the intended NGO and stated that the proposed NGO was not intended to further criminalized activities of gay persons as stipulated in the Penal Code, but was intended for purposes of furthering the well being of homosexuals,

bisexuals and transgender groups who are a minority group living in Kenya and who enjoy equal rights and freedoms as espoused in the Bill of Rights.

6. That explanation notwithstanding, the appellant stuck to its original position and declined to register the NGO. The 1st respondent contended that the refusal to register the NGO was a gross violation of his rights; tantamount to inhuman and degrading treatment as, arguing that the appellant looks upon homosexuals as criminals with no right to associate in any manner; was denial of the right to access equality in the face of the law; and was a denial of freedom to access information irrespective of one's sexual orientation.

7. The 1st respondent sought the following prayers:

> ***"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 respondent has 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 like any other Kenyan.***
>
> ***4. An order of mandamus directing the 1st respondent to strictly comply with its constitutional duties under Article 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 of the Constitution infringes upon***

- ***The rights of marginalized and minority groups in the Republic of Kenya to which the petitioner falls and other gay and lesbian persons.***
- ***The right of Kenyan Gay and Lesbian citizens to have the Constitution fully implemented both in its letter as well as spirit.***

6. ***That the costs consequent upon this application be borne by the respondents.***

7. ***All such other orders that this Honorable court shall deem fit."***

The appellant's reply

8. Further to the reasons for refusal of registration as stated in paragraph 4 above, the appellant argued that the 1st respondent's petition was premature as the petitioner had not exhausted all the appeal mechanisms as provided for under **section 19(1)** of the **Non-Governmental Organizations Co-ordination Act, 1990 (NGO's Act)** and as such should be referred back to the Minister. Further, the petitioner had failed to appeal the decision of the bureau to the Board.

9. The appellant stated that the 1st respondent had the right and freedom to register the NGO; that it was committed to observance and respect of the freedom of association as stipulated under **Article 36** of the **Constitution**; but the 1st respondent required to review the objectives and the name of the proposed NGO in a manner that does not offend the provisions of the law, and that is what it had advised the 1st respondent to do.

10. The appellant further contended that gays and lesbians do not fall under the constitutional provisions or definition of vulnerable groups as provided for under **Article 21** of the **Constitution**; that the enjoyment of the freedom of association provided for under **Article 36** of the **Constitution** is not without limitations; that gays and lesbians are persons who have made conscious choices regarding their sexual behaviour; that **Article 45** of the **Constitution** expressly authorizes marriage between people of the opposite sex; that the proposed NGO was hell bent on destroying the cultural values of Kenyans.

11. Lastly, the appellant stated that the Transgender Education and Advocacy had expressed reservations about registration of the proposed NGO. In a letter dated 16th November, 2013 addressed to the Executive Director of the appellant, **Audrey Mbugua Ithibu**, the Executive Director of Transgender Education and Advocacy had stated, *inter alia*:

> ***"However, I would urge you to take the issue of registration of NGOs purporting to work with transgender people (and intersex people) seriously. Over the past three years, the TEA has seen proliferation of organizations purporting to work with TRANSGENDER people and the result has been economic, sexual and legal exploitation of transgender people by some individuals forming these groups.***
>
> ***Of concern is the National Gay and Lesbian Human Rights Commission. I would like to contest the assertion that their beneficiaries include transgender and intersex people. I equivocally denounce this as a falsehood as some of the founders of the said***

organization have in the past been abusing the rights of transgender women including alleged sexual exploitation.

Second, the legal and advocacy programs run by most of these groups have been detrimental to the lives of transgender people. For example, these groups have systematically advocated for the inclusion of transgender women into MSM (men who have Sex with Other Men) HIV programming which coerce transgender women to have sex with men for them to be relevant and to access the health systems. This has resulted to a significant section of transgender women getting infected with HIV/AIDS in addition to coercing transgender women to engage in other high risk activities. Some of these NGOs have been recruiting transgender women to be used in scrupulous drug trials here in Kenya.

Additionally, the name of the said organization does not reflect the said beneficiates, transgender and intersex people are not part of gays and lesbians. This practice has led to widespread misinformation and victimization of Kenyans having Gender identity Disorders (GID) and Disorders of Sex Development (DSDs – formally known as hermaphroditism) because of lumping of issues and transgender and intersex people into gay and lesbian baskets. Sexual orientation and gender identity are different issues. Transgender Kenyans are not gays or lesbian and what this commission is doing is it is forcing us to be gay and lesbian.

Lastly, I would like to state that the Transgender community in Kenya did not request this gay and lesbian commission to be our mouth piece. The transgender community in Kenya can articulate her issues and we don't want inconsistencies because of these non-transgender people giving conflicting reports about us.

We urge you to be extra vigilante (sic) and play a role in ending misinformation, stereotyping, exploitation and marginalization of transgender people by various organizations and individuals. I urge you not to register this gay and lesbian commission until amendments are made. We are not against gay and lesbian Kenyans but we demand that this gay and lesbian commission respect other minorities."

12. On those grounds, the appellant urged the High Court to dismiss the petition.

The 3rd and 4th respondents' case

13. The 3rd and 4th respondents were admitted by the High Court as interested parties to the matter on the basis that they had diverse interests in the registration of the proposed NGO. **Audrey Mbugua Ithibu**, the 3rd respondent, is a transgender woman, and as I have stated above, is the Executive Director of the Transgender Education and Advocacy, while **Daniel Kandie** is the father of an intersex child.

