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Joint Stakeholders Submission By:

RIGHT HERE RIGHT NOW

Right Here Right Now Kenya

Sexual and Reproductive Health and Rights Alliance Kenya

Network for Adolescent and Youth of Africa

Love Matters Kenya

With Technical Support from

CHOICE for Youth and Sexuality

Rutgers

For sexual and reproductive health and rights

IPPF International Planned Parenthood Federation

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Key words: Youth friendly sexual and reproductive health services; abortion; comprehensive sexuality education, sexual orientation and gender identity and expression.

Executive Summary

1. This stakeholder report is a collaborative effort by Right Here Right Now Kenya, Sexual and Reproductive Health and Rights Alliance Kenya, Network for Adolescent and Youth of Africa, Reproductive Health Network and Love Matters Kenya with technical support from Rutgers, CHOICE for Youth and Sexuality, Sexual Rights Initiative and International Planned Parenthood Federation - Africa Region Office.
2. The report covers the period from 2015 - 2019 and discusses progress as well as gaps in access to comprehensive sexual and reproductive health and rights in Kenya.
3. This submission focuses on four key issues:
   - i. Barriers to accessing comprehensive youth friendly Sexual and Reproductive Health services
   - ii. Restrictive Policy and Legal Environment on Comprehensive Abortion Care
   - iii. Inadequate access and provision of comprehensive sexuality education by young people
   - iv. Discrimination and violence based on Sexual Orientation, Gender Identity and Expression and Sex Characteristics (SOGIESC)
4. Kenya has previously been reviewed twice by the Universal Periodic Review and has on both occasions met its reporting obligations. Kenya has also submitted a voluntary midterm report on the implementation of the key recommendations emanating from the second cycle review.
5. During its last review, Kenya received a total of sixty-eight recommendations on the theme of sexual and reproductive health and rights and accepted fifty or 73.5% of these and noted eighteen or 26.4% of the recommendations.
6. The majority of noted recommendations related to decriminalising consensual same sex conduct and addressing violence and discrimination against individuals based on their

sexual orientation and gender identity and expression; ensuring access to sexual and reproductive services including abortion; and ratification of optional protocols on a number of international treaties.

7. Many of these themes have also been addressed through recommendations and concluding observations issued to Kenya by other international and regional treaty bodies and human rights mechanisms.

8. These themes remain of critical importance, and as this report will show the situation has in some instances even further deteriorated with negative consequences for rights holders.

ISSUE 1: Barriers to Accessing Comprehensive Youth Friendly Sexual and Reproductive Health Services

Laws and policies

9. The Constitution of Kenya, 2010 in Article 43 (1) guarantees Kenyans the right to the highest attainable standard of healthcare including reproductive health. In 2017, the president signed into law the Health Act (The Health Act No 21 of 2017) that provides for an overarching legal framework for health.

10. Further, The Health Policy 2014-2030 provides for inclusive and non-discriminatory services to health for all Kenyans. In addition, Kenya is a signatory to the Eastern and Southern Africa Ministerial Commitment on Comprehensive Sexuality Education (ESA)[1], where nations committed to step up efforts to ensure adolescents' and young people's access to good quality CSE and youth-friendly SRH services.

11. The Ministry of Health further developed the National Adolescent Sexual and Reproductive Health Policy 2015[2], National Adolescent and Youth Friendly Services

[1] https://www.youngpeopletoday.org/esa-commitment/
[2] https://www.popcouncil.org/uploads/pdfs/2015STEPUP_KenyaNationalAdolSRHPolicy.pdf

Guidelines 2016[3] and the National Adolescent Sexual and Reproductive Health Implementation Framework 2018-2022 that provides guidance in realizing the constitutional guarantee of the highest attainable standard of healthcare on sexual and reproductive health.

