

LITIGATING THE STRUGGLE FOR LGBTQ+ RIGHTS IN KENYA: REFLECTIONS ON RECENT JURISPRUDENCE FROM KENYAN COURTS

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Introduction

Kenya's constitutional framework has come under increasing scrutiny as debates over the rights of sexual minorities intensify. Two related controversies—the Eric Gitari cases and a parallel decriminalisation litigation—highlight these tensions. In the Gitari matter, the Non-Governmental Organizations Coordination Board rejected the registration of an organisation designed to protect LGBTQ+ rights. This decision was based on penal provisions that criminalise same-sex behaviour, reflecting laws that many now see as outdated. Meanwhile, the decriminalisation case questions whether laws that criminalise consensual same-sex conduct violate the rights to privacy, dignity, and equality.

The controversy surrounding the Gitari case began in 2013 when Eric Gitari, a prominent human rights lawyer, sought to register the National Gay and Lesbian Human Rights Commission (NGLHRC). The refusal by the NGO Coordination Board ignited legal battles that would extend across a decade, culminating in a landmark Supreme Court decision in 2023.

This piece critically examines both judicial paths. It assesses the Supreme Court's reasoning in the Gitari cases and the Court of Appeal's reasoning, similar to the High Court decision in the matter. It contrasts this with the High Court's cautious approach in the decriminalisation suit. The analysis challenges underlying assumptions, exposes inconsistencies, and compares decisions in India and

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Botswana. In doing so, it calls for a bolder judicial response and a more thorough commitment to protecting the rights of sexual minorities.

I. The Eric Gitari Cases: Examining the Right to Associate

A. Context and Background

The controversy in the Gitari case began when Mr. Gitari, an experienced lawyer and human rights advocate, applied to register an organisation meant to defend the rights of gay, lesbian, and other non-heteronormative individuals. His proposed group aimed to address the violence, discrimination, and stigma faced by sexual minorities in Kenya. Yet the NGO Coordination Board rejected the application based on sections 162 and 165 of the Penal Code, which criminalise same-sex relations. The Board argued that using names associated with gay and lesbian identities would conflict with existing laws and prevailing moral views.

Historically, the criminalization of same-sex conduct in Kenya originates not from African traditions but from the imposition of the Indian Penal Code.[‡] Prior to the introduction of sections 162 and 165 in the 1930s, many African ethnic communities in Kenya did not ostracize individuals engaging in same-sex relationships. In some communities, diverse sexual expressions were tolerated, reflecting a broader understanding of human sexuality. This colonial-era legislation imposed an alien moral code that criminalized practices which had previously been integrated into social life.[§]

[‡] John C Mubangizi, 'A Historical Overview of Legislative Measures to Criminalise Same-Sex Relations in Selected African Countries' (2024) 30 *Fundamina* 1 <<https://doi.org/10.47348/fund/v30/i1a1>> accessed 14 March 2025.

[§] Augustine Edobor Arimoro, 'Interrogating the Criminalisation of Same-Sex Sexual Activity: A Study of Commonwealth Africa' [2021] *Liverpool Law Review*.

The dispute focused on whether this administrative decision violated Mr. Gitari's constitutional right to form and join associations as Article 36 of the Constitution guaranteed. The case passed through the High Court and the Court of Appeal, with the Supreme Court eventually affirming that the right to associate applies equally to all, regardless of sexual orientation. The judgment raised essential questions about whether traditional moral views should override the constitutional guarantee of equality.

B. Analysis of the Supreme Court's Judicial Reasoning

The Supreme Court's decision in ***NGOs Co-ordination Board v EG & 4 others; Katiba Inst. (Amicus Curiae) [2023] KESC 17 (KLR)*** represents a significant milestone for LGBTQ+ rights in Kenya, marking a step forward in the struggle for equality. However, it is important to acknowledge that this progress is not without its limitations.^{**} The Court confirmed that the right to form associations is a fundamental right that cannot be denied based on sexual orientation. It rejected the notion that popular moral disapproval justifies denying registration to an association. That said, the judgment stops short of fully embracing a modern understanding of equality; it avoids explicitly stating that sexual orientation should be a protected characteristic under Article 27(4) of the Constitution.