14. In addition to what the 3rd respondent stated in the above cited letter to the appellant, the 3rd and 4th respondents also argued that there is a distinct difference between Lesbian, Gay, and Bisexual person (LGB) on the one hand, and Transgender and Intersex persons (TI) on the other. They stated that being lesbian, gay and bisexual is a feature of who a person is attracted to, people of the same or people of both sexes; whereas being a transgender or intersex person is a feature of a person's own identification with a particular sex. Their concern was that the registration of the proposed NGO will result in a blurring of these issues; such that by being classified as LGBTIQ there will be a misconception that transgender persons are gay and lesbian, which is not the case. They added that gays and lesbians are cases of sexual orientation, while transgender are medical conditions. In short, there is no one community known as LGBTIQ and

therefore it would be improper and misleading to register the proposed NGO whose stated objectives focus on the infringement of the rights of LGBTIQ persons.

15. Lastly, the 3rd and 4th respondents submitted that as regards the alleged breach of **Article 36** by the appellant, the 1st respondent was already enjoying the right to form an association as he was already running an NGO that had been in existence since 2012; that there is no evidence that an application for registration had been made; and that the 1st respondent's prayer for an order of mandamus to compel the appellant to carry out its mandate was premature.

The 5th respondent's case

16. **Kenya Christian Professionals Forum (KCPF),** which was joined to the proceedings on the date of the hearing of the petition, did not file any pleadings or submissions in the High Court but made oral submissions through its advocate, **Harrison Kinyanjui**. Counsel submitted, *inter alia*, that the 1st respondent's right under **Article 36** were not violated as he had not shown that he was denied the right to form or associate, or that his rights under **Article 36(3)** were violated. He said that the appellant's letter dated 25th March 2013 simply indicated the Board's rejection of the

proposed name(s) on the basis of **section 162** of the **Penal Code**, which was not unreasonable.

17. Mr. Kinyanjui further submitted that the petitioner was seeking to have the court find that sexual orientation cannot be a ground of discrimination, yet **Article 27.(4)** states that the State shall not discriminate on the ground of sex. The two are not the same, he argued.

18. **Katiba Institute**, the 6th respondent, is a registered non-profit making and non-partisan organization dedicated to the faithful implementation of the Constitution of Kenya. It was admitted as an *Amicus Curiae*. The 6th respondent submitted that the appellant's decision not to accept the proposed names for registration of the NGO violated several of the petitioner's rights, including the right to freedom of association and fair administrative action; that the appellant exercised its discretion unreasonably; and that **Article 47** is subject to **Article 24**, which provides that 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. But to the extent that the appellant had not addressed itself to the provisions of **Article 24**, the Court should send back the case to the appellant for reconsideration, the 6th respondent's counsel submitted.

19. Regarding **sections 162 to 165** of the **Penal Code** that were cited by the appellant for rejecting the proposed names, counsel submitted that the issue before the Court was about registration, not about criminality. He added that the said provisions of the Penal Code were vague and came into force in the 19th century and did not meet the test of **Article 24** of the **Constitution**.

The trial court's determination

20. The learned judges were of the considered view that the petition was not about moral values, as argued by some of the parties, rather, the two pertinent issues for determination were whether LGBTIQ persons have a right to form associations in accordance with the law; and whether the decision of the appellant not to allow registration of the proposed NGO because of the choice of the name was a violation of the rights of the petitioner under **Articles 27 and 36** of the **Constitution**.

21. Regarding the appellant's argument that the 1st respondent had not exhausted internal remedies before moving to court as stipulated under **Article 19** of the **NGOs Act** and as affirmed by several authorities of this Court, the trial court held:

> ***"64. 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.

65. 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 organization 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.

***66. 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."**

22. The learned judges further held that the 1st respondent claimed that there had been breach of his constitutional rights and such a claim could not be dealt with by the Minister, it could only be determined by the courts. Consequently, they concluded, the petition was rightly before the court.

23. The trial court held that the 1st respondent's right to freedom of association guaranteed under **Article 36** had been violated.

24. Regarding the appellant's concern that the proposed name of the NGO was unsuitable in view of the provisions of **section 162** of the **Penal Code,** the court held that the Penal Code does not penalize homosexuality

or the state of being homosexual, but only certain acts **"against the order of nature".** The court stated:

> ***"That the State does not set out to prosecute people who confess to be lesbians and homosexuals in this county is a clear manifestation that such sexual orientation is not necessarily criminalized. What is deemed to be criminal under the above provisions 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."**

The section states 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 or her against the order of nature,***
> ***is guilty of a felony and is liable to imprisonment for fourteen years.***
> ***Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—***
> ***(i) the offence was committed without the consent of the person who was carnally known; or***
> ***(ii) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act."***

25. The court therefore rejected all the appellant's reasons for rejection of the proposed names, holding that it had acted in a discriminatory manner contrary to **Article 27** of the **Constitution**. Consequently, the court made 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."

Appeal to this court

26. Being aggrieved by the aforesaid decision, the appellant filed this appeal and raised the following grounds:

"1. THAT the Learned Judges erred in law and fact by identifying lesbian, gay, bisexual, transgender and queer as inate attributes of various persons without any or any sufficient evidence in support, and by failing to recognize that these attributes were the consequences of behavioural traits which the society has a right and duty to regulate for the sake of the common good.

2. THAT the Learned Judges erred in law when they held that the refusal to register the 1st Respondent's proposed NGO was not a decision contemplated under section 19 of the NGO Act for which an appeal lies to the Minister.

3. THAT the Learned Judges erred in law in failing to recognize the limits of the right of association, and the fact that the right is enjoyed by persons qua persons and not based on any attribute they may determine for themselves.

4. THAT the Learned Judges erred in law in finding that right of association extended to the proposed NGO of the 1st respondent.