12. The National Guidelines for Adolescent and Youth Friendly Services in Kenya defines Adolescent and Youth Friendly services as services that appeal and are respectful to adolescents and youth, are provided in a non-judgmental and considerate manner, have service delivery points in an environment where adolescents and youth can obtain health services they need with the support of community members. Further, the Guideline lists key characteristics of youth friendly services as equitable, accessible, acceptable, appropriate and effective.

13. In line with devolution, and the County Governments Act, 2012, County Health Management Teams have the prerogative to develop auxiliary legislations and frameworks on health. A number of Counties have developed County Specific Health Implementation Frameworks.

14. Despite the progressive policy environment, there is no legislative framework on Sexual and Reproductive Health and Rights in Kenya. Attempts to develop a Reproductive Health Act in Kenya and the East Africa Community Sexual and Reproductive Health Bill have been met with resistance and have subsequently been thwarted.

Availability of services

15. According to the World Health Organization[4], many young people regard health services as not meeting their needs and distrust them. They avoid such services altogether or seek help from them only when they are desperate. For health services to address the needs

[3] https://www.k4health.org/toolkits/kenya-health/national-guidelines-provision-adolescent-youth-friendly-services-yfs-kenya

[4] http://www.who.int/maternal_child_adolescent/documents/fch_cah_02_14/en/

of young people, services should be in the right place, available at the right time, at the right price (affordable or free) and delivered in the right style to be acceptable by them.

16. However, the Kenya Service Availability and Readiness Assessment Measure[5], shows that only one out of ten public health facilities provide comprehensive youth friendly services. Further, there's inequitable distribution of these facilities across the counties with some counties having more than half of the existing facilities providing youth friendly services while other counties having zero percent access (SARAM). Young women and girls are limited in accessing healthcare information and services including contraceptives with frequent stock outs and few healthcare professionals trained on youth friendly services.

Other structural barriers

17. Numerous structural and systemic barriers, such as laws and policies requiring parental or partner consent, distance from facilities, costs of services and/or transportation, long wait times for services, inconvenient hours, lack of necessary commodities at health facilities have a significantly negative impact on access for young people.

Stigma and discrimination

18. Socio-cultural barriers, such as restrictive norms and stigma around adolescent and youth sexuality; inequitable or harmful gender norms; and discrimination and judgment of adolescents by communities, families, partners, and providers and individual barriers, such as young people's limited or incorrect knowledge of SRH, including myths and misconceptions around contraception; limited self-efficacy and individual agency; limited ability to navigate internalized social and gender norms; and limited information about what SRH services are available and where to seek services. There are also problems relating to actual and suspected breaches in confidentiality and privacy by health care providers which have a chilling effect on access. LGBTIQ+ and young people with disabilities face multiple and compounded discrimination and barriers in accessing services.

[5] http://apps.who.int/healthinfo/systems/datacatalog/index.php/catalog/42

Lack of consistent training and resourcing of services

19. While Kenya is a signatory to the Abuja Declaration, in which African nations committed to allocating a minimum budget of 15% to health, Kenya's budgetary allocation to health has not met this minimum; 7.5% in Financial Year 2014/2015, 7.7% in Financial Year 2015/2016 and 7.6% in Financial Year 2016/2017[6].

20. Despite a clear policy framework on youth friendly services that identifies the above barriers, implementation including dissemination to county levels, resourcing, training of service providers, monitoring and evaluation and coordination have remained inadequate.

Lack of data and evidence collection and disaggregation

21. Further, there exists limited updated data on the situation of youth friendly services in Kenya despite evidence for action being a key proposed action of the National Guidelines.

RECOMMENDATIONS FOR ACTION

ISSUE 1: Barriers to Accessing Comprehensive Youth Friendly Sexual and Reproductive Health Services

22. Increase proportion of public health facilities providing comprehensive youth friendly services from 10% to 30% by 2020 in line with The National Adolescent and Youth Friendly Services Guidelines

23. Enact a Reproductive Health Law to provide a human rights based legal framework for young people's sexual and reproductive health, paying particular attention to the young people facing multiple and intersecting forms of discrimination.

[6] http://www.healthpolicyplus.com/ns/pubs/6138-7235_KenyaNatlCountyBudgetAnalysisFebv.pdf

24. Increase budgetary allocation to health to at least 15% as per the Abuja Declaration and allocate 412 Million US Dollar to Adolescent Sexual Reproductive Health (ASRH) Sub Program in line with National Adolescent Sexual and Reproductive Health Policy Implementation Framework 2018-2022.

25. Invest in human resources for health by recruiting and providing compulsory training on human rights based service delivery in consultation with affected youth and conduct continuous monitoring and performance evaluation of health care professionals based on service and users feedback.

ISSUE 2: Restrictive Policy and Legal Environment on Comprehensive Abortion Care

Laws and policies

26. The Kenya Penal Code Cap 63 article 158, 159, 160 and 228 of the penal code criminalizes abortions and places jail terms of up to 14 years for women and service providers providing abortion services. These provisions are inconsistent with key international frameworks including the **General Comment 22 on the right to sexual and reproductive health**[7] under article 12 of the Covenant on Economic, Social and Cultural Rights, CESCR, which has stated that the "right to sexual and reproductive health is an integral part of the right to health enshrined in article 12."

27. In order to operationalise Article 26(4) of the 2010 Constitution[8] which provides for access to safe and legal abortion, as well as mitigate the magnitude of unsafe abortion in Kenya, the Ministry of Health together with key stakeholders developed the *Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya*. The

[7] CESCR, *General Comment 22: The Right to Sexual and Reproductive Health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*(May 2016), pars. 1-2.
[8] http://kenyalaw.org/kl/index.php?id=398

Guidelines were launched in 2012 and utilized for the provision of quality comprehensive abortion care.

28. The Post Abortion Care Guidelines were launched in 2019, as a guide for healthcare providers borne out of the need to equip Reproductive Health Service providers with the knowledge and skills to provide timely and quality PAC services to reduce morbidity and mortality associated with complications of unsafe abortions.

Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya

29. The Ministry of Health through a letter dated 3rd December 2013 withdrew the Standards and Guidelines and the subsequent memorandum dated 24th February 2014 prohibited training of health care providers on Comprehensive Abortion Care. This continued to allow for inconsistent service provision as different counties in Kenya interpreted it liberally while others interpreted it restrictively as a complete ban on the provision of safe and legal abortion. Further, this resulted in the rise of "quacks" (unregistered and/or unqualified persons posturing as medical staff) who provide illegal and unsafe abortion[9] (CSO Report to Africa Commission).

30. In 2015, civil society organizations moved to court in Petition 266 of 2015 challenging the withdrawal of the 2012 Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya and the National Training Curriculum for the Management of Unintended, Risky and Unplanned Pregnancies.

31. In a landmark ruling[10] on 12th June 2019, the High Court ruled that the decision to withdraw the 2012 Standards and Guidelines and Training was unjustified, discriminatory, was prejudicial to and violated the rights of women and adolescent girls of reproductive age.

[9] https://rhrn-ke.org/downloads/alternative-report-on-kenya-reproductive-health-and-the-maputo-protocol/
[10] https://www.judiciary.go.ke/press-summary-petition-266-of-2015/

32. The court also ruled that the directive by the Director of Medical Services created an environment in which survivors of sexual violence could not access safe quality services despite the constitutional provision on the grounds for access to safe and legal abortion. The court therefore quashed the memo withdrawing the Standard and Guidelines and declared it unlawful, illegal, arbitrary, unconstitutional, and thus null and void *ab initio*.

33. Kenya's restrictive abortion laws and the barriers in accessing legal and safe abortion have been the subject of numerous UN and regional concluding observations and recommendations:

    i. In its Concluding Observations to Kenya in 2013, the Committee against Torture recommended to Kenya to amend its legislation in order to grant women who have been subjected to rape or incest the right to abortion.

    ii. The Committee on the Rights of the Child called also called on Kenya to reinforce its efforts to prevent teenage pregnancies, unsafe abortions and address lack of access to age-appropriate and quality sexual and reproductive health education and health services. The committee also called on Kenya to decriminalize abortion in all circumstances and review its legislation with a view to ensuring that girls have access to safe abortion and post-abortion care services and that their views are always heard and respected in abortion decisions and to provide clear guidance to health practitioners and information to adolescents on safe abortion and post-abortion care as well as to take guidance from the OHCHR technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality.

    iii. In its concluding observations during its review of Kenya in 2017, the Convention on Elimination of All Forms Discrimination Against Women (CEDAW), expressed concern about maternal mortality and injuries due to unsafe abortion and called on Kenya to reinstate the Standards and Guidelines on access to safe and legal abortion.

iv. The African Commission on Human and Peoples' Rights (ACHPR) called on Kenya and other State Parties to repeal restrictive abortion laws, to amend their penal and criminal laws to remove criminal sanctions related to abortion adopt WHO Guidelines on Safe Abortion at policy level and ensure their implementation, including through providing training for doctors and nurses and ensuring adequate stocks of abortion supplies and commodities.

Banning of Marie Stopes Kenya

34. On 14th of November 2018, the Kenya Medical Practitioners and Dentists Board (KMPDB) banned Marie Stopes Kenya (MSK) from providing abortion services including post abortion care that is provided for by the Kenyan Constitution and the Health Act 2017. Whereas the Cabinet Secretary, Ministry of Health purported to have lifted the ban, the Director of Medical Services issued a memo staying the initial ban on provision of post abortion care services and instead directing them to refer patients.

Misleading and harmful anti-abortion advertisements in Nairobi

35. Thirteen billboards and posters with misleading and stigmatising information on abortion have also been erected in Nairobi City by Sozo Church of God. These billboards have slogans such as 'Abortion is murder', 'Shut down abortion clinics' and contain images of supposed aborted fetuses. These billboards have the direct result of fueling anti-abortion sentiment and endanger health providers and women seeking safe abortion services as provided for by the Kenyan Constitution 2010. While the billboards were finally removed by the Nairobi County Government, this was only after three months of mobilization and advocacy by women's rights civil society organisations.

High mortality and morbidity rates resulting from barriers to accessing safe and legal abortion

36. In 2013, a study carried out by the Ministry of Health and the African Population and Health Research Centre titled the *Incidence and Complications of Unsafe abortion in*

Kenya[11] was launched. This study revealed that about 465,000 abortions occurred in Kenya in 2012, translating to one of the highest national abortion rates in the world.

37. The study showed that 120,000 women received care in health facilities for complications from unsafe abortion, and that more than three-quarters of those treated had moderate or severe complications. Almost half of those who sought post-abortion care services were young people aged below twenty-five.

38. Case study on the violation of the right to safe abortion care[12]

"In December 2013, while most Kenyan school children were out for the holidays, one 14-year-old Kenyan girl found herself in a desperate situation. After being coerced by an older man into her first sexual relationship, she discovered she was pregnant and feared she would be blamed and rejected by her family if she were to reveal her condition.

Living away from home in order to attend a good school, Wanjiku turned to a friend, an older girl, for advice on how to end the pregnancy. The older girl knew someone nearby who could help. This is how Wanjiku found herself doing what hundreds of thousands of women in Kenya are forced to do each year: seeking abortion care from an unqualified provider.

Two days after seeking an abortion from a "doctor" in the backroom of a local pharmacy, she began vomiting and bleeding heavily. She was taken to a hospital where she was found to be experiencing kidney failure. After she was stabilized, she was detained by the hospital because her mother—a poor tea picker—could not pay the hospital bills. There, Wanjiku was forced to sleep on a mattress on the floor, where her health again deteriorated. Wanjiku unfortunately succumbed to these complications.

Wanjiku (JMM) was the petitioner in Petition 266 of 2015 challenging the withdrawal of the 2012 Standards and Guidelines for Reducing Morbidity and Mortality from Unsafe Abortion in Kenya.

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[11] African Population and Health Research Center, et al., *Incidence and Complications of Unsafe Abortion in Kenya: Key Findings of a National Study*. 2013, APHRC: Nairobi, Kenya.

[12] https://www.reproductiverights.org/feature/keep-wanjiku-safe

On 12th June 2019 the High Court in Nairobi ruled that JMM's rights were violated and awarded her compensation.

Recommendations

ISSUE 2: Restrictive Policy and Legal Environment on Comprehensive Abortion Care

39. Implement the judgment in Petition No 266 of 2015 *inter alia* to reinstate the 2012 Standards and Guidelines on Reducing Maternal Mortality and Morbidity related to unsafe abortions and the Training Curriculum for medical professionals in public hospital.
40. Repeal Cap. 63 article 158, 159,160 and 228 of the Penal Code that criminalise women seeking abortions and abortion providers.
41. Withdraw the reservation on Maputo protocol section 14 (2c) to ensure right to the highest standard of health care.
42. Increase budgetary allocation to at least KSH 7 Billion for maternal health including cost of family planning commodities, post abortion care and direct personnel cost to ensure right to highest standard of health care in line with National Family Planning Costed Plan[13] and Kenya 2020 Family Planning Commitments.
43. Adopt and implement comprehensive sexuality education to empower girls and young women with information and skills on sexual and reproductive health and rights to make informed choices and engage in public awareness and information campaigns that provide accurate rights based information about the legal status of abortion in Kenya.

ISSUE 3: Inadequate Access and Provision of Comprehensive Sexuality Education by Young People

[13] http://www.familyplanning2020.org/sites/default/files/2017-2020_Kenya_Family_Planning_CIP.pdf

Lack of evidence based, scientifically accurate, human rights based information on sexuality and reproduction.

44. In Kenya, young people have inadequate access to information on sexuality that hinders effective decision making. According to Google Zeitgeist, "What Is Sex? is among the questions most asked online by young people in Kenya.

45. According to the 2014 Kenya Demographic and Health Survey, about half of men and women start engaging in sex by age 17 and 18 respectively, yet about 43% of females do not have comprehensive information. However, there is limited acknowledgment by families and communities of early onset of sexual debut by adolescents. (MoH, 2016)

Unmet contraceptive needs, unplanned and early pregnancy

46. Teenage pregnancy is a major challenge nationally. According to facility data, the national prevalence of teenage pregnancy is 30% in Kenya (MoH, 2019). Statistics from UNFPA indicate that between June 2016 and July 2017, 378,397 adolescent girls in Kenya aged 10-19 got pregnant. Further, in 2018, over 14,000 teenage girls sat for their national exams while heavily pregnant or immediately after delivery, with Kilifi County being among the disproportionately affected Counties (UNFPA). Unmet contraceptive needs, criminalisation of abortion services, inadequate access to comprehensive sexuality education and information provision, gender based violence including coercive sex and rape all contribute to early and unplanned pregnancy.

Comprehensive sexuality education not integrated into school curriculum

47. According to UNESCO, age-appropriate comprehensive sexuality education provides information on cognitive, emotional, physical and social aspects of sexuality and is critical in enabling young people to make safe, healthy and informed sexual choices including delayed initiation of sexual intercourse, decreased number of sexual partners, increased use of condoms and decreased risk taking.

48. In 2013, the Kenya signed the Eastern and Southern Africa (ESA) Ministerial Commitment on Comprehensive Sexuality Education in which it committed to scale up comprehensive rights-based sexuality education. Despite the inclusion of comprehensive sexuality education (CSE) in the revised National Adolescent Sexual and Reproductive Health Policy (2015), there have been no or little efforts at all by Ministry of Education (MOE) to deliver its mandate as expected.

