

Significance

On one hand, the Court's decision was within the confines of the law in that the applicable law provides for compelling homosexuals to anal examination for purposes of proving the offence of sodomy. This is apparent in the reasoning of the court, which in a nutshell is that the law requires subjection to anal examination to prove the offence of sodomy, and therefore there was nothing illegal in compelling the petitioners to endure such a test.

The Court's reasoning is however not entirely sound. Though the Court seemed very certain about its analysis of the rationale for undertaking anal examinations, especially in paragraph 51 of the judgment, it is not at all certain whether indeed anal examination can prove the offence of sodomy. Further, the unanswered question remains as to whether in order to prove the offence, it is necessary to subject persons to humiliating anal examinations.

The main issue however is not the legality or illegality of conducting anal examinations to ascertain sexual behaviour, which might fall one way or the other depending on the national legal framework. A more fundamental question is whether the body of laws that allows such examinations is ethical in accordance with the rights to human dignity and equality, which many constitutions, including Kenya's, extol.

In this Kenyan case, the Court did not attempt to subject the state's action to human rights scrutiny, especially to question whether the state's practice of forcible anal examinations was in accordance with human rights norms. Instead, it took for granted that the state's practice of anal examinations would definitely prove some specific sexual behaviour. At least, the Court could not have been so certain about evidentiary veracity of such anal examinations.

RECOGNITION OF LGBTIQ ADVOCACY AND GROUPS

Eric Gitari v. Non-Governmental Organizations Co-Ordination Board & 4 Others
[2015] eKLR, Petition No. 440 of 2013
Kenya, High Court

COURT HOLDING

The words "every person" in Article 36 of the Constitution include all persons living within the republic of Kenya, regardless of their sexual orientation.

The respondents contravened the provisions of Articles 36 of the constitution in failing to allow gay and lesbian persons living in Kenya to register an association of their choice.

The petitioner is entitled to exercise his constitutionally guaranteed freedom to associate by being able to form an association.

Summary of Facts

The petitioner sought to register a nongovernmental organisation (“NGO”) with the 1st respondent, the Non-Governmental Organisations Coordination Board (“NGO Board”), a body corporate established under the provisions of the Non-Governmental Organisations Co-Ordination Act, Cap 19 of the Laws of Kenya (“NGO Act”). The NGO aimed to further the equality of lesbian, gay, bisexual, transgender, intersex, and queer (“LGBTIQ”) persons in Kenya. The NGO Board refused to accept the names proposed by the petitioner because they all contained the terms “gay” and “lesbian.” The NGO Board cited Sections 162, 163, and 165 of the Penal Code which criminalise gay and lesbian liaisons, and Regulation 8(3)(b) of the NGO Regulations of 1992 (the “Regulations”) as the basis for rejecting the request. The referenced Regulation provides that the Director of the NGO 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 a letter stating its reasons for refusal, the NGO Board also expressed the opinion that sexual orientation was not listed as a prohibited ground of discrimination in Article 27(4) of the Constitution of Kenya, 2010 (the “Constitution”); nor was same-sex marriage permitted in the Constitution whilst heterosexual relationships are expressly protected in Article 45(2).

Issues

The central issue in this case is whether persons who belong to LGBTIQ groups have the right to freedom of association, non-discrimination, and equality before the law. In particular:

1. Whether such persons have a right to form associations in accordance with the law; and
2. If the answer is in the affirmative, whether the decision of the Board not to allow the registration of the proposed NGO because of the choice of name was a violation of the rights of the petitioner under Articles 36 and 27 of the Constitution.

Court’s Analysis

The Court affirmed that Article 36 of the Constitution grants “every person” the right to freedom of association, and that any limitation to the right ought to be reasonable and justifiable under the law. “Person” is defined under Article 260 of the Constitution to include a company, association, or other body of persons whether incorporated or unincorporated. The Court therefore found that Article 36 does not exclude homosexuals.

The Court also referenced Article 20 of the Universal Declaration of Human Rights (UDHR), Article 22 of the International Covenant on Civil and Political Rights (ICCPR), and Article 10 of the African Charter on Human and Peoples’ Rights (ACHPR), which recognise the right to freedom of association and noted that they were inclusive of all natural persons and did not exclude any person.

The Court recognised the right to freedom of association as an important and powerful right, and is also critical to the enjoyment of other rights. The importance of this right has been recognised by other tribunals which the Court referenced including the African Court of Human and Peoples’ Rights in *Jawara v. The Gambia* (2000) AHRLR 107 (ACHPR 2000), the African Commission on Human

and Peoples' Rights in *Civil Liberties Organisation v. Nigeria*, Communication No 101/93, and the Ugandan Court of Appeal in *Kivumbi v. Attorney-General* [2008] 1 EA 174.

The Court found that the basis of the decision by the NGO Board, which was that the group held unpopular views which were unacceptable to others outside the group, contradicted the rights advanced by the Constitution. The Court rejected the NGO Board's judgmental attitude, and referenced the Privy Council's decision in *Patrick Reyes v. The Queen*, Privy Council Appeal No. 64 of 2001, which held that a tribunal or decision-making body should not read its "own predilections and moral values into the Constitution, but is required to consider the substance of the fundamental right at issue ..." The Court also cited the South African case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 to agree with its holding that even if the Constitution allowed persons to hold and articulate their views and beliefs against homosexual conduct, it did not allow the state to then turn these beliefs into dogma imposed on the whole of the society.

In the Court's opinion, the aims and objectives of the proposed NGO, which were to advance human rights issues relevant to the gay and lesbian communities living in Kenya, were not illegal. The Court therefore held that the decision of the Board not to accept the name of the NGO infringed on the right to freedom of association secured under Article 36 of the Constitution.

The Court noted that the NGO Board justified the limitation of the right under Article 36 of the Constitution based on the Penal Code's criminalisation of sexual conduct "against the order of nature," and also acts of "gross indecency between males." However, the Court rejected this view. In the Court's view, the Penal Code does not criminalise the state of being a homosexual or homosexuality. Further, the Penal Code does not criminalise the right of association of people based on their sexual orientation.

The Court rejected the NGO Board's argument that sexual orientation was not a listed ground for prohibition of discrimination under Article 27(4) of the Constitution. The Court found this argument flawed because the absence of sexual orientation did not then mean that the state was free to discriminate on this basis. Second, the burden was on the NGO Board to prove by citing relevant law that the limitation was allowed under that law. The Court found that the NGO Board had failed to discharge this burden. The Court therefore found that the acts of the Board in rejecting the petitioner's name for the proposed NGO, and by implication its refusal to register the proposed NGO, was a limitation of the petitioner's right to freedom of association under Article 36 of the Constitution. Further, the Board failed to justify the limitation in accordance with the requirements under Article 24 of Constitution.

The Court then inquired whether the NGO Board's decision infringed on Article 27 of the Constitution which prohibited discrimination. In the Court's opinion, while Article 27(4) does not explicitly state that sexual orientation is a prohibited ground of discrimination, it prohibits discrimination both directly and indirectly against any person on any ground. Further, the listed grounds are not exhaustive; the language used when stipulating the grounds is "including" which according to 259(4)(b) of the Constitution means "includes, but is not limited to." Furthermore, when the Court considered the Constitution holistically, it concluded that the Constitution was committed to promoting the values of human dignity, equality, and freedom. In the Court's view, to allow discrimination on the basis of sexual orientation was to contradict these constitutional values. The Court therefore held that the NGO Board's decision also contravened Article 27 of the Constitution.

Conclusion

The petition succeeded. The Court issued orders including an order of *mandamus* directing the Board to strictly comply with its constitutional duty under Articles 27 and 36 of the Constitution and the relevant provisions of the Non-Governmental Organizations Co-ordination Act.

Significance

This is one of the cases of “recognition of LGBTIQ organisations” that have appeared in Kenya and Botswana, and may reflect naming compromises being made by LGBT advocacy organizations in other African countries. Perhaps the significance of this case could be discerned from this dictum of the Court:

There is a whiff of sophistry in the recommendation by the respondent that the petitioner registers his organisation, but by another name. What this recommendation suggests is that the petitioner can register an organisation [under a very different name] but carry out the objects of promoting the interests of the LGBTIQ community, which suggests that what the Board wants to avoid is a recognition of the existence of the LGBTIQ groups. (para. 149)

Political recognition as citizens of a particular identity is the heart of the issue for both the NGO and the NGO Board. It is interesting that in both the Kenya and the Botswana cases, the contention of the government representatives was that LGBTIQ persons are somehow not citizens and that their Constitutions should not recognise LGBTIQ people as persons. In some countries, LGBTIQ organisations have been registered under non-controversial names, and governments have tolerated their carrying out of their objectives to advance rights of LGBTIQ persons. Indeed, “what’s in a name?” Perhaps the petitioners in this case and the Botswana LEGABIBO cases would respond, “Everything.” This could be an area of reflection for advocacy organisations: the significance of seeking such recognition rather than accepting a compromise.

Thuto Rammoge & 19 Others v. The Attorney General of Botswana
[2014] MAHGB-000175-13
Botswana, High Court

COURT HOLDING

The refusal of the government to recognise and register an organization founded to lobby for equal rights and decriminalisation of same-sex relationships violated constitutional rights to equal protection before the law, and freedom of expression, association and assembly, guaranteed under Sections 3, 12, and 13 of the Constitution, and was therefore unjustifiable under the Constitution.

Summary of Facts

The Applicants, belonging to an organisation called Lesbians, Gays and Bi-sexuals of Botswana (“LEGABIBO”), filed this application to challenge the decision of the Minister of Labour and Home Affairs (“Minister”) who rejected the Applicants’ registration of their organisation, LEGABIBO. The