5. ***THAT the learned Judges erred in law by adopting and applying ratio from South Africa without recognizing the distinct and divergent constitutional background of the said country.***

6. ***THAT the Learned Judges erred in law by disregarding the religious preference in the Constitution of Kenya 2010, and the preambular influence that must be applied in interpreting and applying the various constitutional provisions in issue.***

7. ***THAT the Learned Judges erred in law by failing to uphold the provisions of the Penal Code that outlaw homosexual behaviour, as well as any aiding, abetting, counseling, procuring and other related and inchoate crimes.***

8. ***THAT the Learned Judges erred in law and in fact by effectively reading into the Constitution's non-discrimination clause the ground of sexual orientation.***

9. ***THAT the Learned Judges erred in law by misunderstanding and misapplying the limitation clause in article 24 of the Constitution of Kenya, 2010.***

10. ***THAT the Learned Judges erred in law and in fact by rejecting the legitimate role of the moral purpose or public policy test in determining whether to accept registration of proposed applications for associations of persons.***

11. ***THAT the Learned Judges erred in law and fact by granting the declarations sought and the order of mandamus in the Decree appealed against."***

27. The appellant urged this Court to allow the appeal, set aside the High Court's judgment and affirm the right and duty of the appellant to deny registration to any association intended to be established contrary to public interest, or public policy, or to advance an agenda of directly or indirectly promoting conduct that is impugned under the laws of this country, including advancement of any homosexual agenda or practice.

Submissions

28. The appeal was canvassed by way of written submissions that were briefly highlighted by counsel. **Mr. Charles Kanjama** and **Mr. A. Simiyu** appeared for the appellant, **Mr. Waikwa Wanyoike** held brief for **Mrs. Ligunya,** for the 1st respondent and also represented the 6th respondent, **Mr. Eric Obura** was on record for the 2nd respondent, and **Mr. Harrison Kinyanjui** acted for the 5th respondent. The 3rd and 4th respondents neither filed submissions nor were they represented.

The appellant's submissions

29. Mr. Kanjama submitted that the learned judges erred in law and fact by identifying lesbian, gay, bisexual, transgender and queer as innate attributes of various persons without any or any sufficient evidence to that effect. Counsel stated that major scientific studies in Australia, the United States of America and Scandinavia had come to the same conclusion, that homosexuals were not born that way, it was an acquired behaviour. Counsel submitted that a person cannot claim constitutional protection on the basis of a freely chosen behaviour, regardless of legality of the behaviour. Homosexuality is a sexual orientation which is purely a person's preference as opposed to it being an innate of a human being, counsel added.

30. Citing **Article 27(4)** of the **Constitution**, Mr. Kanjama submitted that sexual orientation is not listed as one of the grounds under which the State cannot discriminate against a person. The Article provides:

> ***"27.(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, or belief, dress, language or birth."***

Whether the refusal to register the 1st respondent's proposed NGO was a decision contemplated under section 19 of the NGOs Act for which an appeal lies to the minister.

31. The section 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."***

32. Counsel submitted that the 1st respondent, being aggrieved by the decision of the appellant to refuse registration of his proposed association

without amending its name, should have appealed to the Minister instead of filing the petition. Where a statute has established a dispute resolution procedure, then the procedure must be strictly followed in resolving that dispute, counsel submitted. He cited this Court's decision in **SPEAKER OF THE NATIONAL ASSEMBLY v JAMES NJENGA KARUME [1992] eKLR** where the Court held:

> ***"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."***

33. In his view, the learned judges misdirected themselves in hearing and determining the 1st respondent's petition, whose grievance ought to have determined by the Minister on appeal.

Who enjoys the right of association and are there limits to this right under Article 24?

34. These submissions cover grounds 3, 4 and 9 of the appeal. Mr. Kanjama responded to that question by citing the provisions of Articles 36 and 24 of the Constitution. The first states as follows:

> ***"36.(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; and

(b) there shall be a right to have a fair hearing before a registration is cancelled."

35. Counsel submitted that human rights and freedoms apply to persons by virtue of being human beings and not by virtue of possessing certain attributes they may determine for themselves. However, the rights and freedoms are not absolute. He cited **Article 24.(1)** of the **Constitution** which provides:

"24.(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, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

Given the nature of the freedom and the real purpose and objectives for which the 1st respondent wanted to register the intended NGO, the appellant was right in rejecting the suggested names, counsel submitted.

He added that the real objective and intent of the 1st respondent in seeking the registration was to promote self determined sexual preferences and inclinations and not inherent attributes of simply being a human being.

36. Counsel added that the sexual preferences of the target group are immoral and prohibited by the penal law of this country and therefore the appellant was right in its decision to reject the proposed names. He cited the Ugandan case of **JACQUELINE KASHA NABAGESERA & 3 OTHERS v ATTORNEY GENERAL & ANOTHER (Uganda Misc. Cause No. 033 of 2012)** where Musota, J. held:

> ***".....it is my considered view and I agree with learned counsel for the respondent that the ordinary meaning of persons being equal before and 'under the law' in that Article is that all persons must always be equal subject to the existing law even when exercising their rights. Where the law prohibits homosexual acts and persons knowingly promote those acts, they are acting contrary to the law. Such persons cannot allege that the actions taken to prevent their breach of the law amount to denial of "equal protection" of the law because the law abiding people were not equally restricted ....."***

Whether the learned judges erred in law by adopting and applying ratio from South Africa

37. Mr. Kanjama submitted that the learned judges erred in adopting and applying decided cases from South Africa, whose constitutional background is distinct and divergent from that of Kenya; that the Kenyan Constitution in **Article 45** recognizes the family unit as the natural and

fundamental unit of the society and the necessary basis for social order, thus enjoying the recognition and protection from the State; and that it is common knowledge that families arise from the union of two consenting adults of the opposite sex.