This cautious language suggests that while the Court has moved forward on the issue of association, it is not ready to overhaul laws rooted in colonial-era thinking. The Board's reliance on sections 162 and 165 underscores how outdated legal rules continue to shape public policy. The Supreme Court examined these sections of the Penal Code. It concluded that, in line with Article 24 of the Constitution, they do not expressly seek to restrict the LGBTQ+ community's right to freedom of association. The Gitari decision, though symbolically important, fails to remove

^{**} *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR)*

the underlying legal barriers that keep sexual minorities at risk of state-sanctioned harassment and social exclusion.^{††}

In the Gitari decision, the Court directly challenged the appellant's claim that sexual orientation falls outside the prohibited grounds listed under Article 27(4) of the Constitution. The appellant argued that the term "including" in the provision did not extend to sexual orientation, thereby contesting the Court of Appeal's and High Court's interpretation. In its analysis, the Supreme Court emphasised that Article 27(4) is meant not to provide but to offer examples—ranging from race and sex to marital status and disability—against which the State must not discriminate. Drawing on international human rights obligations, the Court pointed to Article 2(1) and Article 26 of the ICCPR, which ensure equality and non-discrimination, and to regional instruments like the African Charter on Human and People's Rights that similarly guard against discrimination on multiple grounds. The Court also referenced comparative jurisprudence: in *Salgueiro da Silva Mouta v. Portugal*, the European Court of Human Rights recognised that sexual orientation is encompassed within the broader non-discrimination mandate of Article 14 of the European Convention, and in *Toonen v. Australia*, the Human Rights Committee explicitly noted that references to "sex" should be interpreted to include sexual orientation. Guided by these legal instruments and analyses, the Court concluded that the word "sex" in Article 27(4) should be understood not in its narrow sense as merely the physical act but as encompassing the broader spectrum of sexual orientation, whether one is heterosexual, lesbian, gay, intersex, or otherwise. This inclusive interpretation reinforces the principles of human dignity, equality, and inclusiveness in the Constitution. As a result, the appellant's refusal to reserve the name of the intended NGO on the basis that sections 162, 163, and 165 of the Penal Code criminalise gay and lesbian liaisons was deemed

^{††} See David Kuria Mbote and others, 'Kenyan Religious Leaders' Views on Same-Sex Sexuality and Gender Nonconformity: Religious Freedom versus Constitutional Rights' (2016) 55 The Journal of Sex Research 630 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5474220/>>.

discriminatory, violating the constitutional guarantee against discrimination. The decision thus reaffirms that any interpretation of non-discrimination that excludes sexual orientation is fundamentally at odds with the overarching constitutional commitment to equal protection and human rights.

One cannot overlook the immense pressure exerted on the judiciary by religious organizations during these proceedings. Mainstream Christian churches and evangelical groups, along with some segments of the Muslim community, mounted a coordinated campaign opposing LGBTQ+ recognition. This pressure intensified to the point that some factions openly declared a willingness to break from global church bodies such as the Vatican and the Anglican Communion if LGBTQ+ rights were acknowledged. The Court's caution in its final judgment can, in part, be attributed to this sustained religious outcry and the political dynamics it engendered. The Executive, mindful of its reliance on church support during electoral cycles, has often aligned itself with religious interests, further complicating the judiciary's independence in politically sensitive cases.

The decision, therefore, sends mixed signals. It acknowledges the need to respect the rights of all citizens to organise, yet it leaves unresolved the broader problem of legal discrimination against sexual minorities.^{##}

C. Societal Impact and the Call for Fundamental Change

The implications of the Gitari cases extend well beyond a single administrative decision. The decision's reluctance to challenge the underlying penal provisions leaves many sexual minorities vulnerable, reinforcing the societal discrimination they face.^{§§}

^{##} Jeffrey Walimbwa and others, 'Political Homophobia and the Effect on GBMSM Programmes in Kenya: The Significance of a Community-Led Rapid Agency Assessment' (2023) 18 Global Public Health.

^{§§} Milka Wahu Kuria and Shelmith Gatwiri Maranya, 'The Legal Impunity for Gender-Based Violence against Intersex, Transgender, and Gender Diverse Persons in Kenya: A Legal Recognition Issue for the African Human Rights System' (2022) 33 Stellenbosch Law Review 100.

By preserving outdated law that criminalizes same-sex behaviour, the judiciary sends a conflicting message. While it may protect the right to organise, it is unwilling to dismantle the legal structures that facilitate discrimination.^{***} This situation underscores the urgent need for a more radical judicial and legislative response to ensure that the law fully protects all citizens, regardless of their sexual orientation.

