REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 150 OF 2016

EG.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

CONSOLIDATED WITH PETITION NO. 234 OF 2016

JM.....1ST PETITIONER

MO.....2ND PETITIONER

MAO.....3RD PETITIONER

YP.....4TH PETITIONER

MO.....5TH PETITIONER

GAY AND LESBIAN COALITION OF KENYA.....6TH PETITIONER

NYANZA WESTERN AND

RIFT VALLEY NETWORK.....7TH PETITIONER

KENYA HUMAN RIGHTS COMMISSION.....8TH PETITIONER

VERSUS

THE ATTORNEY GENERAL..... RESPONDENT

AND

DKM.....1ST INTERESTED PARTY

AO.....2ND INTERESTED PARTY

IR.....3RDINTERESTED PARTY

GN.....4TH INTERESTED PARTY

YH.....5TH INTERESTED PARTY

JT.....6TH INTERESTED PARTY

KENYA CHRISTIAN PROFESSIONAL

FORUM.....7THINTERESTED PARTY

KENYA LEGAL & ETHICAL ISSUES NETWORK

ON HIV & AIDS.....8THINTERESTED PARTY

IRUNGU KANGATA.....9TH INTERESTED PARTY

REGISTERED TRUSTEES JAMIE MASJID AHLE

SUNNEIT WALJAMAIT & THE REGISTREDTRUSTEES

UMMAH FOUNDATION.....10THINTERESTED PARTIES

AND

KATIBA INSTITUTE.....1ST AMICUS CURIAE

KENYA NATIONAL COMMISSION ON HUMAN

RIGHTS.....2ND AMICUS CURIAE

JUDGMENT

INTRODUCTION

1. This judgment disposes two consolidated Petitions, namely, Petition number **150** of 2016 (herein after referred to as the first Petition) and Petition Number **234** of 2016 (herein after referred to as the second Petition). The common thread in the two Petitions is that they both challenge the constitutionality of sections **162(a) (c)** and **165** of the Penal Code.[1] Additionally, the first Petition assaults the said provisions on grounds of vagueness and uncertainty.

2. The second Petition seeks a declaration that **sexual** and **gender** minorities are entitled to the right to the highest attainable standards including the right to health care services as guaranteed in Article **43** of the Constitution. The Petitioners also seek an order directing the State to develop policies and adopt practices prohibiting discrimination on grounds of **sexual orientation** and gender identity or expression in the health sector.

The Parties

3. EG, the Petitioner in the first Petition describes himself as a lawyer and director of the [Particulars Withheld], a Non-

Governmental Organization. He states that he presents this Petition in his own interest as an individual who has been subjected to stigma and discrimination as a direct and indirect result of the impugned provisions. He also describes himself as a gay man who is exposed to the risk of wrongful prosecution under the impugned provisions. He further states that he brings this Petition on behalf of homosexuals (or more precisely Lesbians, Gay, Bisexuals, Transgender, Intersex and Queer (LGBTIQ) citing Article **22(1) (2) (c)** of the Constitution.

4. The first Petitioner in the second Petition, JM, is a male adult of sound mind. He claims that he has been subjected to attacks, rape and discriminatory acts because of his perceived or actual sexual orientation, and, that, his family has also been subjected to similar attacks and discrimination purely because of his perceived or actual sexual orientation.

5. The second Petitioner **MO,** describes self as an adult male of sound mind who has been subjected to public attacks, arbitrary arrests by police, discriminated against purely on the basis of his perceived or actual imputed sexual orientation. He claims to have been attacked and gang raped because of "his" perceived or actual imputed sexual orientation.

6. The third Petitioner **MAO** is a female adult of sound mind and the mother to the second Petitioner. She claims to have witnessed discriminatory acts committed against the second Petitioner, and, to have severally gone to police stations to secure the second Petitioner's release whenever detained on grounds of his perceived or actual imputed sexual orientation.

7. The fourth Petitioner, **YP**, an adult woman of sound mind claims that her rights to privacy, human dignity and security of the person have been violated because of her **imputed** sexual orientation. She also states that she has undergone public attacks, arbitrary detention and eviction from her residence and attacks on her business purely because of her **perceived or actual imputed** sexual orientation.

8. The fifth Petitioner **MO** is an adult male of sound mind and a priest based in Kisumu County. He avers that in his interactions with the community, he has witnessed discriminatory acts and attacks against members of lesbians, gay, bisexual and transgender.

9. The sixth Petitioner**, Gay and Lesbian Coalition of Kenya**, is a civil society organization working on the human rights and welfare of persons of minority sexual orientation and gender identities in Kenya.

10. The seventh Petitioner, **Nyanza Western and Rift Valley Network,** describes itself as an organization that champions for the respect of human rights and welfare of persons of minority sexual orientation and gender identities in Nyanza, Western and Rift Valley regions of Kenya.

11. The eighth Petitioner is the Kenya Human Rights Commission, a registered Non-Governmental Organization working on and supporting human rights in Kenya and the region.

12. The Petitioners in the second Petition state that they bring the Petition on their own behalf and in public interest seeking orders aimed at actualizing the human rights provisions of the Constitution, to protect the fundamental rights and freedoms of persons of minority sexual orientation and gender identities in the Republic of Kenya.

13. The Respondent in the two consolidated Petitions is the Honorable Attorney General sued in his capacity as the principal legal adviser to the government of Kenya pursuant to Article **156** of the Constitution.

14. The first to sixth Interested Parties filed an affidavit by **DKM** sworn on 2nd December 2016 on his own behalf and that of the second to sixth Interested parties. He deposes that he is a gay man and that he, together with the second to sixth Interested Parties, have been advocating for the protection of rights of Gays, Bisexuals and Men who have sex with Men (MSM) and Lesbians respectively.

15. The seventh Interested Party, **Kenya Christian Professional Forum,** is an organization that comprises Christian Professionals engaged in different sectors of the economy. It states that one of its main objects is to campaign for the consideration of the perspectives and ideals held by Christian Professionals in Kenya and by extension all other Christians in legal-policy formulation and public debate on topical and sensitive issues, hence, its interest in the instant Petitions.

16. The eighth Interested Party is the Kenya Legal & Ethical Issues Network on HIV & AIDS whose. Its interest in these Petitions is

in relation to the right of MSN to access health care services, and in particular access to HIV care, prevention, and the effect of criminalization of same sex consensual sex and the right to health.

17. The ninth Interested Party **Irungu Kangata** is the Senator of Muranga County. His interest in these Petitions is to secure the diversity of Kenyan Cultures in their common rejection of homosexuality.

18. The tenth Interested Parties are the registered trustees of Jamie Masjid Ahle Sunneit Waljamait & the Registered Trustees Ummah Foundation.

19. The first *Amicus Curiae* Katiba Institute describes itself as a non-profit making non-governmental organization with expertise in constitutional law and international human rights law. It states that it is dedicated to the faithful implementation of the 2010 Constitution and more specifically the constitutional principles of the rule of law and human rights.

20. The second *Amicus Curiae* is the Kenya National Commission on Human Rights, an independent constitutional commission established under Article **59(4)** of the Constitution with the mandate to promote and protect the observance of human rights in Kenya.

Litigation history

21. Petition **234** of 2016 was certified under Article **165(4)** of the Constitution on **9th** June 2016 while Petition No. **150** of 2016 was certified as such on 2nd November 2016. This bench was thereafter constituted on **1st** February 2017. On **18th** January 2018, the court with the consent of all the parties consolidated the two Petitions. On 22nd February 2018, the court allowed International Commission of Jurists, through Mr. Solomon Ebobra and Queens Counsel Tim Otty to be observers in these proceedings without taking any active role.

22. Although the two Petitions are similar, for ease of clarity, we deem it appropriate to summarize the facts of each Petition as presented by the parties.

Petition 150 of 2016.

23. The first Petition dated **15th** April 2016 is supported by the affidavit of EG. The Petitioner also filed two affidavits sworn by expert witnesses namely Prof. Dinesh Bhugra and Prof. Chris Beyrer. He also filed a witness statement signed by Prof. Lukoye Atwoli who gave oral testimony and was cross-examined.

24. In his affidavit, EG deposed that he is emotionally, affectionately, sexually and spiritually attracted to persons of his own sex, that is, to male persons, and, as an openly gay person living in Kenya, he has experienced discrimination and hostility as follows: -

a. that in 2011, he was denied service at a barber shop at 20th Century Plaza along Mama Ngina Street, Nairobi despite having patronized the shop for over one year. The reason given was that other patrons had complained about the barber shop providing services to him and that the clients did not want to be associated with LGBTIQ persons;

*b. that he has been a target of numerous threatening, insulting and death messages on Facebook and other social media, and, that, on **10th** May 2015, the Weekly Citizen posted an article claiming to unveil Kenya's top Gays including him and other individuals thus violating their right to privacy;*

*c. that a client of the NGLHRC was on **18th** December 2015 fired from his job by a flower handling company, and, his employer told him "people like you are not allowed in the office;"*

d. that one of his friends had the word "shoga" (homosexual) written on his car and on the door to his house in Nairobi, and, feeling intimidated and threatened, he moved out of his home to avoid the stigma;

e. that he has been forced to limit the stigma by keeping a low profile by limiting his social life and has lived in constant apprehension of the risk of arrest, prosecution and conviction for being a gay person;

f. that the impugned provisions affect the sexual and emotional aspects of his experiences of being human, his core private intimacy which he believes is inviolable and has affected and continue to affect his private life decisions;

g. that the said provisions are discriminatory and unjustified and that his attempt to register an NGO to advance their cause was rejected by the NGO Registration Board prompting him to successfully challenge it in court;

h. that between November and December 2015, one of their clients and a founder of a lesbian and bisexual women's group in Mombasa was targeted by a group of vigilantes in Shimo La Tewa area who assaulted her and threatened to kill her forcing her to flee from her home;

*i. that on **24th** May 2015 one of their clients was assaulted by police officers at Parklands Police Station where he had gone to report loss of his property for 'dressing very gay" while another person was assaulted on **28th** February 2016 for working with LGBTIQ;*

*j. that on **27th** December 2015 yet another client was assaulted and evicted by her landlord for watching sex movie with her girlfriend while naked and, lastly;*

*k. that on **18th** February 2014 some parliamentarians issued a statement calling for the arrest of all homosexual persons and incited the pubic to arrest them where the police fail to do so.*

25. In support of his petition, EG filed a witness affidavit sworn by Prof. Dinesh Bhugra, a Professor Emeritus of Mental Health and Cultural Diversity; a Fellow of the Royal College of Physicians of London; a Fellow of the Royal College of Psychiatrists; a Fellow of the Royal College of Physicians of Edinburgh; a Fellow of the Royal College of Public Health Medicine and an Honorary Fellow of amongst others.

26. Prof. Bhugra also deposes that he was the President of the World Psychiatric Association (WPA) from 2014-2017, an Association of National Psychiatric Societies which included 140 member societies from 120 different countries representing more than 200,000 individual psychiatrists whose core mandate is to promote the highest possible ethical standards in Psychiatric work. He states that he has authored or co-authored over 275 peer-reviewed articles on issues of psychiatry, psychology and mental health and also authored or co-authored over 30 books in the same field.

27. Prof Bhugra states that in 2016, the WPA issued its position statement on gender identity and same sex orientation, attraction and behaviours intended to set out an authoritative statement on the current state of scientific knowledge in respect of homosexual and bisexual orientation and associated matters of ethical clinical practice. In the position statement, WPA, considers same sex attraction, orientation and behaviours as normal variance for human sexuality; and recognizes the universality of same sex expression across cultures and that same sexual orientation arises in all cultures worldwide.

28. Further, that WPA considers sexual orientation innate, and determined by biological, psychological development and social factors and recognizes the multifactorial causation of human sexuality, orientation, behavior and lifestyle.

29. According to Prof Bhugra, considerable scientific research has been undertaken on the subject but that the exact mixture of factors giving rise to sexual orientation have not been conclusively established, and the same position statement states that approximately 4% of the world population identify with the same sex orientation.

30. Prof Bhugra goes on to quote the Position Statement which states, *inter alia*, that WHO accepts same sex orientation as a normal variant of human sexuality,[2] and that the United Nations Human Rights Council, 2012 values lesbian, gay, bisexual and transgender(LGBT) Right. In his opinion, modern scientific and medical standards recognize that there is nothing disordered about same sex sexual orientation or behavior, which is not any kind of illness or disorder but part of the variation of human beings, which occurs naturally by reference to multiple variations in fundamental characteristics and attributes.[3] Prof Bhugra also cited the Psychological Society of South Africa[4] and Psychological Association of the Philippines[5] both of which uphold the same view.

31. Prof Bhugra argues that same sexual orientation being a natural variation within human sexuality and not any kind of illness or disorder is not a suitable subject matter susceptible to treatment; and that attempts to treat and change sexual orientation are harmful to the mental health of persons subjected to such attempts and therefore unethical. Prof. Bhugra, quoted the Position Statement to

the effect that discrimination and stigmatization have negative health consequences of LGBT people and that LGBT individuals show higher unexpected rates of psychiatric disorders and once their rights and equality are recognized, this rate starts to drop.

32. He also quoted WHO Comprehensive Mental Health Action Plan 2013-2013 and concluded that the removal of stigmatization and discrimination contributes to an improvement in the mental health of LGBT people.

33. EG also filed an affidavit sworn by Prof. Chris Beyrer, a Professor in Public Health and Human Rights; a Professor of Epidemiology, International Health, Behavior and Society, Nursing and Medicine among other qualifications.

34. Prof Beyrer deposed that he has extensive experience in conducting international collaborative research and training programs in HIV/ AIDS and other infectious diseases and provided advisory services on the subject. He swore the affidavit to provide his expert views on public health implications of laws criminalizing same-sex sex, particularly from the perspective of the global HIV epidemic, contending that criminalization laws operate as a critical barrier to HIV prevention, treatment and care efforts.

35. Prof. Beyrer deposed that **MSM** have been a vulnerable group throughout the global HIV epidemic and that Laws criminalizing consensual adult same-sex sex, social stigmatization, and discrimination have exacerbated health risks facing MSM; promoted violence against them and restricted their access to adequate prevention and medical treatment.[6] He cited Sullivan et al., 2009 and his own research C. Beyrer et al., 2016 and deposed that they bear the highest rates of HIV infection in many countries.

36. Referring to C. Beyrer et al., 2012, he deposed that Data on this burden is incomplete; that individual country reports vary widely on HIV prevalence, incorporate exceedingly small samples of MSM for studies, and oftentimes provide a very limited surveillance of how HIV impacts MSM.

37. Prof Beyrer deposed that HIV infection among MSM tends to be higher in countries criminalizing same sex sex, as compared with countries, which do not criminalize. Further, he deposed that Healthcare providers often carry their own biases against MSM, which can minimize or prevent access to appropriate healthcare for MSM. He also deposed that many MSM fear testing, counseling and treatment services due to social stigmatization, potential conflict, violence, arrest, extortion, blackmail by the police and other public authorities and tension within their households, families and communities.[7] He however also admitted that elimination of criminalization laws is not sufficient to address all the health needs of MSM. Prof Beyrer concluded that decriminalization of same-sex practices is not just a battle over legal doctrine or religious principle; but it is a fight for better health for all.

38. EG also called Prof. Lukoye Atwoli an expert witness, who is an Associate Professor of Psychiatry and Dean at the Moi University School of Medicine, College of Health Sciences in Eldoret. He also holds other qualifications.[8] In his oral testimony, Prof. Lukoye Atwoli adopted his witness statement dated 9th February, 2018 as his evidence in chief. He stated that he specializes in the area of trauma and mental health, including children's mental health, HIV and mental health, and general hospital psychiatry. He further stated that he has dealt with a wide range of issues relating to the mental health affecting LGBT persons in Kenya in the course of his professional practice as a psychiatrist. He also stated that he teaches university courses on human sexuality, which include issues concerning the nature and experiences by individuals, of homosexual and bisexual sexual orientation and related mental health issues.

39. Prof. Lukoye Atwoli testified that from his experience as a psychiatrist and as an academic researcher, the scientific consensus in the fields of psychiatry and psychology and related social and medical sciences, on the nature of sexual orientation is that human sexuality is considered on the basis of three related matters – sexual orientation, sexual identity and sexual behavior. Further, that all human beings can be placed somewhere on a spectrum encompassing heterosexual, bisexual, homosexual and asexual. In addition, he stated that sexual orientation cannot be predicted at birth, but an individual's sexual orientation is largely fixed and immutable.

40. Further, he testified that the determinants of sexual orientation are complex and have not been conclusively scientifically established. However, he stated that the established scientific consensus is that as with most matters relating to humans, the causation reflects a complex mix of biological, psychological and social or environmental factors.

41. He referred to the working definition of sexuality as given by WHO thus:

"*…a central aspect of being human throughout life; it encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes,*

values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, legal, historical, religious and spiritual factors."[9]

42. Responding to affidavit evidence tendered by the 7th interested party, in respect of sexual orientation of identical twins **suggesting** that sexual orientation may result from genetic or biological factors, Prof. Lukoye contended that such conclusion is not supported by science. In his view, no two human beings even where sharing the same womb, experience life in an identical manner.[10] In support of his proposition, he cited the study by K. Richardson and S. Norgate where it was noted that **"equal environment assumption" (EEA) in Twin Studies may not *hold even in identical twins.***[11]

43. In his view, it is possible that the intra-uterine hormonal exposure of one twin may differ significantly from another, resulting in identical twins being exposed to different biological factors. He further stated that genetics may be one aspect of the overall picture, but even in respect of genetics, the question as to which parts of a person's DNA are activated and which are not is a product of complex environmental factors, including intra-uterine hormonal factors; and that the expression of the genetic code in any one individual depends on many different factors.

44. Prof. Lukoye acknowledges, however, that other studies on twins have established that identical twins do have a higher chance of both being homosexual than non-identical twins or other siblings.[12] He cited the study carried out by K. S. Kendler, L. M. Thornton, S. E. Gilman, R. C. Kessler which found that biometrical twin modelling suggested that sexual orientation was substantially influenced by genetic factors, but family environment may also play a role.

45. Prof Lukoye further cited other studies[13] that support a familial link, and do not support the idea that siblings of homosexuals may behaviourally ***'acquire'*** homosexuality. He also stated that contrary to the suggestion in the affidavit by Dr Wahome Ngare, identifying identical twins where one identifies as having a homosexual sexual orientation and one as having a heterosexual sexual orientation does not prove any proposition with respect to the existence of genetic or biological factors among the determinants of same sex sexual orientation.

46. Prof. Lukoye Atwoli emphasised that it is not possible to change sexual orientation through 'medical intervention. In his view, where a person's sexual orientation (or identity) truly changes in life (without the intervention of coercion or stigmatization), what is often happening is that the individual has come to understand and recognize/accept a fundamental part of his or her human personality, his or her sexual orientation, which he or she had previously repressed or not appreciated or understood.

47. He maintained that homosexual or bisexual sexual orientation is not a disease, as they are not included as disorders in the main international classifications for diseases and mental disorders.[14] He further stated that since it is not a disease, doctors cannot properly or ethically speak of seeking to treat or change homosexual or bisexual sexual orientation.