38. Counsel cited the Supreme Court decision in **JASBIR SINGH RAI & 3 OTHERS v TARLOCHAN SINGH RAI & 4 OTHERS [2013] eKLR** where Mutunga, C.J. stated:

> ***"100. In the development and growth of our jurisprudence, Commonwealth and international jurisprudence will continue to be pivotal. However, the Supreme Court will have to avoid mechanistic approaches to precedent. It will not be appropriate to pick a precedent from India one day, Australia another day, South Africa another, the U.S. yet another, just because they seem to suit the immediate occasion. Each of those precedents has its place in the jurisprudence of its own country. A negative side of the mechanistic approach to precedent, is that it tends to produce a mind-set: "If we have not done it before, why should we do it now?" The Constitution does not countenance such a pre-determined approach. All the cases cited in this matter were subjected to an inquiry into their respective contexts. We sought to find out whether they are still good law, or have been overturned. We did all this because our progressive needs, under the Constitution, are different; and there is the need to bear in mind that our Constitution remains always, as our brother Judge Ojwang has emphasized, a*** **transformative charter of good governance.**
>
> ***101. While our jurisprudence should benefit from the strengths of foreign jurisprudence, it must at the same time obviate the weaknesses of such jurisprudence, so that ours is suitably enriched, as decreed by the*** **Supreme Court Act."**

39. He concluded that ground of appeal by submitting that the learned judges ignored the religious, moral, cultural and social values of our society and instead adopted and applied jurisprudence from South Africa which does not apply to our society.

The 1st respondent's submissions

40. The 1st respondent, like the appellant, largely reiterated the submissions made before the High Court. Responding to the first ground of appeal, that the learned judges erred in law and fact by identifying LGBTIQ as innate attributes without any evidence, Mrs. Ligunya submitted that nowhere in the impugned judgment did the learned judges so state; instead, she stated, the Court held that the 1st respondent and other LGBTIQ persons were entitled to the benefit of the constitutional right in question because, as per **Article 19.(3)** of the **Constitution**, the rights and fundamental freedoms in the Bill of Rights belong to each individual.

41. That notwithstanding, counsel added, even if this Court were to conclude that the High Court proceeded on the basis that sexual orientation is innate, it would have been right. She cited a finding to that effect by the World Psychiatric Association in March 2016.

42. As to whether the 1st respondent ought to have complied with the process set out under **section 19** of the **NGOs Act** by appealing to the Minister against the appellant's objection to the proposed names, the 1st respondent's counsel observed that it was the appellant that suggested to the 1st respondent that he needed to seek the Court's intervention on the issue; that the issues raised in the petition were of significant public importance and could not be dealt with by the Minister.

43. The 1st respondent's counsel further submitted that the right of association is enjoyed by persons by virtue of being human beings, irrespective of their sexual orientation, including the LGBTIQ persons. Under **Article 24.(1),** there must be a legal basis for any action that restricts enjoyment of any one's constitutional right, counsel added.

44. Counsel further submitted that the objectives of the 1st respondent's proposed NGO were lawful and did not contemplate commission or promotion of any unlawful activities. The stated objectives were:

- ***"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.***
- ***To contribute to the development of domestic and international law and its jurisprudence including policy development and programmatic approaches, in matters of***

equality in relation to LGBTIQ individuals, groups and communities in Kenya.

- ***To publish annual human rights status reports and briefings on human rights conditions of LGBTIQ individuals, groups and communities of Kenya.***
- ***To establish an endowment fund to receive grants, donations, gifts and other assistance in any form whatsoever from Kenya or from any other source for any one or more of the objects of the organization.***
- ***To institute, support and advance personal and community legal, economic social cultural and other welfare programmes for LGBTIQ individuals, groups and communities in Kenya; and***
- ***To do all such other things as in the opinion of the Founders may advance the object of the organization and in particular the human rights and social welfare of LGBTIQ individuals, groups and communities in Kenya."***

45. Regarding alleged adoption of ratio from South Africa, the 1st respondent's counsel submitted that the learned judges did not adopt any South African authority, they simply referred to South African authorities as well as authorities from other jurisdictions and international tribunals as part of a comparative analysis. The learned judges also cited many local decisions and several others from other jurisdictions, and all of them were relevant, counsel added.

46. Turning to the appellant's sixth ground of appeal, that the learned judges erred in law by disregarding the religious preference in the Constitution of Kenya, 2010 and the preambular influence which the appellant argues must be applied in interpreting and applying the Constitutional provisions in issue, Mrs. Ligunya submitted that the

Constitution contains no religious preference; that the preamble celebrates the ethnic, cultural and religious diversity of the nation; that **Article 8** is explicit – that there shall be no State religion; and **Article 32** guarantees every person the right to freedom of conscience, religion, thought, belief and opinion.

47. Further, **Article 21** of the **Constitution** obligates the State to address the needs of the vulnerable groups within society, including those within particular ethnic, religious or cultural communities. The 1st respondent's counsel therefore submitted that the learned judges were not required to be guided by any religious biases in deciding the petition.

48. Regarding the appellant's argument that the learned judges did not give due regard to the fact that the Penal Code outlaws homosexual behaviour, Mrs. Ligunya submitted that the registration of the proposed NGO will not occasion any violation of the Penal Code; that at issue was not whether homosexual persons have a right to engage in criminalised homosexual behaviour, but whether such persons have a right to form associations with each other for political and related purposes; that the Penal code does not criminalise homosexuality in general; and that the Penal Code does not criminalise the right of association of people based on their sexual orientation.