II. The High Court Judgment on Decriminalization: Judicial Caution Revisited

A. Challenging Outdated Penal Provisions

In a separate legal challenge in the case of *EG & 7 others v Attorney General*,^{†††} Petitioners sought to overturn sections 162 and 165 of the Penal Code. They argued that these laws, which criminalise consensual same-sex conduct, violate constitutional rights to privacy, dignity, and equality. The petitioners maintained that such provisions, remnants of a colonial past, have no place in a modern legal system that respects human rights.

All the same, the High Court's decision was notably conservative. The Court decided that the issue of decriminalisation should be left to Parliament. It acknowledged the controversy surrounding same-sex conduct but argued that change must come through legislative debate rather than judicial intervention. By doing so, the Court effectively upheld the penal provisions, leaving the legal status of consensual same-sex behaviour unchanged.

B. Consequences of Judicial Hesitation

The High Court's decision reflects a broader reluctance to challenge long-standing legal norms. Deferring to Parliament in matters of moral and cultural debate means that the courts are not fully responsible for protecting vulnerable groups.

^{***} Joyzy Pius Egunjobi and others, 'Kenyans Attitude towards Formation of LGBTQ Association' (2023) VII International journal of research and innovation in social science 1802.

^{†††} *EG & 7 others v Attorney General*; *DKM & 9 others (Interested Parties)*; *Katiba Institute & another (Amicus Curiae)* [2019] KEHC 11288 (KLR)

Critics contend that the judiciary permits discriminatory laws to remain in force by failing to act decisively.

This approach contrasts sharply with decisions in other countries. In India, the Supreme Court's decision in *Navtej Singh Johar & ors. Vs. Union of India* **thr. Secretary Ministry of Law and Justice** rejected the notion that public morality should override individual rights, effectively striking down laws criminalising same-sex conduct.⁺⁺⁺ Similarly, Botswana's courts have shown a willingness to reinterpret constitutional rights in a manner that protects sexual minorities.^{§§§} In Kenya, however, judicial caution has maintained the status quo, leaving many at risk.

The impact of maintaining these laws is significant. Not only do they criminalise private, consensual behavior, but they also contribute to a climate of stigma and discrimination. The failure to decriminalise same-sex conduct means that sexual minorities continue to face potential arrest, prosecution, and social exclusion, undermining efforts to create a more inclusive society.

III. Comparative Perspectives: Insights from India and Botswana

A. A Different Approach in India

India's decision in *Navtej Singh Johar v. Union of India* starkly contrasts Kenya's judicial caution. The Indian Supreme Court took a clear stand by overturning laws that criminalised consensual same-sex behaviour. The Court reasoned that the Constitution demands equal protection for all, irrespective of sexual orientation. By rejecting the primacy of popular moral sentiments, the Indian judges set a new standard for constitutional protection of minority rights.

⁺⁺⁺ 2018 INSC 790

^{§§§} Gosego Rockfall Lekgowe, 'A New Dawn for Gay Rights in Botswana: A Commentary on the Decision of the High Court and Court of Appeal in the Motshidiemang Cases' (2023) 67 Journal of African Law 477.

The decision represents one of the most transformative judicial interventions in the country's constitutional history.^{****} The Court struck down Section 377 of the Indian Penal Code as much as it criminalised consensual same-sex relations between adults, holding that such criminalisation was incompatible with fundamental rights under Articles 14 (equality before the law), 15 (non-discrimination), 19 (freedom of expression), and 21 (right to life and dignity) of the Indian Constitution. The judgment was firmly grounded in the principle of constitutional morality, a concept championed by Justice D.Y. Chandrachud, who asserted that individual rights cannot be subjected to majoritarian morality. The Court recognised that laws rooted in Victorian-era morality, such as Section 377, perpetuated stigma and led to systemic discrimination against LGBTQ+ persons. Justice Indu Malhotra went further, acknowledging that history owed an apology to the LGBTQ+ community for the indignities and persecution they had suffered. The Court's analysis relied heavily on international human rights instruments, including the Yogyakarta Principles, and emphasised that sexual orientation is an innate aspect of identity that cannot be criminalised. By rejecting the archaic idea that non-procreative sexual activity is "against the order of nature," the judgment dismantled centuries-old prejudices and paved the way for broader legal and social acceptance of LGBTQ+ rights in India.⁺⁺⁺⁺

Kenyan courts have recognised the right to form associations but have not extended that protection to challenge discriminatory penal provisions. The Indian approach, rooted in a commitment to constitutional morality, provides a model for how courts can protect individual rights even in the face of widespread social opposition.

^{****} Pratik Dixit, 'Navtej Singh Johar v Union of India: Decriminalising India's Sodomy Law' [2019] *The International Journal of Human Rights* 1.

⁺⁺⁺⁺ See Ashitha Mary Christopher and Unni Krishnan Karikkat, 'From Colonial Violence to Decriminalisation and Recognition: An Interdisciplinary Appraisal of Perspectives on Indian LGBTQ+ Community's Encounter with Law' [2023] *Journal for Cultural Research* 1.

B. Lessons from Botswana

The Court of Appeal of Botswana also offers a valuable lesson. Judges in Botswana have relied on international human rights standards, including the ICCPR and the UDHR, to interpret constitutional rights more inclusively. This approach has led to significant progress in protecting the rights of sexual minorities and sets a precedent for other nations grappling with similar issues.^{###}

In the Botswana decision rendered on November 29, 2021, in the appeal of ***Attorney General Botswana v. Letsweletse Motshidiemang***, the court undertook a rigorous examination of the constitutional underpinnings that govern the rights of sexual minorities, scrutinising the extent to which traditional legal rules can be reconciled with contemporary demands for equality and dignity.^{§§§§} The judgment reveals a careful yet assertive approach by the judiciary when confronting provisions inherited from a colonial legal heritage, particularly those that continue to impose discriminatory effects on individuals based on their sexual orientation.^{*****} In its analysis, the court assessed the statutory framework in question. It underscored that any legal provision disproportionately burdens a marginalised group must be interpreted in light of the fundamental principles of fairness and justice in the constitution.⁺⁺⁺⁺ The judges emphasised that protecting individual rights, such as the right to privacy and non-discrimination, is not a matter of preference but a constitutional imperative that must guide the interpretation and application of laws in modern society. The decision challenges the prevailing moral and cultural assumptions by affirming that discriminatory

^{###} Bonolo Ramadi Dinokopila, 'The Decriminalisation of Homosexuality in Botswana' [2022] Journal of Homosexuality 1.

^{§§§§} See the positions of this court in earlier cases of *Kanane v The State*[2003]2 BLR 67 and *Rammoge and Others v The Attorney General*[2017]1 BLR 494. In *Rammoge* the Botswanan Court of Appeal acknowledges the general change of attitude towards gay rights in Botswana.

^{*****} See Paras 52 of the Decision.

⁺⁺⁺⁺ Tashwill Esterhuizen, 'Decriminalisation of Consensual Same-Sex Sexual Acts and the Botswana Constitution: *Letsweletse Motshidiemang v the Attorney-General (LEGABIBO as Amicus Curiae)*' (2019) 19 African Human Rights Law Journal.

statutes must yield to a higher standard of legal scrutiny, prioritising human dignity over entrenched social biases. In doing so, the court called on lawmakers to undertake comprehensive reforms that would eliminate archaic provisions and align national law with international human rights obligations, including those articulated in the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.**** The judgment also reflected a deep awareness of the transformative role of judicial review in protecting vulnerable communities, stressing that legal change must occur through a critical reexamination of established doctrines rather than through incremental adjustments that leave fundamental injustices intact. The court's reasoning in this case sets a significant precedent by rejecting arguments that seek to justify discriminatory laws solely based on traditional moral values or majority opinion. Instead, it insists that a constitutional system must protect all citizens equally, irrespective of their sexual orientation, and that the judiciary has an active role in ensuring that the law does not serve as a tool for social exclusion. This decision, therefore, serves not only as a robust affirmation of individual rights but also as a clarion call for a more responsive legal framework that respects the inherent dignity of every person. By aligning its judgment with international human rights norms, the Botswana court demonstrated a commitment to justice and equality essential in a democratic society, effectively rejecting the notion that outdated legal provisions can be tolerated in a modern constitutional order. This decision contributes significantly to the evolving jurisprudence on LGBTQ+ rights in the region and provides a model for other jurisdictions grappling with similar challenges. Its insistence on critical and comprehensive legal reform stands as a testament to the potential of judicial leadership in advancing human rights and ensuring that no group is left vulnerable under the weight of obsolete laws.

****See also Zanele Nyoni, 'Decriminalising Homosexuality: Reshaping the Landscape in Botswana and a Missed Opportunity in Kenya' [2020] Harvard Human Rights Journal.

The Botswana example demonstrates that legal reform requires not the abandonment of cultural values but a reexamination of them in light of contemporary human rights standards. Kenyan judges, by contrast, have shown reluctance to let international norms guide domestic interpretations, resulting in a legal system that remains overly influenced by outdated perspectives.

C. The Weight of International Human Rights Norms

Both the Indian and Botswana experiences underscore the importance of international human rights instruments. Documents such as the ICCPR, UDHR, and the Yogyakarta Principles offer clear benchmarks for protecting individual rights. These instruments demand that any restrictions on rights be necessary, proportionate, and non-discriminatory.^{§§§§§}

Although international norms are sometimes mentioned in Kenya in judicial decisions, they have not been forced to override longstanding discriminatory laws. This failure to fully integrate international human rights standards into domestic jurisprudence is a critical shortfall that continues to hinder progress.

IV. Critical Reflections and the Way Forward

A. The Limits of Partial Victories

While the Gitari cases mark a step in the right direction, they remain insufficient if considered in isolation. Recognising the right to form associations is important, but it does little to protect LGBTQ+ persons if other laws continue to sanction discrimination. The Supreme Court's decision, though significant, stops short of providing full justice by leaving untouched the criminal provisions that continue to harm sexual minorities.

^{§§§§§} Ashutosh Gupta, 'Whether Section 377 of IPC Violates the Fundamental Rights' (2018) Volume-2 International Journal of Trend in Scientific Research and Development 962.

This fragmented approach undermines the overall goal of achieving equality. Incremental victories may provide symbolic relief but do not substitute for the comprehensive legal reform required to eradicate discrimination. The continued existence of punitive penal provisions keeps many sexual minorities in a state of legal insecurity and social isolation.

B. The Need for a More Assertive Judicial Role

Kenyan judges must be prepared to question whether existing laws are just. When courts defer to legislative processes or popular morality, they risk reinforcing outdated legal structures. The judiciary's role should include a critical assessment of laws that discriminate against minority groups. By adopting a more assertive stance, the courts can help initiate the broader reforms needed to create a legal system that protects all citizens.

The reluctance observed in the decriminalisation case illustrates the dangers of judicial passivity. The failure to use constitutional power to challenge discriminatory laws not only denies justice to those affected but also sends a message that protecting minority rights is a matter for political debate rather than judicial obligation.

Eric Gitari's decriminalization case; EG & 7 others versus Attorney General [2019] KEHC 11288 KLR is pending hearing in the Court of Appeal. It is expected the Court of Appeal and/or the Supreme Court will seize the opportunity to apply the principles raised in this paper.

C. A Call for Legislative and Judicial Reform

Lasting change requires action from both the legislature and the judiciary. Parliament must repeal or amend laws that criminalise consensual same-sex conduct. Such legislative reform would remove the legal ambiguities that allow discrimination to persist. At the same time, judges should use their powers to offer

a more comprehensive interpretation of constitutional rights, calling on lawmakers to update outdated legal provisions.

A unified effort by the courts and Parliament, guided by international human rights standards, would mark a breakthrough. Explicitly including sexual orientation as a protected characteristic in domestic law would not only secure legal protection for LGBTQ+ individuals but also signal Kenya's commitment to upholding the universal values of dignity and equality.

D. Embracing International Standards as a Catalyst for Change

Kenya's commitment to international treaties such as the ICCPR and the UDHR should serve as a strong impetus for reform. By aligning domestic laws with global human rights norms, Kenya can better safeguard the rights of its citizens. The experiences of India and Botswana illustrate that judicial decisions informed by international standards lead to more inclusive and just legal systems.

Kenyan judges must make these international norms more prominent in their reasoning. A rigorous application of these standards would ensure that laws restricting individual rights are justified by outdated social mores and assessed against the demands of justice and equality.

V. Conclusion: A Path Toward True Equality

The controversies surrounding the Gitari cases and the decriminalisation litigation reveal a legal system between recognising individual rights and a reluctance to overhaul discriminatory laws. The partial progress made in affirming the right to form associations is overshadowed by the continued existence of penal provisions that criminalise consensual same-sex behavior.

Kenya needs a more forceful judicial and legislative response to achieve genuine equality. Courts must challenge laws perpetuating discrimination, and Parliament must take decisive steps to remove legal barriers rooted in colonial-era thinking. The lessons from India and Botswana demonstrate that a commitment to

constitutional morality and international human rights norms can drive meaningful reform.

Ultimately, the journey toward a fair and inclusive legal order is ongoing. The decisions in the Gitari cases and the decriminalisation litigation are important markers but represent only part of a larger struggle. True progress will require a sustained effort by all branches of government and civil society to reject outdated legal concepts and embrace a modern understanding of human rights.