48. According to Prof. Lukoye Atwoli, any attempt to "treat," or change homosexual or bisexual sexual orientation often cause the persons subjected to such efforts or "treatment" significant mental and psychological harm, and that efforts to change sexual orientation ("conversion therapies"), have been largely scientifically discredited.[15] In his view, restricting or denying the existence of sexual orientation other than heterosexual will not reduce the incidence of such other sexual orientations; and that homosexual and bisexual sexual orientation will continue to exist in a minority of people whether or not they are restricted by the criminal law or by societal norms.

49. On what is ***"normal" human sexuality***, Prof Lukoye Atwoli quoted the WHO current working definition of sexual health which is"*…a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled.*"[16]

50. Prof. Lukoye Atwoli asserted that normal human sexuality includes feeling attracted to persons, being able to express your attraction for such persons and being free to approach them in consequence, and if they are similarly attracted and willing to engage in consensual sexual activity.

51. According to Prof. Lukoye Atwoli, in the absence of legal and social stigmatisation or other factors suppressing normal sexual

behaviour, most people will express their sexuality in a way, which accords with their sexual orientation. He added that as a matter of scientific analysis, sexual orientation, sexual identity and sexual behaviour are distinct and interdependent elements of human sexuality, they cannot be divorced from each other, and, therefore the restriction of any of the three elements impairs the functioning of normal human sexuality.

52. In Prof. Lukoye Atwoli's view, in a society where sexual acts between two consenting adults of the same sex are stigmatized or otherwise discouraged, more individuals with a bisexual or homosexual orientation will repress their sexual identity or will not be open about their sexual orientation. He argued that where homosexual or bisexual behaviour is not criminalised, the social atmosphere for LGBT people would improve.

53. In his view, criminalisation of same sex sexual acts leads to a wide range of mental health issues and relationship dysfunction. He stated that attacks, stigmization or violence on LGBT people might cause trauma to the individual, leading to posttraumatic stress disorder (PTSD), depression, anxiety disorders and substance use disorders.[17]

54. Responding to the 7th Interested Party's alleged link between homosexual sexual orientation and child sexual abuse, Prof. Lukoye Atwoli contended that there is no linkage between sexual orientation and sexual abuse.

55. He also stated that while it is correct to say that, generally, a person who has been abused is statistically more likely to become abusive later in life, that finding is not limited to any particular sexual orientation and applies to all sexual orientations and all forms of abuse. He argued that abusive behaviour by victims of abuse is a product of the human condition, giving rise to the common precept that ***"hurting people hurt people."***

56. Responding to the concluding statement of the study by Roberts *et al* relied on by Dr Wahome Ngare, Prof. Lukoye Atwoli argued that the study disputes the suggestion that it is established science that sexual abuse in childhood causes homosexual orientation in later life. He maintained that the article is misinterpreted and misused in the Affidavit of Dr Ngare to suggest a singular association, contrary to what is actually said by the authors and asserted that the article explicitly does not settle the matter, but leaves it open to further research.

57. Prof. Lukoye Atwoli concluded that, in respect of an individual who has suffered sexual abuse as a child, it is established that one of the consequences of the abuse is that the person may act in a less sexually inhibited way in the future, regardless of whether the abuse was caused by a heterosexual or homosexual. In his view, therefore, any attempt to link the decriminalization of any kind of sexual conduct between consenting adults of the same sex to sexual abuse of others, including children, is wholly unfounded in science.

Legal foundation of Petition 150 of 2016.

58. The first Petition challenges the constitutionality of sections **162** and **165** of the Penal Code[18] on grounds that the provisions have in effect, or are in practice applied to criminalize private consensual sexual conduct between adult persons of the same sex. The Petitioner contends that the provisions are vague and uncertain, because they breach the principles of legality and rule of law and infringe the rights of Kenyan citizens.

59. The first Petition questions the constitutional legitimacy of the State in seeking to regulate the most intimate and private sphere of conduct of Kenyans, regardless of their sexual orientation. He states that to the extent that the impugned provisions purport to criminalize the relevant conduct, they are unconstitutional, and by dint of Article **2** of the Constitution are null and void to the extent of the inconsistency because they: -

*a. Violate Articles **27** (Equality and freedom from discrimination), Article **28** (Human dignity), Article **29** (Freedom and security of the person), Article **31** (Privacy) and Article **43** (Economic and social rights-specifically health);*

*b. contravene common law and constitutional principles (including Articles **10** and **50** of the Constitution) relating to legal certainty on account of their vagueness and uncertainty and consequently, cannot operate to create criminal penalties;*

*c. violate International law which has been incorporated as part of domestic law by virtue of Article **2** of the Constitution;*

d. that the principle of legality requires that criminal offences be clearly, precisely and comprehensively drafted so as to be understood by ordinary Kenyan citizens.

*e. That the impugned provisions fail intelligibly to define the conduct to which they relate, hence, they violate the constitutional principle of the rule of law in Article **10(2)(a)** of the Constitution, the common law principle of legal certainty and the right to a fair hearing provided under Article **50(2)(n)(i)** of the Constitution.*

60. The Petitioner in the first Petition also states that he brings the Petition to end what he considers unjust and unconstitutional state of affairs whereby LGBTIQ Kenyans are exposed to the risk of criminal prosecution and imprisonment because of the climate of social opprobrium towards them perpetuated by the criminalization of their sexual orientation and identity.

61. Consequently, he invites this court to strike down the impugned provisions for being unconstitutional. In the alternative, he urges the court to interpret the said provisions in a manner that excludes them from the ambit of the private consensual sexual conduct between adult persons of same sex. The Petition is founded on Articles **2, 19, 20, 21, 24, 25, 31, 43** and **259** of the Constitution.

62. In his view, to the extent that the impugned provisions declare the conduct as unnatural or grossly indecent and criminalize it, the provisions degrade the inherent dignity of the affected individuals by outlawing their most private and intimate means of self-expression. He further claims that sexual intimacy between consenting adults is a fundamental part of the experience of humanity, and an essential element of how individuals express love and closeness to one another; and, establish and nurture relationships. He argues that to criminalize one's conduct of engaging in sexual intimacy in private with another consenting adult, and in a manner which causes no harm to any third party or to the parties so engaging, amounts to a fundamental interference in the person's experience of being human and their personal dignity and privacy and amounts to degrading treatment.

63. He also avers that where the law criminalizes consenting adult sexual intimacy only to persons of a certain sexual orientation, such a law is plainly discriminatory and fundamentally impairs access to adequate health care services and jeopardizes public health generally. He claims that sexual orientation which involves the expression of love and sexual intimacy between persons of the same sex (whether male or female), is an intimate and fundamental part of the human personality of a minority of persons across all places and times worldwide. He further argues that sexual orientation is intimate and is determined by biological, psychological development and that same sex attraction, orientation and behavior is considered as normal variants of human sexuality.

64. Lastly, the Petitioner argues that his Petition neither concerns same sex marriage, nor does it seek to legalize same sex marriage; and, if successful, it will not have the effect of mandating or requiring Kenya to recognize same sex marriage. He maintains that the Petition only challenges the criminalization and severe punishment under the criminal law of a section of Kenyan society because of the fundamental and innate characterization of their sexual orientation.

Petition No. 234 of 2016.

65. The eight Petitioners in Petition No. 234 of 2016 challenge the constitutionality of sections **162(a) (c)** and **165** of the Penal Code.[19] They aver that the two provisions violate Articles **27(4), 28, 29, 31, 32, 43, 50** of the Constitution. They also argue that the impugned provisions undermine fundamental human rights guaranteed by Articles **1,2,3,7,9,12** and **28** of the Universal Declaration of Human Rights (UDHR); Articles 2.1,17.1, 6.1, 7,9.1, 17, 17.1, 26 and 26 of the International Covenant on Civil and Political Rights (ICCPR); Articles 2.2, and 12.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Articles **2,3,4,6,10,19** and **28** of the African Charter on Human and Peoples Rights (ACHPR) and Resolution 275 of the ACHPR. On the basis of the foregoing, they ask the court to give meaning to the provisions of the Constitution that they claim are offended by section **162(a)(c)** and **165** of the Penal Code[20] by declaring them null and void.

The Respondent's response

66. The Respondent filed grounds of opposition on 19th August 2016. He states that the preamble to the Constitution acknowledges the supremacy of the almighty God who is the objective moral law giver and that this informed the decision to retain the impugned provisions. He contended that the Petitioners have failed to lay clear grounds for the court to find the impugned sections unconstitutional. He maintained that the Constitution recognizes marriage as a union of two consenting adults, male and female, and, that the legislative function of the State is exercised by Parliament, hence, the court cannot compel the government to legalize

homosexuality by amending the impugned provisions. He also stated that sexual orientation of an individual is fixed at the birth latest and cannot be changed by any means.

67. The respondent further states that the court will be overstretching its mandate if it grants the orders sought, and, if granted, the orders would have a drastic impact on the cultural, religious, social policy and legislative functions in Kenya as it would amount to legalizing homosexuality through the back door. Finally, the Respondent contended that the Petition is incompetent, misconceived, misplaced and is an abuse of the process of the court as the Petitioners' rights and fundamental freedoms have not been violated.

The First to Sixth Interested Parties' Affidavit in support of the Petition

68. The 1st to 6th Interested Parties filed an affidavit in support of the Petition sworn by the 1st Interested Party, **DKM** on 2nd December 2016. He deposed that he and the 2nd to 6th interested parties advocate for protection of rights of Gays, Bisexuals, MSM and Lesbians. He also averred that he has been involved in HIV and AIDS research among gay men for over ten years and established that Gay men and other MSM are vulnerable to stigma, discrimination, violence and that sexual behavior of gay men and other MSM has implications for both men's and women's reproductive health. He also stated that the population of Kenyan MSM is larger than believed.

69. He further averred that the 4th Interested Party has been a victim of prosecution and persecution, in that he was arrested and charged under section **162** of the Penal Code.[21] That he was forced to undergo examination, which greatly violated his fundamental rights and freedoms, and that, as a catholic, the existence of the said provisions, make him fear confessing before a priest. In addition, he claimed that the impugned provisions infringe on their privacy and freedom of expression, and, that, they have suffered not only in the hands of the state through prosecution, harassment, vilification, ridicule, attacks, stigmatization, discrimination and persecuted by non-state actors.

The Seventh Interested Party's Response to the Petitions

70. The 7th Interested Party filed a number of documents in response to the Petitions namely:

i. Response dated 9th November 2017;

ii. Replying Affidavit sworn by Anne Mbugua on 18th January 2018;

iii. Replying Affidavit sworn by Dr Wahome Ngare on 18th January 2018;

iv. Expert witness Affidavit sworn by Dr Johnson Kilonzo Mutiso on 22nd February 2018;

v. Replying Affidavit sworn by Anne Mbugua on 21st February 2018.

71. In its response dated 9th November, 2017, the 7th Interested Party contended *inter alia* that the Constitution confers the legislative mandate upon Parliament, hence, this Petition aims to use judicial craft to legitimize gay liaisons and such other indecent offences and create a new breed of rights which do not exist in the Constitution. In addition, it states that no right confers a cover to an individual to engage in illegal criminal conduct.

72. It further states that the very nature of criminal law is to circumscribe conduct that is considered wrong the content often being moral, hence, the argument that morality cannot be used must fail. On the alleged vagueness of the impugned provisions, the 7th Interested Party states that the Petitioners contention that the provisions offend the right to equal treatment for persons of homosexual orientation, is by itself an admission of the certainty of the provisions. It also states that the provisions clearly criminalize homosexual carnal knowledge.

73. The 7th Interested further states that it is unsustainable to allege unfairness when society frowns upon persons who are deemed to engage in criminal conduct. In addition, it states that the law is an expression of moral inclinations in the society; that in the realm of criminal law, there is no requirement that there has to be an individual victim for a crime to be complete; and, that the alleged violation of constitutional rights cannot arise since the conduct in question is illegal. Lastly, it states that no evidence has been

adduced to show that persons engaged in homosexuality are denied medical care.

74. Additionally, the 7th Interested Party filed a Replying affidavit sworn 18th January 2018 by it chairperson **Anne Mbugua** in response to Petition 150 of 2016. She deposed that she served as a trainer of trainers during the run up to the referendum that led to the adoption of the 2010 Constitution. To her knowledge, homosexual conduct and abortion arose and the resounding answer that was given by the Committee of Experts was that the new Constitution did not permit abortion nor did it legalize homosexual conduct.

75. Further, she deposed that despite our Constitution heavily borrowing from the South African Constitution, sexual orientation provided in section 9(3) of their Constitution, is not included in Article 27(4). She deposed that the Constitution does not legalizes homosexual conduct nor does it envisage the use of an interpretation intended to circumvent the will of the people of Kenya.

76. She also stated that criminalization of homosexuality is within the confines of the law and that individual liberty is circumscribed where it offends common good and public policy and that the state has a duty to protect the morals and traditional values recognized by the community. Further, that the quest to validate homosexual law is an assault on Article 45 of the Constitution. Moreover, that Article 24 provides for limitation of rights which limitation is justifiable on the basis of public interest and public policy.

77. **Ms Mbugua** referred to annexture **AM2** to her affidavit which is a Replying Affidavit sworn by **Dr. Wahome Ngare** an Obstetrician- Gynecologist in which he stated that research and statistics show that persons who identify themselves as homosexuals are often introduced and recruited through sexual abuse by adults and that those who experience such abuse are more likely to abuse children. Mr. Ngare also referred to a research done on identical twins showing that gays are not born as gay.

78. In response to Petition 234 of 2016, Ms Mbugua also swore another affidavit on 21st February 2018. She deposed that the penal statutes do not in any way violate the constitutional rights of the LGBT community; that the impugned provisions do not criminalize a person's condition for having attractions, impulses or desire to engage in prohibited acts. According to Ms Mbugua, the law focuses on the behavior of persons and not their actions or impulses to engage in criminal activities, rather, that the impugned sections criminalize the conduct of engaging in unnatural sexual behavior.

79. In response to the affidavit of JM, Ms Mbugua contends that he has not provided particulars of the persons who raped him, the church he was excommunicated from and the landlord who evicted him from the salon. Further, she deposed that no evidence has been led to demonstrate that the acts complained of flow from the enforcement of the impugned provisions.

80. In response to the affidavit of MO and his mother MAO, Miss Mbugua deposes that no particulars have been furnished to show that the alleged rape and harassment visited on Maureen flow from the enforcement of the impugned provisions.

81. In response to the affidavit of YP, Ms Mbugua deposes that no particulars have been provided on the alleged attack on her at her work place or eviction by her landlord. Further, that no proof that the actions ever took place, and if they did, they were done in the enforcement of the impugned provisions.

82. In response to the affidavit of **Daniel Peter Onyango** the 8th Petitioner's Director, Ms Mbugua contends that there was no proof that the alleged or existing stigmatization against the LGBT community has been precipitated by the impugned sections. Further, that stigma is a community reaction to a person's behavior that is deemed harmful to the society and was a standard mechanism in traditional African society and that no evidence has been given to show that stigma leads to or causes criminal behavior.

7th Interested Party's Witness Affidavit by Dr Johnson Kilonzo Mutiso

83. The 7th Interested Party also filed a witness affidavit sworn by Dr. Johnson Kilonzo Mutiso on 22nd February 2018[22] in response to the Affidavits sworn by Professor Dinesh Bhugra and Mr. Annand Grover as well as that of Professor Lukoye Atwoli. In his view, matters relating to same sex attraction should not be given a narrow reading or interpretation of medical or scientific literature without linking them to a wider knowledge and experience in the relevant fields such as psychiatry and psychopathology.

84. According to Dr. Kilonzo, **t**here is no scientific and medical research that supports the claim that people are "born gay" or that same sex attraction is innate. He contends that the popular literature from western countries that have decriminalized homosexual

behavior tends to be slanted or consistently interpreted to favour the social, legal or political situation preferred by the pro-homosexual groups (the gay lobby).

85. He highlights some literature with a multi-textured view of the matter and contends that the phrase **sexual orientation** has never been accepted in any binding UN documents and is highly controversial with nations deeply divided over the same. He annexed "JM1," a document by Family Watch International on the subject and argues that it is untrue that up to 5% of the population suffers from or manifests homosexual tendencies. He asserts that the correct figure is just about 2%.

86. Based on his knowledge, professional experience and comparative review on the topic, Dr. Kilonzo deposes that research is accumulating that stipulates that **people are not born gay;** and that no research has proven that same sex attraction is an immutable condition like race or sex. To debunk this fallacy, he cites the American Psychological Association, 2008 on the subject to contend that there is no consensus among scientists on the exact reasons why an individual develops a heterosexual, bisexual, gay or lesbian orientation.

87. According to Dr. Kilonzo, reputable scientific research shows that same sex attraction develops because of a complex interaction factors including experience during childhood and adolescence. This "nurture" factors, in his opinion, are the environmental factors that are largely of influence as opposed to "nature" or genetic factors. Nurture factors are said to include the relationship with parents and peers during early childhood, sexual abuse and gender non-conformity. Referring an article by Dr. Joseph Nicholosi, the deponent states that there is much more evidence for early childhood factors especially the relationship with their parents.

88. Dr. Kilonzo also referred to Floyd Godfrey's Book titled ***'A young Man's Journey; healing for young men with unwanted sexual feelings'*** where it is argued that there are a variety of different contributing factors toward the development of a sexual orientation and that not everyone may have every single one of those contributing factors and that one can unlearn homosexuality through gender reparative therapy**.**

89. In Dr. Kilonzo's view, evidence from a number of studies support the conclusion that sexual orientation is not pre-determined by DNA. He referred to studies on identical twins, which have returned low incidents of both twins being homosexual[23] and another study by Dean Hammer, which made an effort to show the nexus to a DNA stretch found at the X Chromosomes tip, which did not conclusively find that such nexus exist. He concludes that sexual orientation is "fluid' and therefore changeable. To support this view, Dr. Kilonzo referred to research conducted by Dr. Jeffrey Satinova in his Book on "***Homosexuality and the politics of Truth"*** to show that some people with unwanted same sex attraction can and do change and, therefore, such people should be assisted to seek treatment and not to be left to think that their conditions are irreversible.

90. He further stated that in his own experience, he has attended to patients with unwanted sex attraction seeking to correct this orientation; and that part of the therapeutic process involved assisting them to develop health relationships, the same treatment given to mental patients.

91. He also deposed that from his professional experience and research, homosexuals are at higher risk of developing health related complications than their heterosexual counterparts. To support this view, he cited a study by the National Association of Research and Therapy of Homosexuality (NATH), which concluded that homosexuals suffer about three times more physical, and mental health problems than heterosexuals. Further, that according to a report by the US Centre for Disease Control and Prevention (CDC), the risk of HIV infection is greater among homosexuals as compared to heterosexuals.

92. In response to the affidavit sworn by Prof. Chris Beyrer, Dr. Kilonzo states that medical literature undeniably demonstrates that MSM have high rates of HIV/AIDS infection and prevalence and therefore, legalization is not the appropriate public health response to harmful behaviour; that the standard medical protocols (as prescribed by law and practices of forensic medicine) should apply for all victims or perpetrators of harmful activity.

93. In response to the affidavit of Prof. Bhugra**,** Dr. Kilonzo deposed that the WPA does not retain or develop any diagnostic and statistical manual for mental disorders and depends largely on the Diagnostic and Statistical Manual (DSM) prepared by the WPA, which changed its definition of homosexuality in the 1973, 3rd edition of its DSM, due to politics, not science or medicine; that WPA statement that same sex attraction (SSA) is a normal variant of human sexuality is a sociological and philosophical position not justified by science, and contradicted by substantial research in the field. He contended that it is unhelpful to subject science to politics, as this distorts the clinical observations of practicing psychiatrists; and that there is no conclusive scientific research findings on the various claims about biological causation of same sex attraction.