49. Did the learned judges misapply the limitation clause in **Article 24** of the **Constitution**? The 1st respondent's counsel answered this question in the negative. She asserted that there was no justification for limiting the 1st respondent's freedom of association guaranteed under **Article 36.** She therefore urged this Court to dismiss the appeal.

The 5th respondent's submissions

50. Mr. Kinyanjui, learned counsel for the Kenya Christian Professional Forum, a registered society under the Societies Act, started by pointing out that one of the objects of the 5th respondent is to bring to bear upon the administration of justice a Christian perspective and input, as stated in its Constitution.

51. Regarding the merit of the petition that was before the High Court, counsel argued that the petition ought not to have been entertained because the refusal to approve for registration any of the proposed names was a decision contemplated under **section 19** of the **NGOs Act,** for which an appeal lies to the Minister. He cited **DIANA KETHI KILONZO & ANOTHER v AHMED ISACK & ANOTHER [2014] eKLR** where the Court held:

> ***"Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs,***

the jurisdiction of the court should not be invoked until such mechanisms have been exhausted."

The 1st respondent ought to have appealed to the Minister against the decision of the Minister instead of filing a petition, counsel submitted.

52. Mr. Kinyanjui further cited the decision of the Supreme Court of Pennsylvania in **NANCY A. WHITE, on behalf of herself and all others similarly situate – APPELLEE v CONESTOGA TITLE INSURANCE COMPANY, Applicant (No. 30 EAP 2010)** that:

"In all cases where a remedy is provided or a duty is enjoined or anything is directed to be done by any statute, the directions of the statute shall be strictly pursued, and no penalty shall be inflicted, or anything done agreeably to the common law, in such cases, further than shall be necessary for carrying such statute into effect; this statute says in unambiguous language that if the legislature provides a specific exclusive constitutionally adequate method for the disposition of a particular kind of dispute, no action may be brought in any "side" of common pleas to adjudicate the dispute by kind of common law form of action (other) than the exclusive statutory method, unless the statute provides for it, or unless there is some irreparable harm that will follow if the statutory procedure is followed; it is equally clear that if the method for disposing of the dispute is not exclusive, some appropriate form of common law action in the court of common pleas may be available and the court of common pleas may have jurisdiction."

53. Counsel further cited the provisions of **section 9(2)** of the **Fair Administrative Action Act,** which states:

"The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted."

54. Mr. Kinyanjui submitted that this Court ought to uphold the stated principle; to leave the High Court judgment undisturbed would create a bad precedent that any party can ignore the statutory procedure in a matter and jump to the constitutional court, claiming alleged violation of a constitutional right.

55. The 5th respondent further submitted that although the 1st respondent argued that the main objective of his proposed NGO was to advocate for human rights of LGBTIQ persons, strictly speaking, the umbrella of human rights advocacy within the Constitution is circumscribed by **Article 59.(2) (d) (e) and (g)** which vests such duty in the Kenya National Human Rights and Equality Commission. **Article 59(3)** enables anyone to complain to the Commission about denial of a fundamental right or freedom to anyone and the 1st respondent had not demonstrated that the Commission had failed to undertake its constitutional duty.

56. Returning to **Article 27** of the **Constitution** which addresses equality and freedom from discrimination, Mr. Kinyanjui reiterated the appellant's contention that sexual orientation is not a category defined under the said Article under which the State cannot discriminate against any person. The sub-article states that the State shall not discriminate directly or indirectly against any person on any ground including **"race, sex, pregnancy,"** etc

but does not talk about **"sexual orientation",** which is different from sex, counsel argued.

57. Lastly, the 5th respondent's learned counsel supported the appellant's submission that the objects for which the 1st respondent desires to register the proposed NGO are in furtherance of a criminal activity, namely, the promotion and advocacy of homosexuality, contrary to **Sections 162 and 165** of the **Penal Code**. He submitted that homosexuality and related sexual deviance should not be sanctioned by the Court in violation of what Parliament has negated in protection of the Kenyan culture, religious beliefs and customs. Counsel urged the Court to allow the appeal.

The 6th respondent's submissions

58. Katiba Institute, through **Mr. Wanyoike**, started its submission by stating that the petition was not about marriage or morals, but about the right to association and non-discrimination and equality before the law with regard to LGBTIQ persons. The 6th respondent's learned counsel argued that the right to association implicated in the case was not limited to LGBTIQ groups; it also involved rights of non-LGBTIQ persons who wish to associate with LGBTIQ persons through a legally recognized organization.

59. Counsel further submitted that the case was not about legalization of same sex relationships, including marriages or the constitutionality of **Sections 162, 163 and 165** of the **Penal Code.**

60. Responding to the various grounds of appeal raised by the appellant, the 6th respondent submitted that the learned judges never identified LGBTIQ as innate attributes; that although **section 19** of the **NGOs Act** provides an internal mechanism for appeals of decisions of the Board to the Minister and the 1st respondent did not so appeal, the High Court has unlimited original jurisdiction in criminal and civil matters, including jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights had been denied, infringed or threatened.

61. As to whether the learned judges erred in their interpretation of the Constitution in failing to recognize the limits of the right of association, the 6th respondent submitted that the provisions in the Bill of Rights are entitlement of every person, and so is the right to associate, including LGBTIQ persons.

62. Regarding the learned judges' adoption of ratio from South Africa, the 6th respondent submitted that the High Court relied on International Covenants, decisions by the United Nations Human Rights Committee, the African Commission on Human and Peoples' Rights, as well as

jurisprudence from Botswana, Uganda and Kenya in arriving at its decision. He added that the freedom to associate is recognized internationally under various international instruments and conventions that have been ratified by Kenya and therefore their provisions form part of the Laws of Kenya by virtue of **Article 2(5)** and **2(6)** of the **Constitution**.