49. In its Concluding Observations to Kenya in 2017, the CEDAW Committee called on Kenya to include age-appropriate and comprehensive education on sexual and reproductive health and rights, and on responsible sexual behaviour, in school curricula, with a focus on the prevention of early pregnancy and the control of sexually transmitted infections, including HIV, to ensure access to modern contraceptives for all, including adolescents, and take measures to ensure that the foregoing information reaches girls who are not in school

50. Although, the Kenya School Health Policy, the National Adolescent Sexual and Reproductive Health Policy 2015 and the Education Sector Policy on HIV/AIDS provides for comprehensive sexuality education, the Ministry of Education is yet to integrate CSE in the school curriculum thereby denying young people access to sexuality education and information.

Recommendations for Actions

ISSUE 3: Inadequate Access and Provision of Comprehensive Sexuality Education by Young People

51. Develop National Guidelines on Comprehensive Sexuality Education in line with UNESCO Technical Guidelines

52. Put in place a joint framework for coordination and implementation of comprehensive sexuality education between Ministry of Education and Ministry of Health.

53. Include comprehensive sexuality education in the National school curriculum

54. Train teachers to deliver on Comprehensive Sexuality Education and integrate Comprehensive Sexuality Education in teachers' training curriculum.

Issue 4: Discrimination based on to Sexual Orientation, Gender Identity and Expression and Sex Characteristics.

55. During Kenya's second Universal Periodic Review (UPR) by the Human Rights Council in 2015, the Government of Kenya accepted a recommendation by Sweden to "Adopt a comprehensive anti-discrimination law affording protection to all individuals, irrespective of their sexual orientation or gender identity." However, Kenya is yet to enact this act and discrimination and violence based on actual or perceived sexual orientation and gender identity remains rife.

56. The recommendation was further reiterated by the Committee on Elimination of All Forms of Discrimination Against Women (CEDAW) which in its Concluding Observation to Kenya during its review in 2017 called on Kenya to protect all women, including lesbian, bisexual and transgender women and intersex persons, against discrimination by adopting comprehensive anti-discrimination legislation affording such protection. The committee further called on Kenya to include non-heteronormative sexual practices as a basis for protection against discrimination.

Laws and policies

57. The Kenya Health Policy 2014-2030 stresses the importance of inclusiveness, non-discrimination, social accountability, and gender equality in provision of health services. However, sexual and gender minorities still face barriers in enjoying their constitutional right to the highest attainable standard of healthcare. A report[14] by the East African Sexual Health and Rights Initiative (UHAI), indicates that 4 out of 10 LGBTI

[14] '*Why must I cry? Sadness and laughter of the LGBTI community in East Africa,*' (2013), UHAI: East African Sexual and Health Rights Initiative (Nairobi)

persons in East Africa responded that they were denied health services because of their gender identity and 46% responding that they were denied services due to their sexual orientation. Further, about 4 out of 10 respondents (37.44%) confirmed staying away from health services due to their sexual orientation. Per the World Health Organization (2015)[15], in settings where same-sex consensual sexual behavior is against the law, people may be deterred from seeking health services out of fear of being arrested and prosecuted.

58. The Constitution of Kenya in Article 27 (4) guarantees individuals the right not to be discriminated against, directly or indirectly, on any grounds. However, sexual and gender minorities still experience discrimination and violence from state and non-state actors and agencies.

59. In Kenya, consensual, adult, and private sexual conduct between persons of the same sex is a crime under Section 162 (a) and (c), Section 163, and Section 165 of the Kenya Penal Code. These sections of the penal code create a climate of fear among members of the lesbian, gay, bisexual, transgender, queer and intersex community. There is legitimate fear of arrest and possible convictions for engaging in consensual, adult, and private sexual conduct. Further, according to Country Context Analysis on the Human Rights and Health Situation of LGBTI People[16], both perceived and actual criminalisation of same-sex activity and religious and cultural prejudices largely contribute to the stigma and discrimination experienced by LGBTI people in Kenya.

60. Whereas the law only criminalizes same sex conduct and not LGBTI+ persons, sexual and gender minorities are often treated as similar and thus face discrimination and

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[15] https://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984_eng.pd;jsessionid=F03223A138373416D7B1BF71E32E1B95?sequence=1

[16] Kuria MW, 2017, Kenya: Country Context Analysis on the Human Rights and Health Situation of LGBTI People available online https://www.academia.edu/38915058/KENYA_Country_Context_Analysis_on_the_Human_Rights_and_Health_Situation_of_LGBTI_People

violence due to perceptions, attitudes and inadequate understanding of sexual orientation and gender identity.

Legal and jurisprudential developments and setbacks

61. In *Republic* v *COI & GMN*, two male persons were charged under Section 162 (a) and (c) and 165 in Kwale County, in 2015. In order to prove the alleged crime, the defendants were subjected to forced anal examinations among other tests. Forced anal examinations is a serious violation of non-derogable human rights, bodily integrity and is a form of torture or cruel, inhuman, and degrading treatment and punishment[17]. Disturbingly, the Kenyan High Court subsequently ruled that forced examinations were an appropriate and necessary method of gathering evidence to prove that a criminal offence in violation of Section 162 (a) and (c) had occurred. Whereas the Court of Appeal eventually ruled against forced anal examinations declaring it illegal and inadmissible, there is still fear and anxiety among the community.

62. In 2016, sexual and gender minorities and organizations[18] moved to court to challenge the constitutionality of sections 162(a) (c) and 165 of the Penal Code and sought 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 petitions also sought 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 two cases were consolidated and heard by the High Court in Nairobi.

63. In its ruling on 24th May 2019[19], the court ruled that the predominant values, will and views of Kenyans was material and unignorable and thus a critical factor in considering

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17 Petition 51 of 2015 - Kenya Law

18 EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)

19 http://kenyalaw.org/caselaw/cases/view/173946/

constitutional validity of a particular enactment where such legislation seeks to regulate conduct, private or public. The judges argued that even though sexual and gender minorities rights may be violated or threatened on grounds of sexual orientation, it was difficult to rationalize decriminalization merely based on this. The Court also held that contrary to the extensive evidence before it, it could not find any violation of the right to health in a “factual vacuum”, or on the basis of “unsupported hypotheses”.

64. The judges thus ruled that they were unsatisfied with the petitioners’ attack on the constitutional validity of sections 162 and 165 of the Penal Code and thus failed to declare the section unconstitutional and thereby dismissed the suit.

65. The decision of the court was a major travesty of justice considering the evidence of violations and discrimination reported. It was further devastating that by failing to decriminalize sections 162 and 165, the court effectively denied sexual and gender minorities a wide range of other rights including the right to health, life, safety and security of the person, bodily autonomy and integrity, dignity, privacy among others.

66. Kenya has also witnessed a regression of the policy and legal environment for LGBTIQ+ persons in the semi-autonomous units. In 2018, the Kisumu County Assembly debated the Kisumu County Homosexuality Bill that sought to further criminalize and deny key services including health care services to LGBTIQ+ persons living in Kisumu County. Human rights defenders and organizations were also targeted by the law[20]. The Bill was strongly opposed by human rights defenders and advocates and was subsequently withdrawn.

Legal registration of organisations working on sexual orientation and gender identity and expression

[20] https://www.standardmedia.co.ke/article/2001282393/mcas-in-push-to-curb-same-sex-relations

67. According to the Country Context Analysis on the Human Rights and Health Situation of LGBTI People[21], getting LGBTI organisations officially registered in Kenya is a difficult task majorly due to the perceived criminalisation of sexual and gender minorities and the religious and cultural prejudices amongst the state actors responsible for the process. Only 11 of the 47 counties of the country appear to have an already established LGBTI organisation with majority of these organisations being based cities and larger towns thus highly disfavouring LGBT individuals who live in rural areas[22].

68. This challenge is attributed to the perceived criminalisation of sexual and gender minorities and to religious and cultural prejudices amongst the state actors responsible for the process.

69. The Civil Appeal 145 of 2015 of Eric Gitari vs the NGO Board[23] is one illustration. The NGO Board had argued that the criminalization of same-sex conduct on the basis of sections 162, 163 and 165 of the Penal Code was justification for rejection of the registration of the National Gay and Lesbian Human Rights Commission an organization that aims at addressing violence and human rights abuses suffered by LGBTIQ people.

70. The ruling of the High Court that Kenyans have the freedom of association and can register organizations directed the registration of National Gay and Lesbian Human Rights Commission. The decision has been upheld by the Court of Appeal in 2019. The NGO Board and religious based organizations have vowed to seek redress in the Supreme Court of Kenya to overturn the ruling. Sections 162, 163 and 165 of the Penal Code have also created a culture of fear for human rights organizations and defenders who have been

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[21] Kuria MW, 2017, Kenya: Country Context Analysis on the Human Rights and Health Situation of LGBTI People available online https://www.academia.edu/38915058/KENYA_Country_Context_Analysis_on_the_Human_Rights_and_Health_Situation_of_LGBTI_People

[22] Kuria MW, 2017, Kenya: Country Context Analysis on the Human Rights and Health Situation of LGBTI People available online https://www.academia.edu/38915058/KENYA_Country_Context_Analysis_on_the_Human_Rights_and_Health_Situation_of_LGBTI_People

[23] https://www.google.com/url?client=internal-uds-cse&cx=006079857380284091498:m11jfb8ujag&q=http://kenyalaw.org/caselaw/cases/view/108412/&sa=U&ved=2ahUKEwij4L6avuHiAhVEyxoKHQmZDl0QFjAAegQIAhAC&usg=AOvVaw1rkL0KEu--rSbzGy2wtV6P

accused of recruiting and being a decoy for western influence. In 2018, 2 staff working for sexual and gender minorities organization based in Mombasa was arrested and accused of 'recruiting'[24].

71. Kenya's position on sexual orientation and gender identity and expression and its impact on LGBTI+ persons contravenes international and regional norms and has also been the subject of UN concluding observations and recommendations:
    i. The African Commission on Human and Rights, Resolution 275, provides for Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.
    ii. The Committee on Economic Social and Cultural Rights (CESCR[25]) also called on Kenya to decriminalize sexual relations between consenting adults of the same sex and to put an end to the social stigmatization of homosexuality and ensure that no one is discriminated in accessing health care and other social services owing to their sexual orientation or gender identity.
    iii. This was reaffirmed by the CEDAW Committee following the Kenya Review in 2017. The Committee in particular called on the state to protect all lesbian, bisexual and transgender women and intersex persons, against discrimination by adopting a comprehensive anti-discrimination legislation affording such protection.
    iv. In his report to the 73rd General Assembly, the Independent Expert on Sexual Orientation and Gender Identity recognized Discrimination as intersectional and noted that persons with an actual or perceived sexual orientation or gender identity diverging from a particular societal concept of sexual orientation and

[24] https://www.kenyans.co.ke/news/34968-police-arrest-ngo-officials-over-recruiting-youth-homosexuality-mombasa
[25] https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/KEN/CO/2-5&Lang=En

gender identity are at times targeted for violence and discrimination, and violations are pervasive in numerous settings.

Recommendations for Actions

ISSUE 4: Discrimination based on Sexual orientation and Gender Identity

72. Repeal Sections 162, 163 and 165 of the Penal Code and decriminalize consensual same sex conduct between adults
73. Adopt laws, policies and measures to prevent and violence and discrimination on the grounds of sexual orientation and gender identity and expression in line with Resolution 275 of the ACHPR, including through ensuring access to services for victims and survivors of SOGIE-based discrimination and violence, engaging in public awareness and education campaigns, rights based training of police and court officials and ending impunity for perpetrators of SOGIE-based violence and discrimination.