94. Dr. Kilonzo disagreed with Prof. Lukoye Atwoli's claim that morality and religion are not appropriate inputs in a discussion of science since social sciences recognize the importance of religion, morality and philosophy in guiding human behaviour. He contended that Prof. Lukoye Atwoli simply reproduced western conventional view about homosexuality but failed to recognize the dissenting research and findings from the same western sources on the same issue. In his view, Prof. Lukoye Atwoli's statement is liberal and wrongly attributes lack of sexual normality to social stress, despite lack of any credible study that wholly attributes sexual disorders and related adverse health outcomes on social stigma.

95. He argued that Prof. Lukoye Atwoli's views present a theory of criminology and deviance, which is unique to pro-gay literature, and not supported by general theories of crime. He also stated that contrary to Prof. Lukoye Atwoli's statement, there is no basis for the link between gay behaviour and sexual abuse of minors and that studies have shown that gay lifestyle can promote same sex paedophilia. He contended that the justification for decriminalization of homosexuality and the argument that sexual conduct between consenting adults ought not to be regulated by the State is merely a regurgitation of the liberal philosophy of John Stuart Mill. Lastly, Dr. Kilonzo argued that Sexual behaviour is essentially social with consequences on society; hence, considerations relating to legalization or criminalization of such sexual behaviour should be left to Parliament.

Eighth Interested Party's Replying Affidavit

96. The eighth Interested Party, Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN) filed a Replying Affidavit sworn by Ishmael Omumbwa on **9th** February 2018 in support of the Petitions.

97. At paragraph two of the said affidavit, the deponent states that he swears the affidavit on behalf of **Persons Marginalized and Aggrieved in Kenya (PEMA-Kenya).** We have extreme difficulty connecting PEMA-Kenya, the deponent and the eighth Interested Party. Neither Ishmael Omumbwa nor PEMA-Kenya is a party to these proceedings. Accordingly, we find no basis for considering this affidavit.

98. The eighth Interested Party also filed an expert witness Affidavit sworn by **Anand Grover**, an Advocate practicing in the Supreme Court of India and High Courts of Delhi and Mumbai. He deposed that he has over thirty years' experience in the areas of HIV/AIDS and Human Rights Law.[24]

99. He deposed that he served as the United Nations Special Rapporteur on the right of every one to the highest attainable standard of physical and mental health in which capacity he undertook nine country missions and produced fourteen thematic reports. He stated that one of the reports examined the relationship between the right to health and criminalization of private adult consensual behavior, including same sex conduct and sexual orientation. He deposed that criminal sanctions dissuade gay men and other MSM from seeking health services. The rest of his depositions are essentially legal arguments.

The 9th Interested Party's Replying Affidavit

100. The ninth Interested Party filed a Replying Affidavit sworn on 28th February 2018 opposing the Petitions. He deposed that during the constitution making process, the Committee of Experts received over 5000 memoranda from Kenyans overwhelmingly rejecting homosexuality. According to Mr. Kangata, the two petitions are essentially asking the court to legislate. He stated that decriminalizing the impugned conduct would violate Article 44 of the Constitution. In his view, none of the Kenyan communities or culture embraces homosexuality and that historically, homosexuality was punished through ostracization or death.

101. On the net effect of decriminalizing homosexuality, Mr. Kangata argued that the conduct is inimical to the Kenyan State and public interest in that it is against procreation. In addition, he stated that decriminalizing homosexuality is tantamount to compelling communities to embrace the practice in breach of their right to preservation of their culture.

102. Mr. Kangata contended that there is no demonstrable proof that homosexuality is innate. He maintained that the impugned provisions are lawful and that it is in the interest of the majority to protect and preserve the provisions. He also contended that there is no evidence that the Petitioners' rights to privacy have been infringed in the enforcement of the impugned provisions. He dismissed the Petitioners' averments and depositions contending that homosexuality and lesbianism is a matter of choice not innate.

The 10th Interested Parties' Response

103. The 10th Interested Parties filed a replying affidavit sworn on 16th February 2018 by Abdul Bary Hamid, the Secretary General of Jamia Mosque, opposing the Petitions. He stated that the Holy Quran and Hadith abhor homosexuality, which echoes Kenyan cultural values, which the people of Kenya desired in the Constitution. He contended that the impugned provisions do not violate the Petitioners' rights and that those rights are not absolute. He further contended that the impugned provisions are neither ambiguous nor uncertain as alleged and that the mandate of the court is not to legislate but to interpret legislation as enacted by Parliament.

PETITIONERS' SUBMISSIONS

Submissions in Petition No. 150 OF 2016

104. The Petitioner's counsel in Petition No. 150 of 2016 filed written submissions dated 6thOctober 2016 and made oral highlights. They submitted that the Petition is founded upon the discrimination, prejudice and stigma because of attitudes of a section of Kenyans towards the LGBTIQ persons, who view them as criminals.

105. They submitted that government officials, law enforcement officers, healthcare professionals and commercial organizations subject the LGBTIQ people to ill treatment and demean them in their private and public life, which is promoted by existing laws specifically provisions of the Penal Code which criminalizes consensual same sex conduct between adults in private. They argued that the criminalization of the relevant conduct degrades the dignity of the LGBTIQ Kenyans and invades their privacy.

106. They argued that criminalization of the relevant conduct is unconstitutional in that it violates their right to equality, freedom from discrimination (Article 27), human dignity (Article 28), freedom and security of the person (Article 29), privacy (Article 31) and health (Article 43). They maintained that any Law that is inconsistent with the Constitution is void to that extent.

107. Counsel submitted that the impugned provisions foster and promote an environment in which LGBTIQ Kenyans are subjected to a risk of violence, intimidation, extortion, threats of prosecution, discrimination and ill-treatment in connection with the provision of basic government services including health care.

108. Counsel cited Articles 2 and 3 of the Constitution on the supremacy and binding nature of the Constitution. They further cited Article 21 on the duty of every state organ to promote and fulfil the rights and fundamental freedoms. They also cited Article 23(3) (d) on the power of the High Court to grant a declaration that any law that denies, violates, infringes or threatens a right or fundamental freedoms, not justified under Article 24 of the Constitution is invalid.

109. They faulted the Respondent's contention that in allowing the Petition the Court would be usurping the power of the legislature. To buttress their argument, they relied on the case of ***EG v NGO Board & 4 Others*** [25] ***(The Gitari case),*** wherein the court cited with approval the South African case of ***The State v T. Makwanyane & M. Muchunu*** [26] for the holding that the Constitution protects human rights of both the minority and the majority. They argued that in exercising its constitutional jurisdiction, especially with regard to the Bill of Rights, the duty of the court is to uphold the Constitution and not the popular views of the majority.

110. Counsel further argued that the impugned provisions violate Articles 10 and 50 of the Constitution and common law for being vague and uncertain. They contended that the impugned provisions do not meet the limitation test under Article 24; that the Bill of Rights does not limit LGBTIQ rights; and that perceiving homosexuality as repugnant to justice and morality based on religious beliefs is not a justifiable ground under Article 24 to limit their rights based on the majority views.

111. According to counsel, LGBTIQ is a marginalized community or group within the meaning of Article 260 and, therefore, the court owes them a special protective duty under Article 21(1) and 21(3). In their view, this case does not seek to legalize same sex marriages as suggested by the Respondent and that therefore allowing this Petition would not affect Article 45(2) on the right of every adult to marry a person of the opposite sex.

112. They maintained that rejecting homosexuality on the basis that it is a western phenomenon, is misconceived, and that majority of the jurisdictions that criminalize homosexuality are former British colonies. They were concerned that although Britain repealed such laws because of the modern understanding of human sexuality and legal and human rights norms, Kenya continues to utilize the same laws imposed by the British over 150 years ago. Petitioner further relied on international law and norms as well as judgments from courts in other jurisdictions to support their Petition.

113. On the question of *locus standi*, counsel cited Article 22(1)& (2)(b)(c) and cited the cases of ***Coalition for Reforms and Democracy (CORD) & 2 Others v Republic & Another***[27] and ***Caleb Orozco v Attorney General of Belize & Others.***[28] In the latter case, the court held that the threat of prosecution linked to engaging in the relevant conduct was sufficient to bring a claim, a position they argued, has been adopted by courts and treaty bodies in Europe, the Caribbean and the United Nations. They also relied on the case of ***Dudgeon v The United Kingdom***[29] where the court observed that the existence of the legislation directly affected private life. Further reliance was placed on the case of ***Norris v Ireland***[30] where the court had similar views and approach taken by the United Nations Human Rights Committee in the case of ***Toonen v Australia,***[31] holding that laws in Australia purporting to criminalise relevant conduct violated the privacy protections in the ICCPR.

114. It was their submission that even though the Petitioner had not been personally prosecuted under the impugned provisions, he had suffered and continues to suffer from social, moral and political scorn, because, the provisions have a pernicious and ongoing effect on his private life and that of the LGBTIQ persons in general.

115. Regarding the court's power to strike down provisions on account of unconstitutionality, counsel relied on Articles 2(4), 3(1), 21 and 23 of the Constitution and the case of ***Mount Kenya Bottlers Limited & 3 Others v Attorney General & Others.***[32] Commenting on the case of ***Community Advocacy & Awareness Trust & 8 Others v Attorney General***[33] cited by the Respondent, they submitted that this case is distinguishable from the Petitioner's case.

116. Counsel also relied on the case of ***Coalition for Reform & Democracy v Republic of Kenya*** (supra) and ***Aids Law Project v Attorney General,***[34] where the court struck down several provisions of the Security Laws (Amendment) Act No. 19 of 2014 for violating Articles 33 and 34 of the Constitution. Additionally, counsel relied on the case of ***Aids Law Project v Attorney General & 3 Others***[35] where the court declared section 24 of the HIV and AIDS Prevention and Control Act[36] unconstitutional for being vague and overbroad, lacking certainty and violating the right to privacy under Article 31.

117. With regard to the principles of Constitutional interpretation, they submitted that under Article 20(3)(a) and (b), when interpreting the Bill of Rights, the court has a duty to 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.

118. Citing the case of ***Nderitu Gachagua v Thuo Mathenge & 2 Others***[37] ***and Njoya & Others v Attorney General & 2 Others***[38] counsel urged the court to take into account the principles of constitutional interpretation espoused in Articles 20(4) and 259(1). They further relied on an Article by Professor Makau Mutua published in the Daily Nation[39] in which he observed that Kenya's Constitution is emancipatory, it is not a repressive document that takes away rights, or imagines a closed or rigid category of rights. On the contrary, Prof Mutua argues that the Constitution is a living, not a dead document, one that is frozen in time.

119. Counsel argued that issues of fundamental rights are not to be resolved by reference to private morality or subjective moral or religious views of sections or majority of the populace but by constitutional values and fundamental rights.

120. On the question of non-consensual sexual acts involving minors, counsel argued that the Sexual Offences Act[40] adequately provides for these, and, that therefore the Petitioner is not seeking a reversal or dilution of Kenya's stringent laws that prohibit non-consensual sex, and all sexual acts in public. It was further submitted that the Petitioners abhor all non-consensual sexual acts and all sexual acts involving minors regardless of the sex or gender of the perpetrator or victim. They also submitted that the impugned provisions are not needed to charge and convict individuals of such non-consensual acts between two adults as they can be charged under other provisions of the law such as the Sexual Offences Act[41] and section 182 of the Penal Code.[42]

121. They urged that should the court not find the impugned provisions unconstitutional, it should interpret them in a manner that would not criminalise relevant conduct. Reliance was placed on Article 20(3) (b) and 20(4), which requires the court to adopt an interpretation that most favours the enforcement of a right or fundamental freedom and which promotes the values that underlie an open and democratic society.

122. On the definitions of the words "*indecent*" practice and gross "*indecency,*" counsel portended that they have been addressed through legislative amendments to the Sexual Offences Act[43] in 2007 and 2009. It was their further submission that for an act to be indecent, it must be unlawful and intentional. In their view, section 43(1) of the Sexual Offences Act[44] classifies an act as unlawful if it is committed in coercive circumstances, under false pretences or by fraudulent means or in respect of a person incapable of appreciating the nature of an act, which causes the offense. They therefore submitted that what is clear is that the recent legislative consideration of the concept of indecency excludes from the purview of that concept consensual sex.

123. They further submitted that the notion of indecency in the Sexual Offences Act[45] provides a possible interpretation of the concept of indecency at section 165 of the Penal code, which would be appropriate for the court to adopt. That, as an alternative to the petitioner's primary submission as to the violation of the Constitution, the section would have to be interpreted to exclude relevant conduct as not being characterised as against the order of nature. They submitted that the support for such an approach is to be found in the increasing widespread recognition that sexual orientation is innate and fundamental part of human personality of a minority of persons worldwide. For this proposition, they relied on the **WPA Position Statement on Gender Identity and Same-Sex Orientation, Attraction and Behaviours 2016.**[46] They also argued that WHO recognises same sex sexual orientation as a normal variant of human sexuality.

124. Counsel also argued that the impugned provisions are vague and uncertain to render them void as they limit the right to a fair trial under Article 50.

125. Counsel further submitted that if the impugned provisions were to be construed to prohibit relevant conduct, it would infringe on several fundamental rights guaranteed in the Constitution including the right to dignity under Article 28. They argued that the Constitution expressly recognises the importance of human dignity as a right capable of enforcement which right underpins all the other rights. Reliance was placed on ***A.N.N. v Attorney General***[47] where it was held that the Constitution underscores the place of Human dignity in the enjoyment of all other rights in keeping with international treaties and jurisprudence. They cited ***Dawood v Minister of Home Affairs***[48] for the submission that section 10 of the South African Constitution is similar our Article 28 which guarantees every person's inherent dignity and the right to have the dignity respected.

126. It was further submitted that by virtue of Article 2 (5) and (6), the general rules of international law form part of the law Kenya. They argued that dignity is recognised in several instruments and singled out Article 5 of the ACHPR as well as the provisions in the ICCPR and the ICESCR. Counsel relied on the case of ***Republic v Kenya National Examinations Council Ex-parte Audrey Mbugua Ithibu***[49] in support of their submission on the right to dignity. They also relied on the cases of ***National Coalition for Gay and lesbian equality v Minister of Justice,***[50] and ***Orozco v Attorney General of Belize***[51] and ***Lawrence v Texas,***[52] for the holding that, the law which criminalises sexual conduct singles out homosexual people for social disapproval, thereby creating a climate of insecurity and vulnerability, deliberately and automatically degrading a class of individuals within society.

127. According to counsel, international jurisprudence supports the position that sexuality is an inherent characteristic, which gives rise to essential needs hence the concession by the Respondent in their grounds of opposition that sexual orientation is included within the classes protected by the non-discrimination provisions of the Constitution. Counsel submitted that laws which criminalise relevant conduct are humiliating, degrading and stigmatise the LGBTIQ communities.

128. Citing Article 29 on the right to freedom and security of the person and Article 6 of the ACPHR, counsel argued that the African Commission has stated that the Article must be construed in a manner that permits arrests only in the exercise of powers normally granted to the security forces in a democratic society. In their view, security forces in democratic societies have no power to monitor consensual sexual behaviour between adults hence the infringement of the right to freedom and security of the person is not justified.

129. Counsel invoked the right to privacy guaranteed in Articles 31 of the Constitution and 17 of the **ICCPR** and urged this court to adopt an interpretation that promotes Kenya's international legal obligations by virtue of Article 2(6). Additionally, counsel submitted that the right to privacy protects individual decision-making and activities and as such, the State should not invade this right without justification. Reliance was placed on the case of ***National Coalition for Gay and lesbian equality v Minister of Justice*** **(supra)** for this proposition. Further reliance was placed on the case of ***Toonen v Australia*** (supra) where the provisions, which criminalised relevant conduct, were challenged as being inconsistent with the **ICCPR.** They added that the European Court of Human Rights also found that Northern Irish laws criminalising human conduct constituted a violation of the right to privacy.

130. Learned counsel further submitted that every person is equal before the law and to equal protection and benefit of the law, a right guaranteed by international and regional instruments among them, the **UDHR;** Articles 2 and 26 of the **ICCPR** and Articles 2 and 3 of the A**CHPR**. It was their submission that in ***A.N.N v Attorney General*** (supra) the court observed that Articles 27 and 28 are the foundational provisions upon which other rights rest.

131. Counsel argued that the Respondent having acknowledged that the Constitution protects everyone from discrimination based on among others sexual orientation, they cannot turn around and argue that Article 27 of the Constitution is exhaustive on prohibited grounds of discrimination. Further, that Article 27(4) uses the word "*including*" which is defined in Article 259(4) to mean,

"Includes, but is not limited to." Reliance was placed on the case of ***EG v NGO Board***. (supra).

132. Regarding the right to ***health,*** they argued that Article 43 guarantees every person the right to the highest attainable standard of health and that Article 56 obligates the state to put in place affirmative action programmes designed to ensure that minorities have reasonable access to, among others, health services. Reliance was placed on the case of ***P.A.O & 2 others v Attorney General***[53] where it was held that the right to health, life and human dignity are inextricably bound; and that there can be no argument that without health, the right to life is in jeopardy. They added that Article 12 of the ICESCR and Article 16 of the ACHPR guarantee the same right.

133. They submitted that criminalisation of consensual same sex violates the right to health by creating a perception that individuals who have same sex relationships are abnormal and criminals. In their view, this negatively affects their health and results in lack of health programmes and information tailored to their specific needs. Counsel argued that criminalisation of same sex sexual activity and the right to health has been recognised by the ***Commonwealth Eminent Persons Group***[54] which recommended the repeal of laws criminalising homosexuality as a critical move in the fight against HIV/AIDS.

134. On the alleged vagueness and uncertainty, they submitted that the impugned provisions breach Articles 10(2) (a) on the rule of law and 50 (2) on the right to fair trial and adherence to the principle of legality. Regarding section 162 counsel singled out the phrases *"unnatural offences, carnal knowledge of any person against the order of nature;" "permits a male person to have carnal knowledge of him or her against the order of nature,"* and submitted that these phrases are not defined and that it is unclear whether the phrases mean sexual intercourse or include oral, anal, vaginal sex, or whether they include any other contact with the genital organ of another person.

135. Regarding section 165, it was submitted that the phrases *"indecency with another male person"* and *"any act of gross indecency with another male person"* violate the Constitution. They relied on ***Aids Law Project v Attorney General*** (supra) and ***Keroche Industries Limited v Kenya Revenue Authority & 5 Others***[55] for the proposition that a law can be declared unconstitutional for uncertainty. They also relied on the on the case of ***R v Misra and Srivastava***[56] where it was held that vague laws which purport to create criminal liability are undesirable and in extreme cases their vagueness may make it impossible to identify the conduct which is prohibited.

136. On global trends towards decriminalisation, counsel submitted that the impugned provisions contrast the global consensus on the decriminalisation of the LGBTIQ conduct and that a majority of the countries sharing a colonial history with Kenya now recognise the equal rights and dignity of sexual minorities. Counsel cited positions taken by several international and intergovernmental organisations that have recognised the rights of minorities. For this proposition, they relied on the statement by the former UN Secretary General Ban Ki-moon who stated, *"We must reject persecution of people because of their sexual orientation or gender identity who may be arrested, detained or executed for being lesbian, gay bisexual or transgender*."

137. It was their further submission that several organisations including the ACHPR have adopted resolutions on protection against violence and other human rights violations against persons based on their real or imputed sexual orientation or gender identity. They also submitted that in 2006 the **Yogyakarta Principles** were adopted by a group of international Human rights experts on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. The principles articulate state and non-state actors' obligations to respect, protect and fulfil the human rights of all persons regardless of sexual orientation and gender identity.

The 1st Petitioner's reply to the 9th Interested Party's written submissions

138. The 9th interested Party who opposed these Petitions was joined in these proceedings after all the parties had filed their pleadings and submissions. The court allowed the Petitioners to file further submissions in response to 9th Interested Party' submissions.

139. Counsel submitted that the 9th Interested Party's argument that sexual orientation is not one of the prohibited grounds in Article 27(4) is inconceivable because the Respondent's grounds of opposition concede that prohibition on discrimination on grounds of sexual orientation is included in the Article. Reliance was placed on the ***Gitari*** case, which read in sexual orientation in the Article.

140. Responding to the 9th Interested Party's argument that allowing the Petition is tantamount to allowing gay marriage, counsel

submitted that the said argument is unsustainable since there is no connection between the impugned provision and marriage. It was their view that the wording of Article 45 does not permit same sex marriage. Countering the 9th Interested Party's submission that homosexuality is a western import, counsel stated that it is undeniable that Kenyan society includes LGBTIQ people and that rights guaranteed under the Constitution are to be enjoyed by every person.

141. Counsel submitted that the correct approach to limitation of rights is that limitation of rights must be justified by the state. In their view, there is no rational justification for the measures under the challenged provision. In addition, they argued that moral and religious majority views, however sincerely and widely held, cannot justify limitation of constitutional right.

Submissions in Petition No. 234 OF 2016

142. Counsel for the Petitioners submitted both in writing and orally. He urged the court to give meaning to the Articles of the Constitution, which are offended by sections 162(a) and (c) and 165 of the Penal Code. He contended that the impugned provisions have been applied to penalise consensual acts or conduct between two adults of particular sexual orientation and, consequently, the petitioners have been subjected to attacks, incarceration and discrimination.

143. He relied on the **Yogyakarta** Principles on the application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, which define sexual orientation as each person's capacity for profound emotional, affection and sexual attraction, to immune and intimate and sexual relations, with individuals of different gender or the same gender or more than one gender.

144. In his view, Gender Identity refers to each person's deeply felt internal and individual experience, which may or may not correspond with the sex assigned at birth. He maintained that the impugned provisions infringe the Petitioners' fundamental rights given that the sexual conduct is consensual between adults and is done in private.

145. On the question of capacity to sue and jurisdiction, counsel relied on Article 258(1) (2) (C) and submitted that this petition is brought on the Petitioner's behalf and in the public interest and Article 165(3). He cited the ***EG*** case where it was held that the Bill of Rights applies to all persons and that the Constitution should be interpreted in a manner that advances human rights and fundamental freedoms.

146. Regarding the constitutionality of the impugned provisions, counsel set out various Articles of the Constitution and International Conventions and relied on the Indian case of ***State of Kerala & another v N.M Thomas & Others,*** [57] which defined equality to mean parity of treatment under parity of conditions. In the said case, the court held that a classification, in order to be constitutional, must rest upon distinction that are substantial and not merely illusory and that the test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into the category.

147. He also relied on the cases of ***Federation of Women lawyers Kenya(FIDA-K) & 5 others v Attorney General & Another,*** [58] ***Pravin Bowry v Ethics & Anti-Corruption*** [59] and ***Peter K. Waweru v Republic*** [60] for the holding that Article 27 of the Constitution is violated by a difference in treatment between persons who are in comparable situations. They further relied on the Zimbabwean cases of ***Human Rights Committee General Comment No 18, Zimbabwe Human Rights NGO Forum v Zimbabwe),*** [61] ***The 2010 Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; and Annand Grover*** for the postulation that criminalisation is not only a breach of a state's duty to prevent discrimination; it also creates an atmosphere where affected individuals are significantly disempowered and cannot achieve full realisation of their human rights.

148. On whether the impugned provisions violate Articles 28 of the Constitution, Article 1 of the **UDHR** and Article 4 of the **ACHPR**, counsel cited the case of ***Francis Coralie Mullin v Administrator, Union Territory for Delhi*** [62] which defined dignity as the pillar of all other rights. He also cited the cases of ***JWI v Standard Group Limited & Another,*** [63] ***Republic v Kenya National Examinations Council & another Ex-parte Audrey Mbugua Ithibu(supra)*** and ***S v Makwanyane and Another(supra)*** for the proposition that human dignity need not be pleaded as a right for it to be enforced as it is inherent and together with the right to life and that it's an acknowledgement of the intrinsic worth of human beings.

149. Based on the foregoing counsel submitted that the Petitioners' right to dignity had been infringed as the impugned law seeks to regulate consensual adult sex done in private, yet there is no complainant.

150. On the right to dignity guaranteed by Article 29 of the Constitution, Articles 3 and 9 of the UDHR and Article 6 of the ACHPR, reliance was placed on ***Coetzee v Government of the Republic of South Africa***[64] ***Nel v Le roux***[65] for the holding that freedom and security of the person is primarily the protection against arbitrary deprivation of physical freedom and to do so without any criminal charge being levelled or any trial being held is manifestly a radical encroachment upon the right.

151. He also relied on ***Bernstein & others v Bester & others***[66] for the proposition that freedom has two interrelated constitutional aspects namely, procedural aspect and the right to freedom and security. He further submitted that the **ACHPR** in its **Resolution Number 275** calls for the protection against violence and other human rights violations based on their real or imputed sexual orientation or Gender Identity. It was his submission that Kenya being a member of the African Union, has to adhere to its international treaty obligations.

152. Referring to a report by the 6th Petitioner titled "***The Outlawed amongst us***" he submitted that the report found that same sex sexual practices remain criminalised in Kenya even though few convictions are based on the impugned provisions; and that persons from the LGBTIQ community are harassed, blackmailed, subjected to verbal and physical abuse and held beyond the legal limits.

153. Regarding the right to privacy guaranteed under Article 31 of the Constitution and Article 12 of the **UDHR,** he cited ***Eisenstaedt v Baird***[67] for the proposition that the right to privacy is the right of the person whether single or married to be free from unwarranted Governmental intrusion. He also relied on ***Dudgeon v United Kingdom,***[68] ***Lawrence v Texas***[69] *and* ***Bernstein v Besta***[70] for the holding that criminalisation of private homosexual acts constituted an unjustified interference with the right to privacy. He again relied on ***Nicholas Toonen v Australia,*** C***ommunication No 488/1992, U.N. Doc CCPR/c/50/D/488/1992*** **(1994)** for the observation by the **Human Rights Committee of the United Nations** that **Article 17** of the **ICCPR,** which addresses the right to privacy, covers adult consensual sexual activity between persons of the same sex in private. Further, that, the Committee observed that operation of laws criminalising adult consensual, and private sexual conduct between persons of the same sex as well, as gross indecency interfered with the right to privacy.

154. Based on the foregoing, he submitted that if one is gay he is not allowed to express himself and has no right to privacy. He clarified that this Petition does not seek to justify criminal conduct against minors, or persons who might be coerced or non-consensual acts of persons of the same sex in private.

155. With respect to the right to health guaranteed under Articles 43(1) and 56(e) of the Constitution, Article 25 of the **UDHR** and Article 16 of the **ACHPR,** counsel submitted that the said provisions guarantee the right to the highest attainable standard of health, which includes the right to health care services and reproductive health care. He, therefore, submitted that criminalising same sex consensual activity impedes access to and the realization of the right to health in that, it deters individuals from seeking healthcare services for fear of revealing criminal conduct, and being treated in perturbing ways informed by discrimination and stigma.

156. Counsel argued that the right to health is closely related to economic rights hence denial of the right to access healthcare affects economic rights. Reliance was placed on ***P.A.O v Attorney General*** (supra***)*** and ***Purohit and Moore v The Gambia,(Communication No 241/2001, Sixteenth Activity report 2002-2003, Annex VII*** for the proposition that the state's obligation with regard to the right to health encompasses not only the positive duty to ensure that its citizens have access to health care services and medication, but must also encompass the negative duty not to do anything that would in any way affect access to health care services.

157. Counsel cited Jonathan Mann in his book ***Health and Human Rights: A reader,*** for the correlation between the discriminatory laws and consequent discriminatory environments on accessing the right to health. He also referred to a Report[71] by the **UNHCHR,** which found that respect for human rights in the context of HIV/AIDS, mental illness, and physical disability leads to better prevention and treatment. Further, that respect for the dignity and privacy of the individual can facilitate more sensitive and humane care and that stigmatisation and discrimination thwart medical and public health efforts to help people with disease or disability. The report recommended member states to take steps to decriminalize consensual same sex conduct and to repeal discriminatory laws relating to sexual orientation and gender identity.

158. He relied on ***National Coalition For Gay and Lesbian Equality and another v Minister of Justice and others***[72] for the proposition that even where the provisions are not enforced, they reduce gay men to unapprehend felons therefore entrenching stigma and discrimination.

159. On whether the impugned provisions pass the limitations test in Article 24, he submitted in the negative and relied on ***Coalition***

for Reform and Democracy (CORD) & 2 Others Republic of Kenya & 10 others[73] for the proposition that once a limitation has been demonstrated then the state must justify the limitation. He also cited ***Karua v Radio Africa Limited T/A Kiss FM Station and Others***[74] and ***Coalition for Reforms and Democracy (CORD) & others v Republic of Kenya & 10 Others*** (supra) on what is justifiable in an open and democratic society. He argued that the test to be applied should be an objective one and, in this regard, he cited ***Kivumbi v Attorney General.***[75] He also cited ***Charles Onyango-Obbo and Another v Attorney General***[76] for the observation that democratic societies uphold and protect fundamental human rights and freedoms. Counsel also relied on the ***EG* case** for the proposition that protection of minorities is important from the tyranny of the state and oppression from their fellow human beings. He submitted that the court must look beyond the precepts of justifiability and relied on the case of ***Kituo Cha Sheria and 7 Others v Attorney General***[77] which set out factors that constitute the test of justifiability, adding that dignity must form part of the inquiry. He also relied on the case of ***Dawood v Minister of Home affairs***[78] for the similar proposition.

160. He submitted that public opinion and religious inclinations should not be the basis for limiting fundamental rights. He relied on ***S v Makwanyane (supra)*** and ***EG*** (supra). Counsel further submitted that although sexual orientation is not included in the list of grounds for non-discrimination in Article 27, any other interpretation would be unconstitutional.

161. Advancing his argument on the limitation tests, counsel relied on the case of ***S v Manamela***[79] for the holding that the level of justification required to warrant a limitation of rights depends on the extent of the limitation, and, that, the more invasive the infringement, the more powerful the justification must be. He argued that no level of justification has been given for the limitation created by the impugned provisions.

162. Counsel further submitted that the impugned provisions are not clear and accessible to the public. He relied on ***R v Rimmington***[80] and ***Grayned v City of Rockford***[81] and submitted that the principle of legal certainty enables each community to regulate itself; the law must be adequately accessible and it must be void for vagueness if its prohibitions are not clearly defined; and that vagueness offends several important rules. Citing the ***EG*** case, he argued that what is deemed to be criminal under the impugned provisions is sexual conduct *"against the order of nature"* and *"gross indecency"* but the phrases are not defined in the Act.

163. Counsel argued that the objective of a law must be pressing and substantial. He contended that this Petition concerns the most intimate aspect of human private life, and, therefore, there must be a serious justifiable objective for the limitation. He cited ***National Coalition For Gay and lesbian Equality v Minister of Justice***[82] for the proposition that it is important to denote the precise area in which the limitation operates in order to assist the state. He argued that the impugned law operates to criminalise actions that it does not define and that there is no pressing need to criminalise private consensual sexual acts between persons of the same sex.

164. He further submitted that moral or religious convictions and public opinions that do not accommodate or approve consensual sexual acts between persons of the same sex should not be reasons to warrant state interference. He relied on ***Patrick Reyes v The Queen***[83] for the argument that the court has no license to read its own predilections and moral values into the Constitution. In his view, the impugned provisions do not rationally achieve any objective and that the Government must use least restrictive means to achieve its purpose. He urged the Court to consider that the Petitioners are members of families including church leaders, who engage in consensual sexual conduct in private which should not be criminalized. He concluded by urging the court not to protect the tyranny of majority using fluid morality to undermine the rights of minorities.

The 1st to 6th Interested Parties' Submissions

165. Counsel for the 1st-6th Interested Parties submitted in support of the Petition that Sections 162 and 165 violate the right to dignity of the homosexuals, by subjecting them to persecution and prosecution. It was his submission that the Constitution promotes the dignity of individuals and communities for purposes of recognizing and protecting human rights and the Fundamental Freedoms. He cited Article 21 (1) which places a duty on the state and every state organ to protect, promote and uphold the human rights and Fundamental freedoms.

166. He further submitted that Article 2(5) and (6) permits application of International Law. Citing the UN Charter, The Banjul Charter, **UDHR, ICCPR** with its two Protocols and **ICESCR,** he argued that these instruments obligate States to observe and protect Fundamental rights and freedoms.

167. He relied on ***Social and Economic Human Rights Action Center (SERAC) and Anor v. Nigeria,***[84] for the proposition that

each obligation is equally relevant to the right in question and that the state has primary and secondary roles in protecting human rights.

168. Counsel submitted that the state has failed to protect the LGBTIQ community by enforcing the impugned provisions, which criminalize same sex conduct and that the enforcement encourages discrimination and stigma among the gay community. He agreed with the Petitioners' counsel's submissions that the impugned provisions are obsolete having been abolished in Britain, and therefore they should be abolished in Kenya. He argued that the impugned provisions violate the right to inherent dignity guaranteed under Article 28 and recognized in the UN Charter, ICCPR and ICESCR. On what dignity entails, he cited ***Egan v. Canada***[85] where the Court associated dignity with an individual's autonomy of his free will, freedom of choice and value as a person.

169. Counsel relied on ***Francis Coralle Mullin v Administrator, Union Territory of Delhi and Others***[86] where the Court emphasized, *inter alia*, that any act that impairs human dignity is a deprivation of the right to live. He also relied on ***Law v Canada (Ministry of Employment and Immigration)***[87] and argued that dignity entails self-respect and self-worth and that dignity is violated when individuals or groups are marginalized, harmed, or devalued.

170. On Equality and Freedom from Discrimination, he cited Article 27 and maintained that the impugned provisions discriminate against homosexuals based on their sexual orientation. He relied on ***Laurence v Texas***[88] in which sodomy Laws were found to be unconstitutional.

171. With regard to Article 29 counsel argued that the Constitution guarantees every person's right to freedom and security of the person and that criminalizing the relevant conduct amounts to deprivation of the very right.

172. On the right to privacy, he argued that the right to privacy entails not having any information regarding an individual's private affairs revealed. He relied on ***Thornburgh v American College of O and G***[89] and ***Roe v Wade***[90] where the court recognized the right to privacy, though not expressly provided for in the US Constitution.

173. Regarding Article 43 of the Constitution and Article 12 of ICESCR, counsel argued that criminalizing same sex conduct hampers the right to health, in that homosexuals fear persecution and avoid seeking healthcare services. In addition, he argued, it impedes the fight against HIV/AIDS and its programs. He relied on a research[91] which found that the Female Sex Workers (FSW) and Male Sex Workers (MSW) experience stigma from the community and were, therefore, likely to delay accessing health services.

174. He agreed with the Petitioners' submissions that the limitations created by the impugned provisions do not meet the test in Article 24(1). On the proportionality test, he relied on ***State v Makwanyane & Another (supra)*** and ***The Queen v. The Oaks.***[92]

The 8th Interested Party's Submissions

175. Counsel for the 8th Interested Party submitted in support of the Petition, that criminalizing same-sex sexual conduct is prejudicial to MSM who sometimes have unprotected anal sex, thereby enhancing their chances of contracting HIV/AIDS and STI's and that due to fear of prosecution, fail to access treatment.

176. Her submissions were in tandem with those of the Petitioners in every respect including the authorities relied on mainly focusing the right to health under Article 43. She referred to a document from the Ministry of Health titled "Kenya AIDS Response Progress Report 2016" which acknowledges the health risk of the people living with HID/AIDS.

The Respondent's submissions

177. Counsel for the Respondent submitted in opposition to the Petition. On what constitutes unnatural offence, she relied on the definition in the Black's Law Dictionary and contended that every other form of sexual act other than what is in the order of nature, capable of producing off springs is unnatural and therefore punishable by law. She cited ***Khan v Emperor***[93] *and* ***Fazal Rab Choudhary v State of Bihar***[94] and submitted that section 377 of the Indian Penal Code which prohibits carnal knowledge against the order of nature is in near similar terms as the impugned provisions.

178. She added that the impugned sections not only apply to homosexuals but also heterosexuals hence they are not discriminatory. She relied on section 377A of the Indian Penal Code which defines the phrase ***"against the order of nature"*** and submitted that in Kenya, what is prohibited under section 162 is carnal knowledge of an animal and acts of anal or oral sex by either homosexuals or heterosexuals. On what indecent practices are, she argued that section 2 of the Sexual Offences Act defines an indecent act and penetration and contended that the anus is a genital organ.

179. On the assertion that the impugned provisions are unconstitutional, she submitted that every statute enjoys a presumption of constitutionality. She relied on ***Susan Wambui Kaguru v Attorney Gneral & another,*** [95] ***Katiba Institute & Another v Attorney General & Another*** [96] citing ***US v Butler*** [97] and ***Hamdard Dawakhana v Union of India*** [98] and maintained that the impugned sections are constitutionally sound.

180. With regard to the intention of the impugned provisions, *vis a vis* Article 45, she submitted that the institution of marriage is an important social pillar that provides security, support and companionship between members of the society and plays important roles, among them, raising children. She urged the court to be guided by the principles in Articles 259(1) as read with Article 10 and find that marriage can only be between a man and a woman. She also relied on ***Suresh Kumar v NAZ Foundation,*** [99] where the court observed that section 377A of the Indian Penal Code which criminalized sexual activities against the order of nature did not criminalize a particular people, identity or orientation but rather that the section merely identifies certain acts which if committed, would constitute an offence. She argued that such prohibition regulates sexual conduct regardless of gender identity and orientation.

181. She further submitted that decriminalizing the acts complained of would be tantamount to allowing unnatural offences between people of same gender who may have legitimate expectation to enter into marriage contrary to Article 45 of the Constitution.

182. Regarding morality, counsel submitted that the impugned provisions strive to uphold social values and morals at the family level hence privacy is no excuse in tearing into the social fabric of the Kenyan society. She argued that abortion and same sex marriage were among the contentious issues addressed during the Constitution making process and that family was considered to be a marriage between a man and a woman as stipulated in Article 45(2). She urged the court to interpret the impugned provisions with conservatism in sexual matters, as the Constitution was not designed to put Kenya among the front-runners of liberal democracy in sexual matters.

183. She also submitted that homosexuality is considered despicable and insulting to traditional morality. She relied on ***Bowers v Hardwick.*** [100] She also relied on ***Naz Foundation (India) Trust v Government of NCT of Delhi and others.*** [101] Counsel also relied on Article 27 of the ACHPR which stipulates that the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interests; Articles 17 (3) on the State obligation to promote and protect morals and traditional values recognized by the community; and Article 29(7) on the duty of the State to preserve and strengthen positive African Cultural values and to contribute to the moral well-being of society.

184. On enforceability, practicability, reasonability and justification of the impugned provisions, counsel submitted that the impugned sections are reasonable as they protect against sexual immorality and that the right to privacy is justifiably and reasonably limited by Article 24 of the Constitution. On the allegations that the LGBTIQ community are marginalized, she argued that Article 260 of the Constitution defines marginalized groups and that the Petitioners do not fall in that category given that sexual preference is by choice.

185. Counsel further submitted that same sex union is prohibited by the Constitution and to allow the Petition would be tantamount to amending the Constitution to introduce new rights. Relying on ***Re the matter of the Principle of Gender Representation in the National Assembly and the Senate*** [102] she urged the court to develop its own indigenous jurisprudence and not rely on foreign decisions in interpreting the Constitution.

186. Counsel further contended that Article 27 does not provide sexual orientation as a ground for discrimination. She argued that the impugned sections are not discriminatory, as they do not criminalize orientation but particular acts, which would if committed amount to an offence. She also argued that the Constitution is value based as can be discerned from the preamble and Article 10; hence, the impugned sections strive to uphold cultural and moral values at the basic level of the society.

The 7th Interested Party's Submissions

187. Counsel for the 7th Interested Party submitted in opposition to the Petition. He argued that the Petition seeks to invoke international conventions and judicial decisions to persuade the court that same sex sex is provided for in our laws by virtue of Article 2(5) and (6), a position he argues, is contrary to the will of the people.

188. On the alleged vagueness of the impugned provisions, counsel argued that they are clear and unambiguous. In his view, section 162 criminalizes sodomy or conduct of carnal knowledge of male and female against the order of nature. He relied on ***Julius Waweru Plenster v Republic,*** [103] ***Adan Asir v Republic*** [104] and ***John Onzere Kambi v Republic*** [105] for the holding that section 162 does not fail the certainty test. He also cited ***Jacqueline Kahsa Nabagesera & 3 Others v Attorney General & Another*** [106] where the Court held that all persons must be equal under the existing law and that where the law prohibits homosexual acts, any person knowingly promoting such acts is contravening the law and cannot allege that the breach amounts to abjuration of equal protection before the law.

189. He submitted that the right to privacy is not an absolute right and can be limited under Article 24. He argued that privacy is not an excuse to engage in criminal activities. In his view, Articles 27, 29 and 45 cannot be used to legitimize carnal knowledge through the anal orifice. He relied on ***Calvin Francis v Orissa*** [107] where the court held that in order to attract culpability under the impugned provisions, it has to be established that: the accused had carnal intercourse with a man, woman or animal; such intercourse was against the order of nature; the act was voluntary and that there was penetration.

190. Relying on *Hyde v Hyde* [108] which defined marriage as a union between one man and one woman to the exclusion of all others, he submitted that the law only recognizes heterosexual marriages. He cited ***Anarita Karimi Njeru v The Republic*** [109] in which the court cited with approval the decision in ***Republic v Elman*** [110] where the court stated that *"an argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion: but a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not* support that view."

191. Counsel submitted that consenting to a criminal act does not make it a lesser crime. He urged the court to interpret the law in a manner that reflects the will of the people. Citing *Timothy Njoya v Attorney General & Another,* [111] he urged the court to adopt an interpretation that presupposes the constitutionality of the provisions.

192. Counsel further argued that it is impossible to dissociate this Petition from morality, and, that, courts have recognized the place of public morality in the development of jurisprudence. To buttress this assertion, he cited ***Nation Media Group v Attorney General*** [112] and argued that public policy and conceptions where expressed in statutes ought to be respected. He urged the court to interpret the Constitution in a manner that embraces cultural rights and sovereignty of the people.

193. Counsel urged the court to be wary of international instruments and foreign jurisprudence and consider the local context. He relied on ***Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others*** [113] and ***RE the Matter of the Principle of Gender Representation in the National Assembly and the Senate.*** [114]

194. He agreed with the Respondents that the mere fact that the impugned provisions were imposed by the colonial masters is not a ground to impeach them since they are still good law. Citing the European Court of Human Rights in ***Muller and another v Switzerland*** [115] counsel submitted that there is need for acceptance of the fact that even laws in areas of regional integration are sometimes tinkered to appreciate the differences**,** contexts and circumstances. In that case the EUCHR observed *inter alia* that ***"it is not possible to find in the legal and social orders of the contracting states a uniform European conception of morals and that the view taken of the requirements of morals varies from time to time and from place to place especially in our era, characterized as it is only a far reaching explosion…of opinions on the subject."***

195. Regarding separation of powers and striking out of legislation, he argued that there ought to be checks and balances to avoid constitutional autocracy. He relied on ***The Speaker of the Senate and another v Attorney General and 4 others*** [116] where the Supreme Court cautioned that just as Parliament is expected to operate within its constitutional powers, the judiciary too must do so to avoid judicial tyranny. In his view, striking down the impugned provisions is a matter of public policy, which ought to be debated by the relevant stakeholders hence it is not for the judiciary to singlehandedly, make a determination on such a serious issue. He relied on ***Adkins v Children's Hospital of D.C.*** [117] and ***Obergfel v Hodges*** [118] to buttress his argument.

196. Counsel submitted that the Petitioners' claim that LGBTIQ people are innate is not supported by scientific evidence. Referring to Dr. Mutiso's works - ***'my genes made me do it'*** he contended that the work rebuts the allegations that genes make or compel

behavior. He also cited Dr. PHD Francis Collins' writings ***'The language of God'*** who opines that same sex behavior cannot be pre-determined.

197. He proffered that there is no scientific evidence that alleged suppression of instincts causes harm and argued that they should be suppressed for social, emotional and physical well-being. He submitted that self-control is required of all human beings, and that moral and ethical codes require restraint of impulses towards harmful behavior. According to counsel, the impugned provisions do not criminalize self-identity but harmful behavior.

The 9th Interested Party's Submissions

198. Counsel for the 9th Interested Party submitted opposing the Petition. He contended that that the diversity of Kenyan cultures does not recognize homosexuality. He cited the preamble to Constitution as giving the background philosophy of the Constitution, which is to nurture and protect the well-being of the individual, family, community and the nation. He relied on ***Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others*** [119] for the proposition that the court does not allow bootstrapping arguments without the express provision of the Constitution conferring a right. Counsel submitted that Article 44(1) and (2) guarantees the right to participate and enjoy cultural rights and that Kenyan cultures abhor homosexuality even in the absence of the impugned provisions.

199. In his view, the court would be acting contrary to Article 159 (1) if it were to strike down the impugned provisions on the basis of the right to privacy. He contended that the right to privacy is not absolute, and that limiting of privacy rights by the impugned provisions preserve procreation and ultimately the sustenance of the nation. He cited the writings by Kimani Njogu and Elizabeth Orchardson-Mazrui in their book ***"Culture, Gender, Inequality and Women's Rights in the Great Lakes"*** where they advocate for penal consequences for deviant sexual conduct and explain the role of sexual taboos in African culture.

200. He urged the court not to adopt a broader interpretation of the right to privacy, which will defeat public interest in the enforcement of other laws. He argued that unlike in the US or other jurisdictions where homosexuality has been accepted, Kenya has a ***'socially conservative'*** Constitution that detests the practice.

201. He contended that Articles 27, 28, and 29 of the ACHPR obligate state parties to ensure that the cultures of the citizens are respected. He argued that the Regional Human Rights regimes invoked by the 2nd *Amicus Curiae* reject the extreme version of the individualistic view of rights originating from the western conception of a person.

202. He further submitted that the Committee of Experts on Constitutional Review (CoE) intentionally excluded **'sexual orientation'** from Article 27 (4) because they were aware of the volatility of same sex marriage and that the Constitution limits marriage to the opposite sex. Drawing a distinction between the Kenyan Constitution and that of South Africa, he pointed out that whereas the later contains the phrase *"sexual orientation"* Article 27(4) does not.

203. On Kenya's obligations to international law, counsel relied on the ***Mitu-bell Case*** (Supra) and argued that the Court of Appeal observed that despite the provisions of Article 2(5) and (6), if the International law is inconsistent with the Kenyan Constitution, the Constitution prevails. He argued that the fact that Article 23(3) permits the High Court to grant appropriate reliefs, that does not allow the court to borrow legislation from other countries.

204. Counsel further submitted that about 35 African Countries have penal sanctions on homosexuality, demonstrating the existence of a regional customary Law practice on banning same sex conduct. He cited ***Kanane v The State),*** [120] in which the Court, in taking judicial notice of the AIDS prevalence worldwide and in Botswana in particular, held that the legislature in enacting the provisions was reflecting a public concern. He concluded that the impugned provisions meet the limitation test under Article 24(1).

The 10th Interested Parties' Submissions

205. Counsel for the 10th Interested Parties submitted opposing the Petition. He argued that during the Constitution making process, Kenyans demonstrated a desire for certain values and that the issue of same sex marriage or sexual orientation was a contested one. He submitted that the Final CKRC Report (**Clause 8.7 (h)- page 96)** only recommended for recognition of marriage between the opposite sex and called for outlawing of same sex unions. He further submitted that the Technical Working Committee on citizenship and the Bill of Rights recommended the prohibition of same sex marriage and homosexuality.

206. On the interpretation of the Constitution in light of the LGBTIQ rights, he submitted that Kenyans exercised their power in enacting the Constitution and therefore it should be interpreted purposively and in a manner, that promotes its purposes, values and principles. He relied on *Re the matter of* the *Interim Independent Electoral Commission*[121] where the court observed that the values integrated in the preamble to the Constitution, Article 10, Chapter 6 and various other provisions envision the social, cultural, and political realities and aspirations that are important in building a robust, patriotic and indigenous jurisprudence for Kenya.

207. Counsel agreed with the 9th Interested Party's submission that unlike the South African Constitution, the Kenyan Constitution does not contain the phrase sexual orientation in Article 27 (4), and that, recognizing it amounts to elevating non-existent rights. In his view, decriminalizing the impugned provisions would amount to introducing gay marriages.

208. On the alleged violation of Article 27, counsel cited ***Federation of Women Lawyers (FIDA-K) & 5 Others v The Attorney General & Another Case***[122] where the court held that if a provision is alleged to offend equality, the question to consider is whether there exists a difference that bears a reasonable object to the legislation; and, that if the difference has a reasonable connection with the object intended to be achieved, the law with such a provision is constitutional and where there is no such difference, the difference is thus discriminatory and the provision can rightly be said to be repugnant to justice and morality.

209. Concerning the right to dignity (Article 28), Freedom and Security of a person (Article 29), right to privacy (Article 31) and the Economic and social rights (Article 43), counsel submitted that the disputed provisions do not in any way sanction any of the illegalities complained of by the Petitioners namely, arbitrary detention, harassment or blackmail. He relied on ***Suresh Kumar & another v Naz Foundation & Others (*Supra),** where it was held that mere possibility of abuse of a legal provision does not invalidate a legislation; because it is presumed, unless the contrary is proved, its application would be done not with an evil eye and unequal hand.

210. In respect of the right to privacy and social rights, and more specifically health, counsel submitted that the same is subject to the Limitations under Article 24 of the Constitution and relied on ***Daniel Ng'etich & 2 Others v The Attorney General & 3 Others.***[123]

211. On the alleged vagueness and uncertainty of the impugned provisions, counsel argued that the Petitioners' use of metaphorical language to describe the disputed conduct does not render the provisions vague or uncertain. He referred to the Black's Law Dictionary definition of 'Carnal knowledge' and relied on ***Onzere Kambi vs. Republic***[124] for the proposition that for the offence of sodomy, carnal knowledge is also an ingredient which the court elaborated to be penile penetration. Counsel maintained that there is no ambiguity or vagueness in the impugned provisions and that the limitation meets the test under Article 24.

212. On the alleged unconstitutionality of the impugned provisions, counsel urged the court to bear in mind the principle that every legislation enacted by Parliament enjoys a presumption of constitutionality.

The 1st Amicus Curiae's Submissions

213. Counsel for the 1st *amicus curiae* submitted setting out the general principles of constitutional interpretation, and pointed out that the Constitution is an endeavor by Kenyans to give to themselves a framework for governance based on the values and principles in Article 10. She cited ***Luka Kitumbi & 8 others v Commissioner of Mines and Geology & another***[125] on the distinction between the 2010 Constitution and the Independence Constitutions. She also cited ***Re Interim Independent Electoral Commission,***[126] urging the court not to lose sight of the transformative aspect of the 2010 Constitution. She also relied on ***Attorney General v Kituo Cha Sheria & 7 others***[127] and Articles 20(4) and 259(1) on the principles of constitutional interpretation**.** She further relied on ***R v Big M Drug Mart Ltd,***[128] ***Minister of Home Affairs (Bermuda) v Fisher***[129] and ***S v Zuma.***[130]

214. Counsel provided a historical context of the impugned provisions and argued that the British colonial government unilaterally imposed them. She submitted that section 162 originated from section 377of the Indian Penal Code, which was later amended adding section 165 prohibiting gross indecency whereas section 162 was expanded to prohibit carnal knowledge instead of carnal intercourse.

215. She argued that the impugned provisions have adverse effects on the rights of sexual minorities and cited the KNCHR report 2012 which recommended decriminalization of same sex sexual relationships between consenting adults to safeguard their rights under the Constitution.

216. On the alleged discrimination under Article 27, counsel cited ***Brink v Kitshoff***[131] among other decisions for the proposition that the impugned provisions are discriminatory for differentiating between people or categories of people because of their sexual orientation.

217. Regarding the alleged violation of the right to dignity under Article 28, she submitted that human dignity is one of the national values and principles in Article 10, and is central to the notion of human rights and freedoms in general. She added that Article 19(2) guarantees the right to individual dignity and submitted that any finding on the violation of Articles 27, 31 and 43(1)(a) would result into a finding of violation of the Petitioner's right to dignity under Article 28. She relied on ***William Musembi v Moi Educational Centre***[132] and ***Law v Canada (Minister of Employment and Immigration***[133] among other decisions and argued that the impugned provisions encourage and reinforce societal negative stereotypes against LGBTIQ that breed contempt, harassment and violence against them.

218. On the right to privacy counsel argued that the impugned provisions violate Article 31 and relied on ***Standard Newspapers Ltd & another v Attorney General and 4 others***[134] and ***Ibrahim Ndadema Adenya v Attorney General.***[135] She argued that the right to privacy includes the sphere of private intimacy and autonomy, which allows people to establish and nurture human relationships without interference from other persons. She also relied on ***National Coalition for Gay Lesbian equality v Minister of Justice and others (supra.)***

219. Regarding the right to the highest attainable standards of health under Article 43 (1) and (b), counsel cited several decisions and international conventions in support of the proposition that the impugned provisions affect the right to access healthcare.

220. On whether the limitations are justifiable under Article 24, counsel cited numerous authorities including ***Toonen v Australia(supra)*** and concluded that the Petitioners have established that the limitation cannot pass Article 24 analysis test.

221. On whether the impugned provisions are null and void on the basis of vagueness and uncertainty, she argued that the provisions are vague and overbroad and relied on ***Mike Rubia and Another v Moses Mwangi and 2 others.***[136]

The 2nd *Amicus* Curiae's Submissions

222. Counsel for the second amicus curiae submitted that Section 162 violates the right to equality and freedom from discrimination, by targeting members of the gay community due to their orientation; which discrimination falls under the grounds set forth in Article 27(4). He relied on the ***EG*** *case.*

223. He further submitted that Article 17 of the ICCPR which guarantees the right to privacy is applicable to Kenya and relied ***Toonen v Australia, Communication***[137] where the term sex was defined to include sexual orientation for purposes of **ICCPR** and that laws that criminalize same sex conduct violate the right to privacy and non-discrimination, regardless of whether enforced or not. He also relied on the Report by **The United Nations High Commissioner**, titled, ***'Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity,***[138] and submitted that Section 162 is discriminatory and violates Article 27 (4).

224. Counsel further submitted that section 162 violates the right to dignity and privacy of the individual guaranteed in Articles 28 and 31. He cited ***National Coalition for Gay and Lesbian Equality and Another v Minister of Justice (supra)*** where the court observed that prohibition of any act barring sexual intimacy between gay men is a violation of the right to equality and privacy. He also submitted that the criminalization of sodomy laws violated the right to privacy of the gay community if sexual acts are done in private. He further relied on ***Lawrence v Texas, (supra)*** in which the Court emphasized that the liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons. He also relied on ***Dudgeon v United Kingdom*** (supra*)* and ***Caleb Orozco v Attorney General*** (supra) which invalidated laws criminalizing homosexuality.

225. On the constitutionality of section 165, counsel submitted that the Section is unconstitutional as it only targets male persons of homosexual orientation and extends to consensual same sex activities done in private. He relied on ***Samuel G. Momanyi v The Honorable Attorney General & Another***[139] and ***Coalition for Reform and Democracy (CORD) & 2 others v Republic & 10 Others***[140] where various provisions of the law were struck down for violating the Bill of rights. He urged the court to strike down the impugned provisions.

Petitioners' Advocates' Rejoinder to the Respondents,' 7th, 9th and 10th Interested Parties' submissions.

226. Counsel for the Petitioner in Petition 150 of 2016 in their rejoinder to the Respondent's and the 7th, 9th and 10th Interested Parties' submissions, reiterated their earlier submissions, and briefly addressed three key points. First, that the court should not be swayed by majoritarian concept in interpreting the Bill of Rights. Second, the court should decline the invitation to take into account religious or moral views in determining this Petition. Third, the court should not be persuaded by cultural views. Additionally, counsel submitted that sexual orientation is an essential attribute of the right to privacy and that allowing the Petition would have zero effect on the heterosexuals. They contended that the global trend favours decriminalization of the same sex conduct and reminded the court of Kenya's obligations under international instruments.

227. Counsel for the Petitioners in Petition 234 of 2016 argued that the question for determination is the constitutionality of the impugned provisions and not same sex marriage. On the ***Botswana case***, he submitted that foreign decisions should be read in the legal context under which they are made. He pointed out that the Botswana Constitution was enacted in the 1960's and argued that no post 1990 Constitution has declared gay rights illegal. It was his submission that there is no state religion in Kenya nor can religious beliefs be imposed on others. He referred to the preamble to the Constitution, which emphasizes respect for Human Rights.

228. He submitted that the Penal Code does not define unnatural offences hence; the impugned provisions are vague and ambiguous. He also argued that sexual orientation should be recognized as a ground of discrimination under Article 27(4). He maintained that the Petitioners are not seeking new rights but urged the court to enforce rights existing in the Bill of Rights.

Parties submissions on the Navtej Singh Johar & Others v Union of India through Secretary, Ministry of Law and Justice, (The Johar Case)[141]

229. During the hearing of the Petitions, the Respondent's counsel and counsel for the 7th, 9th and 10th Interested Parties, in opposing the Petitions placed heavy reliance on the ***Johar case***, which was then the subject of an appeal before the Supreme Court of India. After concluding the hearing and while this court was in the process of considering its decision, the Supreme Court of India determined the appeal. This development prompted counsel for the Petitioners to move the court by way of a formal mention and requested to address the court on the relevance of the decision to these Petitions. The court granted the request, directed the parties to file brief submissions and allocated a date for oral highlights.

230. The Petitioner's counsel in Petition No. 150 of 2016 adopted their written submissions dated 13thSeptember 2018. He argued that the Supreme Court of India had found section 377 of the Indian Penal Code (the equivalent of the impugned provisions), violated the rights protected by Article 14 of the Indian Constitution on equality before the law; Article 15 on non-discrimination on grounds of sex; Article 19 on freedom of expression; and Article 12 on personal liberty, including aspects of personal dignity, privacy and health. Counsel pointed out that the ***Johar case*** took into consideration international instruments and comparative international law. In counsel's view, the decision significantly supports the Petitioners' case that the impugned provisions are unconstitutional in so far as they penalize private consensual same sex between adults. Counsel implored the court to have full regard to the approach taken by the Indian Supreme Court and grant the Petition.

231. Counsel for the Petitioners in Petition No. 234 of 2016 and counsel the 1th to 6th Interested Parties associated themselves with Petitioners' Advocates' submissions on the ***Johar case***.

232. Counsel for the 8th Interested Party, filed written submissions on the ***Johar case*** and argued that the Indian Penal Code and the impugned provisions are similar. She contended that Kenyan courts have in the past appreciated foreign jurisprudence from India citing ***Law Society of Kenya v Centre for Human Rights & Democracy & 12 Others.***[142] She urged the court to adopt the reasoning in the ***Johar case*** because the issues in the said case and this Petition are similar. In her view, the two provisions have a similar historical origin.

233. Additionally, counsel drew the court's attention to a decision from the High Court of Trinidad and Tobago in ***Jason Jones v the Attorney General***[143] which found laws criminalizing same sex intimacy between consenting adults to be unconstitutional, and, noted that criminalization of homosexual sexual activities runs counter to the implementation of effective educational programs in respect of HIV/AIDS prevention.

234. Counsel for the 1th *amicus curiae,* submitted that limitations imposed on rights should not be arbitrary or excessive, and, that,

there must be a legitimate State interest and a pressing need for such a limitation.

235. Counsel for the 2th *amicus curiae*, pointed out that the court in the ***Johar case*** relied on the decision in ***Naz Foundation v Government of NCT of Delhi & Others***[144] which preferred an expansive interpretation of the word sex to include prohibition of discrimination on the ground of sexual orientation. He inviting the court to adopt a purposive interpretation as was done by the Supreme Court of India in the ***Johar case*** and find that the right in question should be interpreted under the doctrine of constitutional morality and not social morality.

236. The Respondent's counsel did not file written submissions on the ***Johar case***. However, counsel adopted their submissions in response to the Petition. It was her argument that the ***Johar case*** is persuasive and not binding to the court and referring to the Supreme Court decision in ***Re: The matter of Gender representation in the National Assembly*** (supra), she urged the court to exercise caution while applying foreign jurisprudence because the circumstances in those foreign jurisdictions may be different.

237. Counsel for the 7th Interested Party adopted his written submissions on the ***Johar case*** and associated himself with the submissions made by the Respondent's counsel. He argued that the interpretation of the Constitution should be geared towards realizing its purposes, values and principles as stipulated in Article 259(1).

238. He argued that the Supreme Court of India did not find that there was ambiguity in the phrase "unnatural offences." In his view, the fact that the phrase prohibits sodomy, bestiality and buggery was not open to doubt and that neither did the ***Johar case*** strike down the impugned provisions that outlaw bestiality, a demonstration that there was no ambiguity in the section.

239. On the right to privacy and dignity, counsel argued that the Constitution has express provisions and that Article 24 (1) provides for reasonable and justifiable limitation of rights. He contended that the Constitution of India has no provision for limitation of rights.

240. Counsel for the 9th Interested Party submitted that the court should not be persuaded by foreign decisions. He referred the court to Article 160 and argued that foreign decisions interfere with the independence of the court and that only the Constitution and the law bind this court. In his view, the ***Johar case*** refers to Article 21 of the Indian Constitution, which defines discrimination to include sexual orientation, unlike Article 27 of our Constitution. He further submitted that the Supreme Court of Kenya has guided courts to develop local jurisprudence.

241. Counsel for the 10thInterested Party filed written submissions on the ***Johar case*** and associated himself with the submissions made by counsel for the Respondents, the 7th and 9th Interested Parties. He submitted that the ***Johar case*** is distinguishable because it does not reflect the Kenyan legal position on many issues and goes against the constitutional culture of Kenya. He contended that under Article 2(4), any Law, including general rules of international law inconsistent with the Constitution is invalid. In his view, adopting the ***Johar case*** is tantamount to introducing sexual orientation into Article 27(4).

DETERMINATION

242. Upon analyzing the opposing facts presented by the parties, we find that the following issues distil themselves for determination: -

a. Whether sections 162 (a) and (c) and 165 of the Penal Code are unconstitutional on grounds of vagueness and uncertainty.

b. Whether the impugned provisions are unconstitutional for violating Articles 27, 28, 29, 31, 32 and 43 of the Constitution.

243. These Petitions provide an opportunity for this court to re-state in a subtle manner the applicable guiding principles of Constitutional and Statutory interpretation, viewed from the lens and perspective of our unique Constitution, a charter that has been described as fiercely progressive and transformative which ushered in a new set of national values and principles, an enhanced Bill of Rights and a new system of government and reset the relationship between the citizen and the state and reconfigured both the ethos and the architecture of governance.[145]

244. The Constitution gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law[146] Leadership and Integrity.[147] Values and Principles of Public

Service,[148] entrenchment of exercise of Judicial authority in the Constitution[149] and Independence of the Judiciary[150] and confers sovereignty to the people of Kenya to be exercised on their behalf by State Organs to perform their functions in accordance with the Constitution.[151]

245. The philosophy, values and the structures of the previous Constitution had to give way to those of the new constitutional order which includes enactment of new legislation, the realignment of the bureaucracy and management of institutions and the rallying of the national consciousness to the new dawn.[152]

246. Interpretation is the process of attributing meaning to the words used in a document, be it a Constitution, legislation, statutory instrument, policy or contract having regard to the context provided, by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence. The 'inevitable point of departure is the language of the provision itself,' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.[153]

247. In interpreting the Constitution, Article **259(1)** obligates courts to promote 'the spirit, purposes, values and principles of the Constitution, advance the rule of Law, and the Human Rights and fundamental freedoms in the Bill of Rights, permits the development of the law and contributes to good governance. This approach has been described as a mandatory constitutional canon of constitutional and statutory interpretation. The court has a duty to adopt an interpretation that conforms to Article **259**.

248. Constitutional provisions must be construed purposively and in a contextual manner. Accordingly, courts are constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained"[154] but should avoid "excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene," which includes the political and constitutional history leading up to the enactment of a particular provision.[155]

249. It is now trite that enforcement of Penal Statutes is a necessary tool to maintain law and order and also creates offences against morality. The enforcement of Penal Statues can have an impact on constitutionally guaranteed rights. The litmus test is whether such limitation will pass constitutional muster. It follows that Penal statutes must be understood purposively because the Penal Code must be umbilically linked to the Constitution. As we do so, we must seek to promote the spirit, purpose and objects of the Constitution. We must prefer a generous construction over a merely textual or legalistic one in order to afford the fullest possible constitutional meanings and guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the Constitution as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous. That the social and historical background of a legislation is important in seeking to identify the mischief sought to be remedied was appreciated in *Commissioner of Income Tax vs. Menon*[156] where it was held that one of the canons of statutory construction that a court may look into is the historical setting of an Act, to ascertain the problem with which the Act in question has been designed to deal. It was the Supreme Court's view *In Matter of the Kenya National Human Rights Commission*[157] at paragraph 26 that:-

"… 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."

250. It is an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted so as to effectuate the greater purpose of the instrument.[158]

251. Courts have on numerous occasions been called upon to bridge the gap between what the law is and what it is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty, they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute, a document or an action of an individual, which is certain to subvert the societal goals and endanger the public good.

252. Words, spoken or written, are the means of communication. Where they are possible of giving one and only one meaning there would be no problem. But where there is a possibility of two meanings, a problem arises and the real intention of the legislature is to be ascertained and given meaning. The Legislature, after enacting statutes becomes *functus officio* so far as those statutes are concerned. It is not their function to interpret the statutes. The legislature enacts and the Judges interpret. The difficulty with Judges is that they cannot say that they do not understand a particular provision of an enactment. They have to interpret it in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. That situation led to the birth of principles of interpretation to find out the real intent of the Legislature. Consequently, the Superior Courts had to give the rules of interpretation to ease ambiguities, inconsistencies, contradictions or lacunae. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing.

253. A court of law must therefore try to determine how a statute should be enforced. There are numerous rules of interpreting a statute, but in our view and without demeaning the others, the most important rule is the **plain meaning rule**. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.

254. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The court may not add words into a statute. Courts decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature.

255. All that the Court has to see at the very outset is, what does the provision say" If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the court would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature.

256. It is trite law that in interpreting the provisions of a statute the Court should apply the golden rule of construction. The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.[159]

257. The Supreme Court of India in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others*[160] observed that:-

“Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual.”

258. The touchstone of interpretation is the intention of the legislature. The legislature may reveal its intentions directly, for example by explaining them in a preamble or a purpose statement. The language of the text of the statute should serve as the starting point for any inquiry into its meaning. To properly understand and interpret a statute, one must read the text closely, keeping in mind that the initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one. Courts generally assume that the words of a statute mean what an “ordinary” or “reasonable” person would understand them to mean. If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

259. The court, as an independent arbiter of disputes, has fidelity to the Constitution and must be guided by the letter and spirit of the Constitution. Similarly, in interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it. This position was appreciated by the Supreme Court of Kenya in *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others.*[161]

a. Whether sections 162 (a) (c) and 165 of the Penal Code are unconstitutional on grounds of vagueness and uncertainty

260. Certainty is generally considered to be a virtue in a legal system while legal uncertainty is regarded as a vice. Uncertainty undermines both the rule of law in general and the law's ability to achieve objective such as determining anti-social conduct.

261. Counsel for the Petitioners, supported by the 1st to 6th and 8th Interested Parties attacked the impugned provisions on grounds of vagueness, ambiguity and uncertainty and submitted that the provisions fail the constitutional and common law muster. They cited Article 10(2) (a) and the preamble to the Constitution on the requirement of legal certainty. They also argued that the provisions are so vague that they violate the right to a fair hearing under Article 50. Further, they argued that section 162 does not define the phrases, *"Unnatural offences," "against the order of nature."* They submitted that it is unclear whether the phrases mean sexual intercourse or include oral, anal, vaginal sex, or whether they include any other contact with the genital organ of another person.

262. Regarding section 165, it was submitted that the phrases *"indecency with another male person"* and *"any act of gross indecency with another male person"* are unclear.

263. The Respondents counsel supported by the 7th, 9th and 10th Interested Parties contented that the provisions are clear. On her part, the Respondent's counsel cited the definition in the Black's Law Dictionary and contended that any other form of sexual act other than what is in the order of nature, capable of producing off springs is unnatural and therefore punishable under the impugned provisions. On what indecent practices are, counsel argued that section 2 of the Sexual Offences Act defines an indecent act and penetration and contended that the anus is a genital organ.

264. Section 162 of the Penal Code provides as follows:-

Unnatural offences

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.

265. On the other hand section 165 of the Penal Code provides that:-

Indecent practices 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.*

266. It is true that the Penal Code does not define the phrases *"Unnatural offences,"* and *"against the order of nature."* The question we ask ourselves is whether lack of definition renders the provisions uncertain, vague and unambiguous.

267. In the words of David Mellinkoff, the law is a profession of words.[162] By means of words contracts are created, statutes are

enacted, and constitutions come into existence. Yet, in spite of all good intentions, the meanings of the words found in documents are not always clear and unequivocal. They may be capable of being understood in more ways than one, they may be doubtful or uncertain, and they may lend themselves to various interpretations by different individuals. When differences in understanding are irresolvable, the parties having an interest in what is meant may end up in litigation and ask the court to come up with its interpretation. In the eyes of the law, when this kind of situation arises, the contract or the legislative act contains "ambiguity."[163]

268. Judicial pronouncements have construed the term ambiguity as having more than one interpretation: a highly general sense that pertains to language use, and a more restricted meaning that deals with some fundamental properties about language itself. The words "ambiguous" and "ambiguity" are often used to denote simple lack of clarity in language.[164] The word "Ambiguous" means doubtful and uncertain.[165]

269. The word "ambiguous" means capable of being understood in more senses than one; obscure in meaning through indefiniteness of expression; having a double meaning; doubtful and uncertain; meaning unascertainable within the four corners of the instrument; open to construction; reasonably susceptible to different constructions; uncertain because of susceptible of more than one meaning; and synonyms are "doubtful", "equivocal", "indefinite", "indeterminate", "indistinct", "uncertain", and "unsettled."[166]

270. According to the Black's Law Dictionary,[167] *'carnal'* means of the body; relating to the body; fleshly; sexual. *'Carnal knowledge'* is defined as the act of a man in having sexual bodily connection with a woman. Carnal knowledge and sexual intercourse hold equivalent expressions. In ***Noble v State***[168] it was held that from very early times, in the law, as in common speech, the meaning of the words 'carnal knowledge' of a woman by a man has been sexual bodily connections; and these words, without more, have been used in that sense by writer of the highest authority in criminal law, when undertaking to give a full and precise definition of the crime of rape, the highest crime of this character.[169]

271. The phrase *against the order of nature* has been judicially defined. In ***Gaolete v. State***[170] the court had this to say on 'carnal knowledge:-

***'"Carnal knowledge"** is not defined in the Penal Code, but its accepted meaning is "sexual intercourse". There must be penetration, however slight and emission of semen is not necessary. With particular reference to the offence with which the appellant was charged (otherwise known as sodomy), penetration per anum must be proved. The other party involved in the intercourse may be a man or a woman. It is the penetration through the anus that makes the intercourse **"against the order of nature"** and therefore provides the other element of the offence.'(Emphasis added).*

272. The Law Dictionary defines the term **'unnatural offence'** as "the infamous crime against nature; for example, sodomy or buggery. The term **buggery** has been defined elsewhere to include both sodomy and bestiality. **Sodomy**, in its broadest sense, has been defined to include carnal copulation by human beings with each other or with a beast. Whereas the term bestiality is generally understood to mean an act between mankind and beast, some authorities refer to the act with an animal as buggery, and also define bestiality as including sodomy and buggery.[171]

273. The phrase *"indecent act"* is defined in section **2** of the Sexual Offences Act[172] to mean any unlawful intentional act which causes:-

(a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;

(b) exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration;

274. A statute is *void for vagueness* and unenforceable if it is too vague for the average citizen to understand. There are several reasons a statute may be considered vague. In general, a statute might be called void for vagueness when an average citizen cannot generally determine what persons are regulated, what conduct is prohibited, or what punishment may be imposed. A statute is also void for vagueness if a legislature's delegation of authority to administrators is so extensive that it would lead to arbitrary prosecutions.[173]

275. The doctrine of void for vagueness establishes specific criteria that all laws, or any legislation must meet, to qualify as constitutional. Such criteria include: **(a)** the Law must state explicitly what it mandates; **(b)** what is enforceable and

provide definitions of potentially vague terms. Vagueness is the imprecise or unclear use of language, which contrasts with clarity and specificity.

276. Prior to determining whether the challenged language is overbroad, we must properly construe its meaning. In so doing, we must read the text as a whole, assigning a meaning to every word and phrase, and not permitting any portion of the text to be rendered redundant. Thus, the various forms of sexual conduct, natural, indecent, against the order of nature, and gross indecency listed in the impugned provisions, must each be accounted for, and assigned distinct meanings.

277. The Constitution requires that judicial officers read legislation, where possible, to give effect to its fundamental values. Consistent with this, when the constitutionality of legislation is in issue, courts are under a duty to examine the purpose of an Act and to read the provisions of the legislation so far as is possible to conform with the Constitution.[174]

278. Having established that the impugned phrases have been clearly defined in law dictionaries and in a catena of judicial pronouncements, it is our considered view that lack of definitions in the statute *per se* does not render the impugned provisions vague, ambiguous or uncertain. Accordingly, we decline the invitation to declare the said provisions unconstitutional on grounds of vagueness, uncertainty, ambiguity and over broadness.

279. Our above conclusion is fortified by several reasons: - *First*, the phrases used in the sections under challenge are clear as defined above. *Second*, the provisions disclose offences known in law. *Third*, a person accused under the said provisions would be informed of the nature, particulars and facts of the offence. *Fourth*, even though we are not persuaded by the Petitioners' contention that the provisions under challenge are overbroad, it is our considered view that there is a real danger that in reading down an overbroad statute, we will simply substitute the vice broadness with the equally fatal infirmity of vagueness.[175]

b. Whether the impugned provisions are unconstitutional for violating Articles 27, 28, 29, 31, 32, 43 and 50 of the Constitution

280. The Petitioners supported by the 1st to 6th and 8th Interested Parties assaulted the constitutional validity of the impugned provisions, contending that they violate their fundamental rights and freedoms guaranteed under Articles 27 (equality and freedom from discrimination), Article 28 (human dignity), Article 29 (freedom and security of the person), Article 31 (privacy), Article 32 (freedom of conscience, religion, belief and opinion), Article 43, (highest standard of health) and Article 50 (the right to fair hearing).

281. The proponents of the Petition argued that by dint of Article 2(4) of the Constitution, any law that is inconsistent with the Constitution is void to the extent of the inconsistency. Consequently, they urged the court to find that the impugned provisions violate Articles 27, 28, 29, 31, 32, 43 and 50 and invited the court to strike them down.

282. The Respondent, 7th, 9th and 10th Interested Parties took a common position that the impugned provisions do not violate any of the above Articles, and, that, in any event, the Petitioners have not established the alleged violations. They contended that if at all the impugned provisions impose any limitations on the Petitioners' fundamental rights; such limitations are reasonable and justifiable and satisfy the limitation test under Article 24.

283. In order to resolve the broad issue under consideration, we propose to address the Articles alleged to have been violated separately.

i. ***The Right to equality and Freedom from discrimination (Article 27)***

284. The Petitioners' complaint as supported by the 1st-6th and 8th Interested Parties, is that their constitutional rights to equality and freedom from discrimination guaranteed under Article 27 have been violated. The Respondent, the 7th, 9th and 10th interested parties hold a contrary view, arguing that the allegations of violation of constitutional rights have not been proved.

285. The factual matrix and the legal arguments for and against the Petition have been enumerated in detail above. We find no reason to rehash them here. We are fully conscious that the Right to equality before the law and freedom from discrimination is a weighty constitutional matter. We therefore approach it with caution and sensitivity. Any claim of direct or indirect discrimination strikes hard at the very core of our Constitution and more so, the Bill of Rights.

286. Indisputably, there exists a presumption as regards constitutionality of a statute. The rule of presumption in favour of constitutionality, however, only shifts the burden of proof and rests it on the shoulders of the person who attacks it. It is for that person to demonstrate that there has been a clear transgression of constitutional principles. However, this rule is subject to the limitation that it is operative only until the time it becomes clear and beyond reasonable doubt that the legislature has crossed its bounds.

287. The guiding principles in a case of this nature are clear. *First*, the court has to establish whether the law differentiates between different persons. *Second*, whether the differentiation amounts to discrimination, and, *third*, whether the discrimination is unfair. In ***Willis v The United Kingdom***[176] The European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations. The court stated that discrimination is:-

"...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available members of society." (See Andrews v Law Society of British Columbia [1989] I SCR 143, as per McIntyre J.)

288. From the above definition, it is safe to state that the Constitution only prohibits unfair discrimination. In our view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.

289. The principle of equality attempts to make sure that no member of society is made to feel that they are not deserving of equal concern, respect and consideration, and that the law or conduct complained of is likely to be used against them more harshly than others who belong to other groups.

290. The test for determining whether a claim based on unfair discrimination should succeed was laid down by the South Africa Constitutional Court in *Harksen v Lane NO and Others*[177] in which the Court stated:

"At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on article 9 (3), (equivalent to our Article 27). They are:

(a)Does the provision differentiate between people or categories of people" If so, does the differentiation bear a rational connection to a legitimate purpose" If it does not, then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination" This requires a two-stage analysis: -

(i)Firstly, does the differentiation amount to 'discrimination'" If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination,' does it amount to 'unfair discrimination'" If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation…

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

291. The clear message emerging from these persuasive authorities, is that mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is a most reprehensible phenomenon. But where there is a legitimate reason, then, the conduct or the law complained of cannot amount to discrimination.

292. The High court of Botswana in ***Mmusi and Others vs Ramantele and Another***[178] rendered itself thus: -

"The theoretical premise upon which this judgment is anchored recognizes that equality is better understood and applied not in the abstract, but in its proper context. It recognizes, in the words of the renowned American Judge, Oliver Wendell Holmes, that general prepositions of law do not solve concrete cases (Lochner v New York 198 US 45, 76 (1905) (Holmes J dissenting)). The theoretical premise further recognizes that human wrongs are the source of human rights and that inequalities in a particular society, rather than in an imagined society, are the appropriate foundation of a better understanding of equality provisions in national constitutions."

293. In that regard, therefore, it is not every differentiation that amounts to discrimination. It is always necessary to identify the criteria that separates legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination. The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose.

294. Article 27 prohibits all forms of discrimination in absolute terms. It stipulates:

Equality and freedom from discrimination

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(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, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

295. The substance of the Petitioners' complaint is that the impugned provisions target the LGBTIQ community only. If we understood them correctly, their contestation is that the impugned provisions do not apply against heterosexuals.

296. Our reading of the challenged provisions suggests otherwise. The language of section 162 is clear. It uses the words "*Any person.*" A natural and literal construction of these words leaves us with no doubt that the section does not target any particular group of persons.

297. Similarly, section 165 uses the words "*Any male person.*" A plain reading of the section reveals that it targets male persons and not a particular group with a particular sexual orientation. The wording of this section leaves no doubt that in enacting this provision, Parliament appreciated that the offence under this section can only be committed by a male person. In fact, the short title to the section reads "*indecent practices between males.*" The operative words here are *"Any male person"* which clearly does not target male persons of a particular sexual orientation.

298. The Petitioners argued that in the enforcement of the above provisions, they have been subjected to various discriminatory acts on the basis of their sexual orientation. For instance, the first Petitioner in the second Petition deposed in her affidavit that he had been subjected to attacks, rape, and discriminatory acts because of his perceived or actual sexual orientation. He also averred that his family had been subjected to similar attacks and discrimination on similar grounds. On her part, MO claims to have been subjected to public attacks, arbitrary arrests by the police, gang raped and discriminated against on the basis of her perceived or actual sexual orientation. Her mother, Mary Akoth claims to have witnessed the alleged discriminatory acts. MO averred that in his interactions with the community, he witnessed discriminatory acts and attacks against members of the LGBTIQ.

299. The law as we understand it is that a party pleading violation of constitutional rights is at the very least expected to give credible evidence of the said violation and that it is not enough to merely plead and particularize a violation.[179] That is one of the rules enunciated in ***Anarita Karimi Njeru v Republic[180]*** and ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others.***[181] **Even where a party cites** Articles of the Constitution alleging that they have been violated, he/she is duty bound to adduce convincing evidence to prove the alleged violations. In the instant case, save for the allegations made in the Petition and the affidavits, no tangible evidence was given to support the allegations. No iota of evidence was tendered to establish any of the cited acts of discrimination. It is our finding that there is no basis at all upon which the court can uphold any of the alleged violations. In the end, we find that the Petitioners have failed to establish that the impugned provisions are discriminatory.

ii. Whether the impugned provisions infringe the Petitioners' right to the highest attainable standards of health. (Article 43)

300. The Petitioners claim that the application of the impugned provisions impedes their access and realization of the right to health. They argued that they are vulnerable and highly susceptible to HIV/AIDS infections, but because of the impugned provisions, they fear seeking treatment because of the risk of prosecution, stigma and that the health professionals treat them in a perturbing manner. This position was supported by the 1th to 6th and 8th Interested Parties.

301. The Respondent, supported by the 7th, 9th and 10th Interested Parties, contended that no evidence was adduced to demonstrate that anyone or any person had been denied access to health care. Regarding HIV/AIDS, they contended that stigma is not exclusive to LGTBIQ.

302. The right to health is a fundamental right in our Bill of Rights and all other rights depend on this right. Without health, other rights may not be realized or enjoyed. In that regard, Article **43(1)** guarantees every one's right to the highest attainable standard of health.

303. The general principal governing determination of cases is that a party who makes a positive allegation bears the burden of proving it.[182] Moreover, the onus to establish the violation of alleged rights is not a mere formality. Differently put, the onus lies on he who alleges to prove every element constituting his or her cause of action. This includes sufficient facts to justify a finding that the rights have been violated.

304. Constitutional analysis under the Bill of Rights takes place in two stages. First, the applicant is required to demonstrate his or her ability to exercise a fundamental right has been infringed. If the court finds that the law, measure, conduct or omission in question infringes the exercise of the fundamental right, or a right guaranteed in the Bill of Rights, the analysis may move to the second stage. In the second state, the party seeking to uphold the restriction or conduct will be required to demonstrate the infringement or conduct is justifiable in a modern democratic state and satisfies Article 24 test.

305. Cases are decided on the legal burden of proof being discharged (or not). **Lord Brandon** once remarked:-[183]

"No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take."

306. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by **Rajah JA** in ***Britestone Pte Ltd vs Smith & Associates Far East Ltd***[184] **:**

"The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of

proof imposed on him"

307. Decisions on violation of constitutional rights should not, and must not, be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon unsupported hypotheses.

308. The Petitioners and the Interested Parties supporting the Petition argued that their right to health as stipulated in Article 43(1) had been violated. That may be true. However, no evidence was placed before this court to support the allegations. None of the Petitioners tendered evidence to prove that they had been denied medical attention in any health facility in the country, or were subjected to mistreatment in the course of seeking medical attention. They merely made generalized statements without proof. Based on our analysis of the material placed before us, and this being a constitutional Petition, it is our conclusion that the answer to this issue is in the negative.

iii. Whether the impugned provisions violate the Petitioners' right to a fair hearing under Article 50.

309. The Petitioners' other argument is that the enforcement of the impugned provisions impinges their right to a fair trial guaranteed under Article 50 of the Constitution. They also cited Article 10(2) (a) and the preamble to the Constitution on the requirement of legal certainty, and argued that on account of the vagueness and uncertainty of the impugned provisions, and the undignified and dehumanizing manner of gathering evidence to support the offence, their right to a fair trial is not guaranteed.

310. We have already addressed the question of the alleged vagueness and uncertainty of the impugned provisions. We find no need to repeat ourselves. It will suffice to state that we find no merit on the alleged vagueness and uncertainty.

311. On the allegation that evidence is procured in a manner inconsistent with Article 50, we appreciate that evidence obtained in a manner that violates any right in the Bill of Rights, must be excluded if its admission would render the trial unfair or otherwise detrimental to the administration of justice. We are also aware that the Court of Appeal made a determination to that effect in *COL & Another v Chief Magistrate Ukunda Law Courts and 4 Others.***[185]** However, it is our finding that no evidence was tendered to demonstrate that any of the Petitioners was ever subjected to any such examination. Put differently, none of the Petitioners tendered evidence to suggest even in the slightest manner, that evidence was illegally procured from them and used against them in violation of their rights guaranteed in the Constitution. In any event, such a claim would, in our view, constitute a distinct cause of action.

312. The Petitioners further argued that the right to a fair trial is absolute, and that under Article 50 (2), no one should be charged with an offence, which was not an offence at the time of its commission. We agree with this proposition of the law. However, this argument falls on two grounds. First, the offences in question are provided for in the law. Second, no evidence was adduced to show that any of the Petitioners was charged with an offence that was not in existence at the time he/she was charged.

313. Article 50 (2) guarantees every accused person the right to a fair trial, a right that is non-derogable.[186] However, in any criminal justice system, there is a tension between public interest to bring criminals to justice on the one hand, and, the equally greater public interest in ensuring that justice is manifestly done to all. What the Constitution demands is that an accused be given a fair trial.[187]

314. In that regard, Article 50(2) applies to accused persons facing trial. None of the Petitioners or the interested parties supporting the Petition, or persons on whose behalf this Petition was brought, has demonstrated that he/she has been charged under the impugned provisions before any court or has a pending complaint against him or her before a police station to warrant the invocation of Article 50 (2). Accordingly, the Petitioners' argument that their right to a fair trial has been denied, violated, infringed or is threatened fails.

iv. Whether the Petitioners' right to freedom and security of the person has been violated (Article 29)

315. The Petitioners in the second Petition seek a declaration that the impugned provisions violate *inter alia* their rights to freedom and dignity guaranteed under Article 29 of the Constitution, Articles 3 and 9 of the UDHR and Article 6 of the ACPHR, all of which guarantee the freedom and security of the person.

316. The first Petitioner stated that the impugned provisions deprive him the rights guaranteed under Article 29 without justifiable cause. He also argued that enforcement of the impugned provisions perpetuates violence by both public and private actors which amounts to degrading treatment.

317. Relying on a report by the 7th Petitioner entitled ***"Outlawed amongst us"*** the Petitioners claim that the LGBTIQ community is harassed, subjected to extortion, blackmailed, held by law enforcement agents beyond the legal limits and subjected to verbal and physical abuse. The Respondent, 7th, 9th and 10th Interested Party's common response is that the right alleged to have been violated is not absolute.

318. Article 29 guarantees every person the right to freedom and security of the person, that, is, not to be deprived freedom arbitrarily or without just cause; not to be subjected to any form of violence from the public or private sources and not to be treated or punished in a cruel, inhuman or degrading manner.

319. The Article combines the right to freedom and security of the person with the right to be free from bodily and psychological harm. It is essentially intended to protect the physical integrity and dignity of an individual. The right not to be subjected to torture in any manner or not to be treated or punished in a cruel or degrading manner are components of the right to freedom and security of the person. These components are inviolable under Article 25(a) of the Constitution, and therefore, no law can stand if it seeks to limit such right or freedom.

320. It is trite that a party alleging violation of a fundamental right must plead with specificity the violation, infringement or threatened violations and demonstrate that the violation or threat indeed occurred and that the Respondent was the violator. That is what constitutes a cause of action in a constitutional claim. It is not sufficient for a Petitioner to allege in general terms that a fundamental right or freedom has been violated. A court confronted with a claim of violation of a constitutional right is required to inquire into the allegations only when there are specific facts supporting a right in the constitution or the law. A Petitioner cannot merely enumerate constitutional provisions and allege their violations. He must prove the actual violations.

321. We appreciate that a person can approach the court citing threat of infringement of a constitutional right or the Constitution. However, weighing the Petitioners' alleged infringements, violations and threats *vis- a- vis* Article 29, we are of the view that the impugned provisions do not apply exclusively to the Petitioners as already explained elsewhere in this judgment.

v. Whether the Petitioners rights to freedom of conscience, religion, belief and opinion under Article 32 has been violated

322. The Petitioners in Petition 234 of 2016 cited violation of Article 32 which guarantees the right to freedom of conscience, religion, thought, belief and opinion. However, no evidence was led or submission made in support of this allegation. We say no more.

vi. Whether the Petitioners' rights to human dignity and privacy have been violated (Articles 28 and 31)

323. We find it convenient to address the alleged violations of Articles 28 (right to human dignity) and 31 (right to privacy) together, because, in our view, these Petitions stand or fall on these two Articles.

324. As pointed out earlier, the respective parties' positions as presented in their pleadings and legal arguments have been enumerated with sufficient detail in this judgement. At the risk of repeating ourselves, we propose to make brief highlights.

325. The Petitioners, the 1th to 6th and 8th Interested Parties argued that the impugned provisions violate Articles 28 and 31 of the Constitution, as augmented by the **UN Charter, ICCPR, UDHR, ICESCR** and **ACHPR**. They also relied on various judicial pronouncements and authoritative writings to argue that dignity is the pillar of all other rights.

326. On privacy, it was their proposition that the right belongs to the person whether single or married to be free from unwarranted Government intrusion, and that criminalisation of private homosexual acts constitutes an unjustified interference with the right to privacy. They argued that the right to privacy protects adult consensual sexual activity between persons of the same sex in private. They further argued that any act that impairs human dignity is a deprivation of the right to life. In their view, dignity entails self-respect and self-worth and that dignity is violated when individuals or groups are marginalized, harmed or devalued. They, therefore contended that criminalising adult consensual same sex sex in private interferes with the right to privacy.

327. Based on the foregoing, they argued that denying them the right to express themselves in the manner they know best infringes their right to privacy. They also stated that the impugned provisions violate their right not to have any information regarding their individual's private affairs revealed.

328. The Respondent, the 7th, 9th, and 10th Interested Parties countered the Petitioners' arguments and contended that the said rights are neither absolute, nor do they legitimize criminal conduct. It was their further contention that the impugned provisions viewed against the Constitution only criminalize carnal knowledge through the anal orifice.

329. They also argued that it would be erroneous for the Court to strike down the impugned sections on the basis of the right to privacy, because the provisions protect public interest and promote African culture which abhors homosexuality.

330. Human Rights is a foundational value in our Constitution. The preamble to the Constitution recognizes aspirations for a government based on essential values of Human Rights, Equality, Freedom, Democracy, Social justice and the Rule of Law.

331. Article 2 declares the supremacy of the Constitution and its binding nature on all persons. Article 3 obligates every person to respect and uphold the Constitution. Article 10 requires state organs and state officers, public officers and all persons, whenever they apply or interpret the Constitution to take into account national values and principles. Article 2(5) provides that the general rules of international law shall form part of the law of Kenya under the Constitution.

332. Article **1** of UDHR provides:-

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

Article 5

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 12

"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

333. Professor Richard Lillich aptly described the UDHR as the *"Magna Carta of contemporary international human rights law*." It is expressly premised on *"the inherent dignity and ... the equal and inalienable rights of all members of the human family.*"[188]

334. Similarly, the ACHPR[189] provides that *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind...."* It also provides for equality before the law, equal protection of the law,[190] guarantees respect for life and the integrity of the person,[191] and the right to the respect of the dignity inherent in a human being and prohibits all forms of degradation, torture, cruel, inhuman or degrading punishment and treatment.[192]

335. The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Article 19 appreciates that the Bill of Rights is the cornerstone of democracy in Kenya. It enshrines the rights of all people and affirms the democratic values of human dignity, equality and freedom.

336. The Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, as the foundational values. Article 28 provides for the right to inherent dignity and the right to have that dignity respected and protected. The Article does not define the word *"dignity."* However, its role and importance as a foundational constitutional value, has been emphasized in a number of decisions.

337. In *S v Makwanyane*,[193] it was observed that *"without dignity, human life is substantially diminished"* and pronounced the prime value of dignity in the following terms:-

"The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in Chapter 3." (Equivalent of Chapter 4 of our Constitution).

338. The court went on to restate the centrality of human dignity as a constitutional value thus: -

"*Human dignity…informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis... dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.*"[194]

339. So important is the right not to be subjected to cruel, inhuman or degrading treatment or punishment that under Article 25 of our Constitution, this is one of the non derogable rights.

340. On the other hand, Article 31 guarantees the right to privacy of the person, home or property not to be searched. It is now settled, insofar as privacy is concerned, that this right becomes more powerful and deserving of greater protection, the more the intrusion it is into one's intimate life.

341. There is a connection between an individual's right to privacy and the right to dignity. Privacy fosters human dignity insofar as it protects an individual's entitlement to a "sphere of private intimacy and autonomy."[195] The right to equality and dignity are closely related, as are the right of dignity and privacy.[196]

342. In that regard, the Constitution places human dignity and equality as the central theme to our constitutional order. According to Currie and De Waal, *'the determination of whether an invasion of the common law right to privacy has taken place is a single enquiry. It essentially involves an assessment as to whether the invasion is unlawful*.'[197]

343. The Petitioners' case is that the enforcement of the impugned provisions violates their right to dignity and privacy. The substance of their complaint is that by virtue of the impugned provisions, the police subject them to intrusive, undignified and humiliating searches on their person. On privacy, they argued that the relevant conduct is done in private, and that the impugned provisions seek to regulate their most intimate behavior in violation of their right to privacy.

344. The Respondent's position is that no violation has been established and that if at all there is limitation as alleged, the same is reasonable and justifiable under Article 24.

345. When the court is confronted with a claim of violation of a fundamental right, and a contention is made that there is no violation or that the right is limited, it is important to determine whether indeed there is an infringement, or a limitation, which is justifiable under Article 24**.** This is because under Article 165 (3) (b) (d) as read with Article 23, the mandate of this court is to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, or, whether any law is inconsistent with or in contravention of the Constitution.

346. Earlier in this determination, we set out the principles applicable in constitutional and statutory interpretation, which we reiterate here. When the constitutionality of legislation is challenged, a court ought first to determine whether, through "*the application of all legitimate interpretive aids,*"[198] the impugned legislation is capable of being construed in a manner that is constitutionally compliant.

347. The Constitution requires a purposive interpretative approach. The technique of paying attention to context in statutory construction is now required by the Constitution. As pointed out earlier, the Constitution introduced a mandatory requirement to construe every piece of legislation in a manner that promotes the *'spirit, purport and objects of the Bill of Rights.'*[199]

348. The *purpose* of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[200] The often quoted dissenting judgment of **Schreiner JA** eloquently articulates the importance of context in statutory interpretation thus:-

"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."[201]

349. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. When confronted with legislation, which includes wording not capable of sustaining an interpretation that would render it constitutionally compliant, courts are required to declare the legislation unconstitutional and invalid. As it stands, this exposition is generally accepted, but it must be said that context is everything in law, and obviously one needs to examine the particular statute and all the facts that gave rise to it.

350. It is indeed an important principle of the rule of law, which is a foundational value of our Constitution, that the law be articulated clearly and in a manner accessible to those governed by the law.[202] A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.

351. Mindful of the imperative to read legislation in conformity with the Constitution, but only to do so when that reading would not unduly strain the provisions, we turn to an analysis of the impugned provisions.

a. Whether the provisions violate the Petitioners' right to dignity and privacy

352. In view of the contestations by parties in these Petitions, it is necessary to consider the import and tenor of the provisions under challenge. In that regard, we find it useful to reproduce them here below.

353. Section 162 of the Penal Code provides as follows:-

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.