63. Regarding the appellant's contention that the learned judges erred in law by disregarding the religious preference in the Constitution and the preambular influences thereof in interpreting and applying the various constitutional provisions, the 6th respondent's counsel submitted that the Constitution provides for the manner in which courts have to interpret and apply the Bill of Rights. He cited, *inter alia*, **Article 20(3) (a) and (b)** that states that in applying a provision of the Bill of Rights a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

64. In response to the appellant's argument that the learned judges erred in law by failing to uphold the provisions of **sections 162, 163 and 165** of the **Penal Code**, Mr. Wanyoike submitted that there is no connection between the activities prohibited by the aforesaid sections of the Penal

Code and the request by the 1st respondent for registration of the proposed LGBTIQ group.

65. Regarding the appellant's contention that the learned judges erred in law by reading into the Constitution's non-discrimination clause the ground of sexual orientation, counsel submitted that the grounds under which the State cannot discriminate as set out under **Article 27(4)** are not conclusive; that in Canada and South Africa Constitutional Courts have highlighted the adverse effects of discrimination on the basis of sexual orientation, hence the need for protection. He cited **VRIEND v ALBERTA [1998] 1 SGR 493** and **NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY & ANOTHER v MINISTER OF JUSTICE & OTHERS (CCT11/98).**

66. Regarding the role of the moral purpose in determining whether to accept registration of the proposed NGO, the 6th respondent trashed the appellant's argument that **"the two dominant religions in Kenya, Christianity and Islam which believe in the supremacy of the Almighty God condemn homosexuality and are signs of decadence, immorality and disease".** Mr. Wanyoike submitted that morality, religion and cultural values are irrelevant considerations in limitation of constitutional rights. The spirit of the Constitution reigns supreme, he argued, and urged the Court to dismiss the appeal.

Analysis of the submissions and determination

67. Having summarized the lengthy submissions made by all the parties, it is necessary that I first identify the substantive issues for determination in this appeal. Although the memorandum of appeal raises a total of eleven grounds of appeal, looking at the petition, the prayers therein and the orders granted in the impugned judgment, the main issues for determination may be summarized as follows:

> *(a) Whether the appellant breached the provisions of Articles 27 and 36 of the Constitution by rejecting the proposed names of the intended NGO.*
>
> *(b) Whether the 1st respondent's petition before the High Court was premature; and*
>
> *(c) Whether "every person" in Article 36 of the Constitution includes all persons living in Kenya, despite their sexual orientation, character or otherwise.*

68. I shall start by considering whether the 1st respondent's petition to the High Court was premature. In other words, did the 1st respondent exhaust all the available remedies in terms of **section 19** of the **NGOs Act** before he filed the petition? I have already reproduced **section 19** of the **Act.** One of the functions of the NGOs Board under Part III of the Act is to register NGOs. The process of registration starts with submitting to the Director for approval the proposed name(s) of the NGO. Under **Regulation 8(1)** an applicant for the registration of any proposed

organization **"shall prior to such application seek from the Director approval of the name in which the organization is to be registered".** Under **Regulation 8(3)(b)(ii),** the name may be approved or not approved on the grounds that:

> ***"(i) it is identical to or substantially similar 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."***

69. The learned judges held that the rejection of the proposed name was purely administrative and was not a Board decision contemplated under Part III, **section 19(1)** of the **Act**, against which an appeal lay to the Minister. I do not think so. **Section 19(1)** states as follows:

> ***"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".***

70. Part III of the Act deals with registration and licensing of Non-governmental organizations. Part III of the Regulations under which **Regulation 8(3)(b)** falls deals with registration and exemption from registration of Non-governmental organizations. I have already stated that the first step towards registration of an NGO is submission of its proposed name to the Director who is a member of the Board and by virtue of **section 5(1)** of the **Act** is responsible for the day to day management of

the business of the Board. In rejecting the proposed name the Director did so for and on behalf of the Board. That is why the Board was sued.

71. **Section 10(2)** of the **Act** (which falls under Part III) stipulates that applications for registration of proposed NGOs shall be submitted to the Director, also known as the executive director of the Bureau, which is defined as the executive directorate of the Board. **Section 19(1)** of the **Act** requires any person aggrieved by a Board decision under Part III of the Act, which is about registration and licensing of NGOs, to appeal to the Minister. Part III of the Act must be read together with Part III of the Regulations which also deals with registration and exemption from registration of NGOs.

72. Regulations and Statutory Rules, which are part of statutory instruments as defined under **section 2** of the **Statutory Instruments Act, 2013**, are the most common form of delegated legislation. Regulations and/or Statutory Rules contain many administrative details that are necessary for operationalisation of an Act of Parliament. The Interpretation and General Provisions Act requires all statutory instruments to conform to the Act in regard to construction, application and interpretation. In my view, therefore, the learned judges erred in holding that the 1st respondent

could not appeal to the Minister since the Regulations did not prescribe any internal remedy.

73. There was no evidence that the Board ever advised the 1st respondent to move to court to challenge its decision, instead of appealing to the Minister. The 1st respondent stated that it was Mr. Lindon Otieno, a legal officer, who suggested that he should seek guidance from the court on the issue of registration. But even if it was the Board that had so advised, such advice could not contravene the provisions of the Act or confer jurisdiction upon the High Court, until the prescribed internal dispute resolution mechanisms had been exhausted. See **SPEAKER OF THE NATIONAL ASSEMBLY v KARUME** (supra). **Section 9(2)** of the **Fair Administration Action** expressly bars the High Court or a subordinate court from reviewing an administrative action or decision under any Act until internal mechanisms of appeal or review and all remedies available are first exhausted.

74. I am alive to the provisions of **section 9 subsection (4)** of the **Fair Administrative Actions Act** that:

> ***"Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on an application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice".***

However, in the matter that was before the High Court, the 1st respondent did not seek any exemption from the requirement to first exhaust the internal dispute resolution mechanism provided under the Act. The Court, without any application, assumed jurisdiction on the basis that the issues raised in the petition were of significant public importance requiring authoritative judicial guidance. That may as well have been the case, but it did not mean that the statutory provisions for challenging the Board's decision could be disregarded with impunity.

75. In a recent decision of the Supreme Court of Kenya, **METHODIST CHURCH OF KENYA AND MOHAMED FUGICHA & 2 OTHERS, [2019] eKLR**, the Supreme Court set aside the orders of this Court directing the Board of Management of St. Paul's Kiwanjani Day Mixed Secondary School to amend school unless to accommodate students with religions beliefs requiring them to wear particular items in addition to the school uniform. At the High Court, the Methodist Church of Kenya had challenged the decision of, *inter alia*, the Teachers Service Commission and County Director of Education, Isiolo Sub-county, that all Muslim girls in the school be allowed to wear hijab and white trousers contrary to existing school uniform policy. The High Court granted orders sought by the Methodist Church of Kenya. The High Court found a cross petition filed by an

interested party, Mr. Fugicha's daughter and other Muslim female students, defective and struck it out.

76. Aggrieved by the decision, Mr. Fugicha sought redress before this Court, which overturned the High Court decision. The Methodist Church appealed to the Supreme Court, arguing, *inter alia*, that the cross appeal did not constitute a cross petition and had been denied an opportunity to be heard in the alleged cross petition.

77. Allowing the appeal, the Supreme Court held, *inter alia*, that the cross-petition was improperly brought before the High Court and ought not to have been introduced by this Court; and that neither court had proper jurisdiction to deal with the matter, which raised an important national issue. The Supreme stated:

> ***"The Court however, recognizes that the issue as contained in the impugned cross petition is an important national issue, that will provide a jurisprudential moment for this Court to pronounce itself upon in the future. However, to do so, it is imperative that the matter ought to reach us in the proper manner, so that when a party seeks redress from this Court, they ought to have had the matter properly instituted, the issues canvassed and determined in the professionally competent chain of courts leading up to this Apex Court. In view of this, the Court recommends that should any party wish to pursue this issue, they ought to consider instituting the matter formally at the High Court".***

78. In the context of this appeal, the Supreme Court disagreed with the position taken by this Court regarding the procedure in which the cross petition by Fugicha had been introduced before the High Court. The

learned judges of this Court who heard the appeal from the High Court decision were of the view that the Constitution and the relevant rules no longer require such petitions to strictly follow procedure, as long as the other parties were aware of it and had a fair opportunity to respond to it. The Supreme Court took the view that the manner in which a dispute lands before a court is important; even if all the parties have been heard, it has to be demonstrated that the matter was properly before the Court.

79. To the extent that the 1st respondent was well aware of, but did not comply with the mandatory provisions of **section 19(1)** of the **NGOs Act** which required him to appeal the Board's decision to the Minister, whose decision was then appealable to the High Court as stipulated under **section 19(3)** of the **Act**, the High Court should have directed the applicant to first exhaust the statutory remedy; see **section 9(3)** of the **Fair Administrative Actions Act.** In that regard, the High Court had no jurisdiction to entertain the petition. A decision arrived at by a court that lacks jurisdiction is a nullity, even if the court would have arrived at the same decision had it determined the dispute procedurally and at the right time. I would for that reason allow the appeal.

80. Did the appellant breach the provisions of **Articles 27 and 36** of the **Constitution** by rejecting the proposed names for the intended NGO?

Article 27 provides for equality and freedom from discrimination while **Article 36** addresses freedom of association. **Regulation 8(3)(b)(ii)** of the **NGOs Regulations** gives power to the Director to reject a name of a proposed NGO for the reason that it is **"repugnant to or inconsistent with any law or is otherwise undesirable"**. The appellant found the names: "Gay and Lesbian Human Rights Commission; Gay and Lesbian Human Rights Council; and Gay and Lesbian Human Rights Collective unacceptable because **sections 162, 163 and 165** of the **Penal Code** criminalize gay and lesbian liaisons.

81. **Section 162** of the **Penal Code** which I have earlier reproduced addresses itself to unnatural offences and prescribes lengthy custodial sentences to any person who commits such an offence. **Section 163** of the **Penal Code** criminalizes attempts to commit unnatural offences; while **section 165** prohibits indecent practices between males.

82. My understanding of the appellant's rejection of the aforesaid names is that the proposed names were inconsistent with the written law. That, in my view, cannot be denied. It was submitted before us that there is a pending petition in the High Court that challenges the constitutionality of the aforesaid sections of the Penal Code. Unless and until the said sections

of the law are finally declared unconstitutional they remain part of our Penal laws and must be observed accordingly.

83. For as long as sections of our penal law outlaw homosexuality and lesbianism, I think it would be unlawful to promote and give succor to any process or registration of any organization that may undermine the law. That was the mindset of the Director in rejecting the proposed names. The law grants discretionary power to the Director to accept or reject a proposed name. In my view, it was not demonstrated that the Director exercised that jurisdiction in an injudicious manner.