Section 165 on the other hand provides that:

*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.*

354. In attacking or supporting the above provisions, both parties relied on local and foreign jurisprudence and international instruments. Among the key foreign decisions relied upon by the Petitioners are the ***Naz Foundation, Johar case, Dudgeon v U.K., Norris v Ireland, Toonen v Australia, Orozco v Attorney General of Belize, Lawrence v Texas, and National Coalition for Gay and Lesbian Equality and another v Minister of Justice.***

355. On our part, we have also considered foreign and local decisions in this determination. Foreign jurisprudence is of persuasive value because it shows how courts in other jurisdictions have dealt with the issues that confront us. At the same time, it is important to appreciate that foreign case law will not always provide a safe guide for interpretation of our Constitution.

356. When developing our jurisprudence in matters that involve constitutional rights, as the present case does, we should exercise caution in referring to foreign jurisprudence[203] and develop our common law in a manner that promotes the values and principles enshrined in our Constitution. This position was appreciated by the courts in this country. In ***Kenya Airports Authority v Mitu-Bell Welfare Society Limited***[204] the Court of Appeal observed thus:-

"whereas citation and reliance on persuasive foreign jurisprudence is valuable, foreign experiences and aspirations of other countries should rarely be invoked in interpreting the Kenya Constitution. The progressive needs of the Kenyan Constitution are different from those of other countries."

357. This caution was also sounded by the Supreme Court in *Jasbir Singh Rai & 3 Others v Estate of Tarochan Singh Rai & 4 Others*[205] in the following terms:-

"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 mechanical approaches to precedent. It will not be appropriate to pick a precedent from India, one day, Australia, another day, South Africa another, the US 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."

358. With the above in mind, we now proceed to examine a few decisions from other jurisdictions on this subject.

India

359. *The* ***Johar case*** is a landmark decision of the Supreme Court of India that decriminalized all consensual sex among adults in private, including homosexual sex. The court was asked to determine the constitutionality of Section 377 of the Indian Penal Code, a colonial-era law that, among other things, criminalized homosexual acts as an "unnatural offence." While the statute criminalized all anal sex and oral sex, including between opposite-sex couples, it largely affected same-sex relationships. On 6th September 2018, the court unanimously declared the law unconstitutional "in so far as it criminalizes consensual sexual conduct between adults of the same sex." Section 377 of the Indian Penal Code is the equivalent to our section 162 of the Penal Code.

360. ***Naz Foundation v. Govt. of NCT of Delhi*** is a High Court decision of India, in which it was held that treating consensual homosexual sex between adults as a crime is a violation of fundamental rights protected by India's Constitution. The verdict resulted in the decriminalization of homosexual acts involving consenting adults throughout India. This was later overturned by the Supreme Court of India in *Suresh Kumar Koushal vs. Naz Foundation*, which reinstated Section 377 of the Indian Penal Code . However, even this decision was overturned by the ***Johar case***, which decriminalized homosexuality once again.

United Kingdom

361. In the case of ***Dudgeon v UK***, Mr. Dudgeon, a homosexual, alleged that the existence in Northern Ireland of laws, which have the effect of making certain homosexual acts between consenting adult males criminal offences, violated his right to respect for his private life. It was held that the laws prohibiting certain homosexual acts between consenting adult males constituted an unjustified interference with Dudgeon's right to respect for his private life (Art. 8 ECHR). The Court did not find a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society.

Ireland

362. In ***Norris v Ireland (supra)***, the allegation was that legal prohibitions on male homosexual activity violated his right to respect for private life in contravention of Article 8 of the Convention. The European Court of Human Rights (Majority) held that Norris could claim to be a victim within the meaning of Article 25 of the Convention, even though he had never actually been subjected to prosecution under the impugned laws. Further, the Court found a violation of Article 8 of the Convention.

Australia

363. ***Toonen v. Australia*** was a complaint brought before the United Nations Human Rights Committee (UNHRC) by Nicholas Toonen. The Committee held that sexual orientation was included in the anti-discrimination provisions as a protected status under the International Covenant on Civil and Political Rights (ICCPR).

Belize

364. In ***Orozco v Attorney General of Belize*** (Supra), Belize's Criminal Code (Section 53) criminalized 'carnal intercourse against the order of nature' including consensual sexual conduct between adult males in private. The law, which though rarely used, carried a ten-year prison sentence. Orozco, a gay man, challenged the constitutionality of the Section. The Supreme Court found that a law criminalizing consensual sexual conduct between adults in private, including same-sex intimacy, violates the constitutional rights to dignity, privacy, equality before the law, and non-discrimination on grounds of sex, and cannot be justified on the basis of 'public morality.' The Court also held that international treaty obligations must inform the interpretation of the Constitutional rights and declared the law void to the extent that it captures consensual sexual conduct between adults in private.

U.S.A.

365. In ***Lawrence v. Texas (Supra)***, the US Supreme Court struck down the Texas sodomy law, and, by extension, invalidated sodomy laws in 13 other states, making same-sex sexual activity legal in every U.S. state and territory, thus overturning its previous decision on the same issue in *Bowers v. Hardwick* which had upheld the constitutionality of a Georgia statute.

South Africa

366. In ***National Coalition for Gay and Lesbian Equality*** (Supra), the South African Constitutional Court was asked to affirm a decision of the High Court declaring unconstitutional and invalid the common law offence of sodomy; the inclusion of sodomy in schedules to the Criminal Procedure Act and the Security Officers Act, and section 20A of the Sexual Offences Act which prohibited sexual conduct between men in certain circumstances. Although the question before the court was the constitutionality of the inclusion of sodomy in the above provisions, this could not be done without considering the constitutionality of sodomy as a common law offence.

367. The Constitutional Court held that the offences that are aimed at prohibiting sexual intimacy between gay men violated the right to equality, as they unfairly discriminated against gay men on the basis of sexual orientation; such discrimination is presumed to be unfair since the Constitution expressly includes sexual orientation as a prohibited ground of discrimination. The Court stated:-

"The discriminatory prohibitions on sex between men reinforces already existing societal prejudices and severely increases the negative effects of such prejudices on their lives."

Moreover, it added:

"Even when these provisions are not enforced, they reduce gay men . . . to what one author has referred to as 'un-apprehended felons', thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation."

The court further stated that:

"[G]ay people are a vulnerable minority group in our society. Sodomy laws criminalise their most intimate relationships. This devalues and degrades gay men and therefore constitutes a violation of their fundamental right to dignity. Furthermore, the offences

criminalise private conduct between consenting adults, which causes no harm to anyone else. This intrusion on the innermost sphere of human life violates the constitutional right to privacy. The fact that the offences, which lie at the heart of the discrimination, also violate the rights to privacy and dignity strengthens the conclusion that the discrimination against gay men is unfair."

Zimbabwe

368. In Zimbabwe, the Supreme Court was called upon to determine whether the common law crime of sodomy was in conformity with Section 23 of the Constitution of Zimbabwe, which guaranteed protection against discrimination on the ground of gender. This arose in ***Banana v. State***[206] where Canaan Banana, a former president of Zimbabwe, had been convicted by the High Court on counts of sodomy, indecent assault, common assault, and committing an unnatural offence. The court, by majority, dismissed the appeal holding that the law criminalizing sodomy was not unconstitutional. The majority stated that consensual sodomy had been decriminalised in three main ways: by legislation, by a constitution or by a supra-national judicial authority, such as the European Court of Human Rights.

Botswana

369. In Botswana, the Court of Appeal in *Kanane v The State*[207] was called upon to determine whether homosexual acts between two consenting male persons carried out in private should be decriminalized. The appellant alleged that the relevant sections discriminated against male persons on the ground of gender and offended against their rights of freedom of conscience, expression, privacy, assembly and association entrenched in the Constitution of Botswana. The court held that "gay men and women do not represent a group or class which at this stage has been shown to require protection under the Constitution."

European Court of Human Rights

370. In ***Chapin and Charpentier v. France***,[208] a case that questioned the French courts' decision to annul a "marriage" contracted between two men in violation of French law, The European Court of Human Rights unanimously recalled that the European Convention on Human Rights does not include the right to marriage for homosexual couples. The Court observed, *inter alia*, that the question of same-sex marriage is "subject to the national laws of the Contracting States."[209]

371. No local decision on the issue was cited. This is the first case challenging the criminalization of same sex conduct citing violation of the constitutional right to privacy and dignity. The closest our courts have come on the issue is ***Non-Governmental Organizations Co-ordination Board v EG & 5 Others***[210] in which E.G. sought to register an NGO for the LGBTIQ persons. The application was rejected prompting EG to petition the High Court challenging the decision citing violation of his right to freedom of association, dignity, equality and non-discrimination. The High Court allowed the petition holding 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.

372. On appeal, the Court of Appeal, by majority, upheld the High Court decision. The Court of Appeal also held that the High Court was correct in reading in "sexual orientation" into Article 27(4) of the Constitution *where circumstances allow.* The question we must decide is whether criminalization of sodomy between adults in private infringes the right to privacy and dignity.

373. Section 162 and 165 of the Penal Code prohibit un natural offences in the form of carnal knowledge against the order of nature and indecent practices between males, whether in public or in private.

374. The Petitioners' argument, as we understand it, is that the two provisions violate the rights to dignity and privacy guaranteed under Articles 28 and 31 of the Constitution. In the alternative, they urged the court to find that the impugned provisions do not meet the limitations analysis tests under Article 24. They argued that the criminalized conduct is between consenting adults, done in private and does not injure or prejudice the rights and freedoms of others. The Petitioners implored the court to interpret the impugned provisions in a manner that renders them constitutionally invalid for violating their rights not to be discriminated on the basis of sexual orientation guaranteed under Article 27(4).

375. The Respondent disagreed with the Petitioners contending that there is no violation of either the Constitution or the rights to dignity and privacy. They also urged the court to restrain itself in interpreting the Constitution in a manner that would confer non-existent rights.

376. Our Bill of Rights guarantee every person's rights and fundamental freedoms. In that regard, Article 19 is clear that rights and fundamental freedoms in the Bill of Rights—belong to each individual and are not granted by the State; do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with the Constitution; and, are subject only to the limitations contemplated in the Constitution.

377. We appreciate the width and breadth of our Bill of Rights. It is true that rights belong to the individual; are not granted by the State and should be enjoyed to the fullest extent permitted by the Constitution. Nonetheless, the Bill of Rights permits limitation in certain instances.

378. The Petitioners' case is hinged on the interpretation of Articles 28 and 31 of the Constitution. Article 259(1) requires the courts to interpret the Constitution in a manner that promotes its purposes, values and principles; advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.

379. It is useful to restate that the Constitution of a nation is not to be interpreted like an ordinary statute. As **Mahomed AJ** eloquently stated, a nation's Constitution is a mirror reflecting the national soul, the identification of the ideals and aspirations of the nation; articulates the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.[211] In keeping with this, the Constitution must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner.[212]

380. Constitutional provisions are to be 'broadly, liberally and purposively' interpreted so as to avoid 'austerity of tabulated legalism.'[213] It is also true that situations may arise where the generous and purposive interpretations may not coincide.[214] In such instances, it may be necessary for the generous to yield to the purposive interpretation.[215] In interpreting constitutional rights, scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question.[216]

381. The US Supreme Court in *U.S vs Butler*[217] expressed itself as follows:-

"*When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."*

382. A similar position was taken in the Tanzanian case of ***Ndyanabo v AG***[218] where the Court of Appeal held *inter alia* that the Constitution is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and principles of state policy. Courts must therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law.

383. With the above principles in mind, the question is whether the impugned provisions violate the Petitioners' rights to dignity and privacy. The answer lies in this court juxtaposing the impugned provisions against the Articles of the Constitution and determine whether they can be read in a manner that is constitutionally compliant.

384. The two sections prohibit sexual acts against the order of nature and indecent acts amongst men. The rights under Articles 28 and 31 are not absolute. Article 24(1) of the Constitution permits limitation by law, the limitation must however be reasonable and justifiable in an open and democratic society. It is undeniable that the limitation is by law. The question is whether the limitation is reasonable and justifiable.

385. The Petitioners' argument that the same sex sex is consensual among adults and done in private poses one question. The question is if we were to agree with the Petitioners and strike down the impugned provisions, how would that relate to the values, principles and purposes of the Constitution"

386. The values and principles articulated in the Preamble to the Constitution, Article 10, 159 and 259 reflect the historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya.

387. The Constitution is the point of reference in any determination. The Preamble to the Constitution acknowledges ethnic, cultural and religious diversity, the nurturing and protecting the wellbeing of the individual, the family, communities and the nation, a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.

388. Article 4(2) provides that the Republic of Kenya is a multi-party state founded on the national Values and Principles of governance in Article 10. Essentially, this affirms that the progress of the Kenyan nation and the realization of the aspirations of its citizens are predicated on the institutionalization and infusion of these values into all segments of the Kenyan society. In that regard, Article 11 further recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and the nation. We also reiterate that Article 19 appreciates that the Bill of Rights is an integral part of Kenya's democratic state and is the framework of social, economic and social policies.

389. Any interpretation regarding the Petitioners' rights would not exclude other values recognized in the Constitution. **The Concise Oxford English Dictionary**[219] defines values as principles or standards of behaviour. A holistic reading of the Constitution, the final CKRC and CoE Reports leave us with no doubt that these values and principles informed the constitution making process and ultimately the Constitution which was endorsed by Kenyans in the referendum.

390. It is common ground that during the Constitution making process, the issue of same sex marriage was one of the issues raised, discussed, and a recommendation was made outlawing same sex marriage. The Final CKRC Report at paragraph 8.7 (h) on Family and Marriage recommended the recognition of marriage only between individuals of the opposite sex and the outlawing of same sex unions.

391. The deliberations culminated in Article 45 which provides that the family is the natural and fundamental unit of society and the necessary basis for social order, and shall enjoy the recognition and protection of the State; and, that, *"every adult has a right to marry a person of the opposite sex, based on the free consent of the parties."*

392. We remind ourselves that in interpreting the Constitution, the Article should not be "unduly strained"[220] and we should avoid "excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene," which includes the political and constitutional history leading up to the enactment of a particular provision.[221] We have already referred to the historical context of the constitution making process and the fact that marriage union was reserved for adults of the opposite sex.

393. The Petitioners advanced the argument that sexual orientation is innate, that they were born that way and that, that is the way they express themselves and therefore they should be allowed to express themselves the way they know best. They further argued that the prohibited conduct is done in private, is consensual, is among adults and hurts no one. Both sides tendered expert evidence in support of their respective positions. However, the expert evidence was unanimous that there is no conclusive scientific proof that LGBTIQ people are born that way.

394. We appreciate the Petitioners' concerns and arguments. We also appreciate that if they were born that way, they have rights like everyone else. In appreciating this position we must uphold the spirit and intention of the Constitution.

395. We have carefully examined the purport and import of sections 162 and 165 of the Penal Code *vis-a-vis* Articles 28 and 31 of the Constitution; we have also read the Constitution holistically. We are unable to agree with the Petitioners that the impugned provisions violate the Constitution or their rights to dignity and privacy. If we were to be persuaded that the Petitioners' rights are violated or threatened on grounds of sexual orientation, we find it difficult to rationalize this argument with the spirit, purpose and intention of Article 45(2) of Constitution.

396. Article 45(2) only recognizes marriage between adult persons of the opposite sex. In our view, decriminalizing same sex sex on grounds that it is consensual and is done in private between adults, would contradict the express provisions of Article 45 (2). The Petitioners' argument that they are not seeking to be allowed to enter into same sex marriage is in our view, immaterial given that if allowed, it will lead to same sex persons living together as couples. Such relationships, whether in private or not, formal or not would be in violation of the tenor and spirit of the Constitution.

397. Furthermore, section 3(1) of the Marriage Act[222] defines Marriage as the voluntary union of a man and a woman. Even where there is no formal marriage, the Act recognizes cohabitation as an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage. We observe that the constitutionality of the above section has never been challenged. In our humble view therefore, decriminalizing the impugned provisions would indirectly open the door for unions among persons of the same sex. If this were to be allowed, it would be in direct conflict with Article 45 (2).

398. We take this view fully aware of numerous decisions from different foreign jurisdictions that have decriminalized provisions similar to ours. However persuasive these decisions may be, they are not binding to this court. We however observe that courts across the world are divided on this issue. Even where it has been allowed, it has not been unanimous. We also hasten to add that throughout the discussion, we have not come across a country that has a provision the equivalent of our Article 45(2) and has decriminalized similar provisions.

399. We are aware that all laws in existence as at 27th August 2010 must be construed with alterations, adaptations, qualifications and exceptions necessary so as to conform with the Constitution. Nonetheless, as observed above, the issue before us was alive during the constitution making process, and, therefore, if Kenyans desired to recognize and protect the right to same sex relationships, nothing prevented them from expressly doing so without offending the spirit of Article 45.

400. In as much as the Court of Appeal in the EG case agreed with the High Court that sexual orientation could be read in in Article 27(4) of the Constitution as one of the prohibited grounds for discrimination, the Court was emphatic that the reading in would depend on the circumstances of each case. In our view, the circumstances of this case do not permit the reading in because to do so would defeat the purpose and spirit of Article 45(2) of the Constitution.

401. Given the clear wording of Article 45(2), we find it unnecessary to address the question whether the impugned provisions can pass the Article 24 analysis test.

402. We were invited not to be guided by public opinion or majoritarian views in determining this Petition. In our humble view, the desire of Kenyans, whether majoritarian or otherwise are reflected in the Constitution. We are unable to agree with the Petitioners that the views of Kenyans should be ignored given the clear and unambiguous provisions in Article 45 (2).

403. As was held in the persuasive Zimbabwean case of *Banana v. State*,[223] while courts may not be dictated to by public opinion, they would still be loath to fly in the face of such opinion. In our view, where the will of the people is expressed in the Constitution, it represents societal values, which must always be a factor in considering constitutional validity of a particular enactment where such legislation seeks to regulate conduct, private or public. In our case, those views were clearly expressed in Article 45(2).

404. We are required at all times to uphold the paramountcy of the Constitution. We find it appropriate to cite ***Tinyefuza v Attorney General***[224] where it was held that in so far as interpretation of the Constitution is concerned, the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, completeness and exhaustiveness and the rule of paramountcy of the written Constitution.

405. Looking at the impugned provisions *vis a vis* Article 45(2), we are satisfied that the provisions do not offend the right to privacy and dignity espoused in Articles 28 and 31 of the Constitution. Our view is informed by the fact that we cannot read Articles 28 and 31 in isolation from Article 45(2). Differently stated, unless Article 45(2) is amended to recognize same sex unions, we find it difficult to agree with the Petitioners' argument, that, we can safely nullify the impugned provisions, whose effect would be to open the door for same sex unions and without further violating Article 159 (2)(e) which enjoins this court to protect and promote the purpose and principles of the Constitution.

406. In conclusion, therefore, having considered the arguments on both sides, the precedents cited, the Constitution and the law, we are not satisfied that the Petitioners' attack on the constitutional validity of sections 162 and 165 of the Penal Code is sustainable. We find that the impugned sections are not unconstitutional. Accordingly, the consolidated Petitions have no merit. We hereby decline the reliefs sought and dismiss the consolidated Petitions.

407. With regard to costs and considering the nature of the Petitions, we are of the view that the appropriate order to make is that each party shall bear their own costs.

408. We thank counsel for the parties for their invaluable assistance to the court in this matter.

Dated, Signed and Delivered at Nairobi this 24th Day of May, 2019.

Roselyne Aburili

Judge

E C Mwita

Judge

John M. Mativo

Judge