84. Whether sodomy and lesbianism should be decriminalized or not is a very emotive issue that conjures deep seated constitutional, moral and religious ideologies. There are issues that at best ought to be left to the people to decide, either directly through a referendum or through their elected representatives in Parliament, which manifests the diversity of the nation and represents the will of the people and exercises their sovereignty. See **Article 94(2)** of the **Constitution**. At the same time, **Article 165(3)(d)** of the **Constitution** grants the High Court jurisdiction to hear any question respecting the interpretation of the Constitution, including the determination of the question whether any law is inconsistent with or in contravention of the Constitution. That is what the pending petition is all

about. It would therefore be prejudicial to the parties and embarrassing to the High Court bench that is hearing the above petition if this Court were to say much regarding the cited sections of the Penal Code. The less said the better.

85. Did the appellant discriminate against the gay and lesbian community in rejecting the proposed names? I do not think so. Freedom of association that is guaranteed under **Article 36** of the **Constitution** is not absolute. It may be limited in terms of **Article 24(1).**

86. The learned judges appreciated that freedom of association may be limited and stated that:

> ***"97. 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."***

That being the case, I think it is necessary to consider the meaning of **"sexual orientation"** in light of **sections 162, 163 and 165** of the **Penal Code.** Sexual orientation simply refers to a person's sexual identity or self identification; in other words, the inclination of an individual with respect to heterosexual, homosexual and bisexual behaviour. There is scientific literature that shows that sexual orientation (as opposed to a person's gender) is not fixed but fluid. I believe **sections 162, 163 and 165** of the **Penal Code** refer to acts or offences that are committed by persons out of

their preferred unnatural sexual orientation, and that is why they are referred to as unnatural offences.

87. **Article 27(4)** prohibits discrimination on the basis of a person's sex (gender), not sexual orientation. And there is a reason for this distinction, in my view. Other than gay and lesbian liaisons, there are other sexual orientations that are not permitted by our law, for example paedophilia, that is, sexual attraction towards children.

88. The definition of sexual orientation according to **Yogyakarta Principles** that was cited by the 1st respondent's counsel is quite different, and I believe unacceptable in Kenya. The Yogyakarta Principles, a set of principles relating to sexual orientation and gender identity published as the outcome of an international meeting of human rights groups in Yogyakarta, Indonesia, in November 2006, defines sexual orientation in the following terms:

> ***"Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."***

This is the definition of sexual orientation which the 1st respondent wants Kenya to adopt.

89. Our law, as it currently stands, does not permit homosexual and lesbian sexual practices, just as it outlaws sexual escapades between adults and children. It would be unthinkable, for example, for paedophiles to argue that they are entitled to freedom of association without discrimination on the basis of their sexual preferences and therefore demand registration of, say, **"Paedophiles Human Rights Protection Association."** The appellant would not, in my view, be right if it were to permit registration of such NGO. Likewise, the freedom of association of gays and lesbians in Kenya may lawfully be limited by rejecting registration of a proposed NGO, as long as the country's laws do not permit their sexual practices. There are instances where the law permits positive constitutional or statutory discrimination, for example, prohibition of child adoption by homosexual couples.

90. The learned judges in their interpretation of **Article 27(4)** argued that the State shall not discriminate against any person on any ground, including sexual orientation. In my view, gender identity and sexual orientation are two different concepts. Likewise, the learned judges held that the words **"Every person"** in **Article 36(1)** of the **Constitution** includes all persons living within the Republic of Kenya, despite their sexual orientation. This Article states:

> *"36.(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."*

91. Just like the freedom from discrimination and other constitutional rights, all rights or fundamental freedom, including freedom of association, are subject to the extent authorized by the Constitution or other written law; see **Article 24(1).** A democratic society is governed by laws. Our laws are based on the moral principles of our society and must be respected. It cannot be right that **"every person"**, including persons whose practices are not permitted by our laws, have unbridled right to form an association of whatever nature. The words **"every person"** in **Article 36** of the **Constitution** in their proper context must be taken to mean the right of any sane, law-abiding adult to form, join or participate in the activities of a lawful association that accords with the country's Constitution and other laws. The appellant was not obliged to accept a name that it truly believed was repugnant to or inconsistent with our law.

92. The appellant acknowledged that gay and lesbians are human beings and are entitled to all other rights enjoyed by every other human being, save for purported rights that are repugnant and contrary to the existing law. The appellant stated:

> *".....homosexuality is largely considered to be a taboo and repugnant to the religious teachings, cultural values and morality of the Kenyan people and the laws as per the aforementioned*

provisions of the Constitution and the Penal Code punishes same sexual acts as crime".

The appellant's contention was that the proposed NGO must have objectives that are not illegal according to any law. In my view, that was a correct rendition of the law.

93. The Kenyan Constitution protects family and our culture. It is evident that there is a lot of pressure being exerted from within and without to disregard some of our constitutional, moral, religious and cultural values and embrace practices that are seen as more trendy, progressive and modern, all in the name of protecting constitutional liberties. There is a danger in so doing. As a sovereign nation, our 2012 Constitution came after many years of agitating for it and was subjected to a referendum. The values and principles that it espouses must be respected.

94. The Judiciary should act very circumspectively whenever it is called upon to pronounce itself on an issue that was argued, debated and eventually voted upon by millions of Kenyans. One such issue is that of the family, which is covered by **Article 45**. The Constitution recognizes the family as the natural and fundamental unit of society and the necessary basis for social order. It is therefore recognized and protected by the State. The Constitution further recognizes the right to marry a person of the opposite sex. By implication, any association that does not promote family

values goes against the spirit of **Article 45** of the **Constitution** and, in my view, it was appropriate for the appellant to reject its registration.

95. For the aforesaid reasons, I would allow the appeal and set aside the High Court judgment and decree given on 24th April, 2015. I would further propose that each party bears its own costs of the appeal.

Dated and delivered at Nairobi this 22nd day of March, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL