

Statement of Njeri Gateru, Before the U.S. House of Representatives Committee on Foreign Affairs Hearing Entitled “Advancing and Protecting LGBTQI+ Abroad” Presented on June 24, 2021

Chairman Meeks, Ranking Member McCaul, and Esteemed Members of the House Foreign Affairs Committee:

As we mark Pride Month this year, I thank you for holding this important hearing and for inviting me here today to discuss the state of LGBTQI+ rights in Kenya. My name is Njeri Gateru, a feminist human rights lawyer working for the National Gay and Lesbian Human Rights Commission (NGLHRC) in Nairobi, Kenya.

Founded in 2012 by young queer activists, NGLHRC is an independent human rights institution made up of a dedicated team of lawyers and justice defenders with a mission to promote and protect the equality and inclusion of LGBTQ+ persons and communities and advance their meaningful participation in society. We envision a Kenyan society with equal rights and opportunities for all across every city, town, rural area, and county. Using strategic litigation, we strive to avert and counter discrimination based on real or presumed sexual orientation and gender identity, and we engage in advocacy towards an enabling legal environment for LGBTQ+ persons in Kenya.

Over the last eight years, NGLHRC has won legal cases to allow NGOs to be registered with the words “gay” or “lesbian” in their name and challenged the use of forced anal examinations – often perpetrated to obtain evidence of a person’s sexuality – as not only unconstitutional practices, but also as a form of cruel, inhuman or degrading treatment. Since 2016, NGLHRC and other partners have led efforts to strike down laws that criminalize LGBTQI+ identities.

CRIMINALIZATION

Unfortunately, Kenya remains one of the 69 countries in the world that criminalizes homosexuality through two statutes of the Penal Code: Sections 162 and 165. Section 162 outlaws ‘Unnatural Offences,’¹ and the corresponding punishment is a prison sentence of up to 14 years. Section 165 criminalizes indecent practices between males, which can result in up to 5 years imprisonment. Derived under British rule, these now-proscribed sodomy laws continue in Kenya today with NGLHRC helping to lead efforts in the judiciary to challenge these laws. Though our #Repeal162 Petition² was dismissed in May 2019, a decision that upheld these criminal statutes, NGLHRC and our partners have appealed this decision and are continuing to fight for the rights of LGBTQI+ people.

Though consensual same-sex activity is rarely prosecuted, criminalization is widely used to justify a wide range of rights violations of Kenyans who are, or are perceived to be, sexual and gender minorities. The Kenya Human Rights Commission released a report in 2011 which indicates that the effects of criminalization are exacerbated by the absence of a legal framework that explicitly prohibits discrimination on the grounds of sexual orientation and expression.

Yet, Kenyan Courts have released judicial precedents on equality and inclusion with an overall positive effect on LGBTQ+ communities. The 2010 Kenyan Constitution contains a robust Bill of Rights, which makes provisions for varied rights, including: right to life, human dignity, equality and freedom from discrimination, the right to privacy, the freedom of expression and association.³ The 2010 Constitution also incorporated ratified international treaties into domestic law,⁴ thereby including international human rights norms in the contemplation of

¹ The Penal Code of Kenya, s162 (Cap 63 laws of Kenya, Rev. 2012)

² EG v Non- Governmental Organisations Coordination Board & 4 others [2015] eKLR

³ The Constitution of Kenya (2010), see articles 26, 28, 27, 31, 33, 36

⁴ Ibid, article 2(6)

applicable Kenyan law.⁵ The Kenyan Courts have used this new human rights frontier in making progressive judicial decisions on the equality rights of the LGBTQ+ community.

While the legal context appears somewhat optimistic, the majority of Kenya's society continues to espouse homophobic thinking and sentiment. In 2013, a world survey of attitudes towards homosexuality carried out in 39 countries showed that Kenya was one of the most intolerant countries with 90% of the participants responding no to the question of whether society should accept homosexuals.⁶ In another study conducted among high school students, 95% of participants believed that homosexuality is an abnormal orientation while 86% believed that sexual orientation could be changed by counselling.⁷ The study also found that 64% of students believed that prayer could stop homosexuality.⁸ Among university students, similar results were obtained, with roughly 92% of participants holding the belief that homosexuality was abnormal behavior and about 71% of participants believing that prayers could change sexual orientation.⁹ These findings point to a strong cultural influence that is not diminished by access to education.¹⁰

The findings of the study also revealed that there is a strong correlation between religion and attitudes toward homosexuality.¹¹ With over 90% of Kenyans being religious and majority being Christians,¹² it is to be expected that a rejection of homosexuality is the prevalent norm. Many LGBTIQ+ persons have been condemned by their churches and are unable to gain acceptance within their congregations once their sexual orientation or gender identity or expression is revealed.¹³

The political front has also been illustrative of homophobic sentiments in the country. In 1999, the then-President Moi described homosexuality as a 'scourge that went against African traditions and Christian teachings.'¹⁴ Nearly 20 years later, President Uhuru Kenyatta reiterated in a CNN interview that gay rights were of 'no importance' to Kenya.¹⁵ In 2014, members of a fringe political party proposed an anti-homosexuality bill in front of Parliament which increased the severity of punishment for homosexuality to life imprisonment or public stoning to death.¹⁶

⁵ Courtney E. Finerty, 'Being Gay in Kenya: The implications of Kenya's new Constitution for its Sodomy Laws' (2012) 45 Cornell International Law Journal 431, available at: <http://www.lawschool.cornell.edu/research/ILJ/upload/Finerty-final-version.pdf> accessed 5/8/2018

⁶ Pew Research Centre, 'The Global Divide on Homosexuality: Greater acceptance in more secular and affluent countries' (2013) available at: <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/> accessed 5/10/2018

⁷ Winnie Mucherah, 'Grappling with the issue of homosexuality: perceptions, attitudes and beliefs among high school students in Kenya' (2016)

⁹ Psychology Research and Behavior Management 253, available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5024775/> accessed 5/8/2018

⁸ Ibid.

⁹ Winnie Mucherah, Elizabeth Owino, 'Using the Socio-Cultural Theory to Explain the Perceptions of Homosexuality among Kenyan and US University students' (2016) 3(2) Journal of Black Sexuality and Relationships 1 available at: <https://muse.jhu.edu/article/659006> accessed 5/9/2018

¹⁰ Ibid.

¹¹ Barbara Finlay, Carol Walther, 'The Relation of Religious Affiliation, Service Attendance and Other Factors to Homophobic Attitudes among University Students' (2003) 44(4) Review of Religious Research 370, available at: https://www.researchgate.net/publication/271781043_The_Relation_of_Religious_Affiliation_Service_Attendance_and_Other_Factors_to_Homophobic_Attitudes_Among_University_Students accessed 2/8/2018

¹² See the Kenya National Bureau of Statistics' 2009 Census results on Religious Affiliation: <https://www.knbs.or.ke/religious-affiliation/>

¹³ The Kenya Human Rights Commission, 'The Outlawed Amongst Us: A study of the LGBTIQ's community's search for Equality and Non Discrimination in Kenya' (2011) available at: <https://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst-us/file.html> accessed 5/7/2018

¹⁴ Ibid.

¹⁵ CNN, 'President: Gay rights of 'no importance' in Kenya' (April 20th, 2018) available at: <https://edition.cnn.com/videos/world/2018/04/20/kenya-uhuru-kenyatta-gay-rights-intv-amanpour-intl.cnn> accessed 4/28/2018

¹⁶ Human Rights Campaign, 'Kenya: Draft Bill Proposes Stoning to Death of Gay People' (August 15th, 2014) available at: <https://www.hrc.org/blog/kenya-draft-bill-proposes-stoning-to-death-of-gay-people> accessed 5/10/2018

As a result of these sentiments, violence and discrimination against LGBTIQ+ people permeates Kenyan society. Nairobi, arguably the most progressive metropole in Eastern and Central Africa, is a hub for homophobic incidents and violations daily. For example, our organization receives an average of 40 cases of violations in Nairobi monthly.

The lived realities for sexual and gender minorities throughout Kenya continue to feature narratives such as corrective rape of lesbians, blackmail and extortion of LGBTIQ persons, primarily via social media and dating apps, violent attacks of especially vulnerable LGBTIQ persons including refugees, forced evictions by intolerant landlords and neighbors, arbitrary arrests, institutionalization in mental facilities for being homosexual, being expelled from secondary school as well as being fired from the workplace as a result of being discovered to be LGBTIQ.¹⁷ A 2019 study on violence, mental health and access to healthcare shows that LGBTIQ+ persons' lifetime prevalence of sexual violence is more than triple that among women in the general population. The reporting rate for violations remains devastatingly low largely owing to the fear created by the existing criminal laws.¹⁸

In Kenya, LGBTIQ+ peoples' access to health care was also undermined by the global gag rule. The dangerous policy forced trusted and welcoming LGBTIQ+ health providers to choose between receiving U.S. global health assistance and providing comprehensive care to those in our community. The global gag rule shuttered clinics who previously served LGBTIQ+ people and disrupted other services, including HIV treatment and prevention services, putting the lives of LGBTIQ+ people at risk.

IMPACT OF COVID ON THE COMMUNITY

The effects of the COVID19 pandemic have been felt deeply most vulnerable communities in Kenya, including our LGBTIQ+ community. The last 18 months have been marred with elevated levels of violence against the queer community, limited and dwindling resources, lack of access to safe and affirming spaces and severe economic indignity, especially within rural and working-class communities.

Around the world, we have seen lockdown measures and restrictions on movement put in place in an effort to minimize and manage COVID infections. In Kenya, this has meant an imposition of dusk to dawn curfews, limitations on movement and gatherings, periodic shut down of institutions and businesses, as well increased policing and surveillance in specific communities. These measures have had the following impact on the lives and livelihoods of LGBTIQ+ communities:

1. We have seen a marked increase in reports of harassment, arrest and detention by community members, owing to increased policing and movement restrictions. We saw specific targeting of LGBTIQ+ safe houses where members were arrested and detained by officers who demanded bribes, and when they were unable to offer this, the members were charged with violating government protocols on COVID related to gathering.

Attacks from families and neighbors were also on the rise as a significant number of community members experienced lockdowns with homophobic/transphobic family members. Members reported discrimination and stigma in isolation centers, especially since they were gender segregated. Cases of intimate partner violence also rose

¹⁷ Supra, note 88 at p 436.

¹⁸ Supra, note 88 at p 436.

dramatically. In this year alone, we have received at least triple the average number of requests for assistance by our constituents.

1. The lockdown guidelines have forced shut a number of safe spaces and LGBTIQ+ friendly organizations that offered affirming services including legal, health and HIV care. Furthermore, movement restrictions made it impossible for some of our rural community to travel and access affirming healthcare in larger cities that offered them some sort of anonymity. Many partners who provide antiretroviral treatments, condoms, lubricants and HIV testing services were unable to stay open and accessible to their clients. Requests for mental health services have also been on the increase, with many LGBTIQ+ organizations having to provide counselling and other psychosocial services virtually or via the telephone.
2. The social-economic situation for a large percentage of our community is quite precarious with a 2019 study finding that only 18% out of a sample size of 1000 held jobs in the formal economy¹⁹. A significant number of the LGBTIQ+ workforce held informal jobs which suffered greatly with the upheaval of the pandemic and its response. Partner organizations reported food, basic commodities and financial assistance as the largest requests from their memberships in this period. We continue to receive numerous reports of evictions, loss of livelihoods and a lack of humanitarian support available for constituents.
3. LGBTIQ+ advocacy work was greatly affected as a large portion of programming was dependent on social gatherings, such as training law enforcers and religious leaders. Some organizations lacked the equipment and expertise to allow them to work virtually, while others were required to close operations in line with the guidelines. We also experienced a sharp decrease of funding opportunities and other resources for LGBTIQ+ work, with some funders pulling out of the spaces while others significantly decreased allocations in this area.
4. The closure of public institutions such as the Judiciary and Office of the Ombudsman resulted in major delays in the litigation processes in which the community was engaging. Some of our matters in court have been postponed for almost a year without being assigned hearing or judgment dates. While the Kenyan judiciary has begun to adapt to the situation and has been conducting its work virtually, the backlog and a general unwillingness to fast-track cases on the basis of sexual orientation, gender identity or expression, or sex characteristic has led to petitioner fatigue, higher litigation cost and a general feeling of a denial of justice.

THE REFUGEE SITUATION

Kenya remains the only country in East Africa that continues to accept asylum claims on the basis of sexual orientation and/or gender identity; however, due to the staggering 519,989 refugees in Kenya, LGBTQIA+ refugees are often left invisible.²⁰ As at May 2021, there are an estimated 750 asylum seekers and refugees in the urban area and 350 persons in the Kakuma refugee camp. LGBTQIA+ refugees report daily violence and harassment from Kenyans, including those associated with the government, and other refugees in the camp and the urban area. LGBTQIA+ refugees are at significantly higher risk of violence from police with already intolerant attitudes towards queer people, and these risks are elevated due to their displacement and refugee status. Police and other government agents are known to target and take advantage

¹⁹ Müller, A., Daskilewicz, K. and the Southern and East African Research Collective on Health (2019). 'Are we doing alright? Realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in Kenya

²⁰ <https://www.unhcr.org/ke/wp-content/uploads/sites/2/2021/06/Kenya-Infographics-31-May-2021.pdf>

of the situation, creating a culture of impunity for abuses.

In line with Kenyan refugee policy, all new arrivals, upon registration with the government, are moved to Kakuma camp where LGBTQIA+ refugees are required to integrate within the larger refugee community but are often met with unfathomable homophobia and transphobia. LGBTQIA+ asylum seekers and refugees have endured destruction of property, theft, verbal and physical attacks²¹ with many of the incidents in full view of security personnel at the UNHCR reception center. In 2021 alone, there have been 3 reported cases of arson, with one of the arson attacks leading to death.²² Sadly, the case remains open.

Refugees in Kakuma have creatively identified ways to ensure their narrative is heard throughout the world through allies and the use of social media. In 2018, we saw the first successful Pride event²³ in Kakuma solely planned and executed by LGBTQIA+ refugees. Unfortunately, this event increased visibility of the group and resulted in widespread backlash. For the rest of 2018, there was a massive increase in human rights violations against this group, forcing the government of Kenya and UNHCR to evacuate all LGBTIQ+ refugees from the camp to Nairobi for their safety.

Outside of the camp, refugees are required to meet their basic needs without financial or material support from UNHCR and its partners. The resilience of queer refugees has been evidenced by their financial independence, despite the legal and social attitudes in Kenya, particularly in informal urban settlements where the majority reside. Queer refugees, however, continue to report of harassment and violence at government and privately-owned service providers, with some blatantly declining services to gender non-conforming persons. Persons of Concern then are forced to approach privately-owned, and often expensive, service providers or national LGBTQIA+ organizations for services.

Despite these challenges and over the years, LGBTQIA+ refugees have maintained an amicable relationship with law enforcement by ensuring that community leaders introduced themselves to the local administration and police stations within the areas they reside. Community-based organizations conducted community forums with new arrivals to ensure that all asylum seekers understood the legal landscape. In the event of arrest by police, community leaders were quick to respond, albeit many times being forced to pay bribes to secure their release. Unfortunately, at the height of government lockdown to curb the rise of COVID-19 cases, police raided one of the community safe houses and arrested over 6 queer refugees. Efforts to secure their release have been protracted and bonds terms have faced steep prices.

INTERVENTIONS/RECOMMENDATIONS

As we consider the role of the United States in promoting LGBTIQ+ rights around the world, we must recognize that the United States has a long history and relationship with Kenya, whether through diplomatic engagement or strong investment in foreign assistance programs, especially through the PEPFAR program. As we work in our communities to confront criminalization and change social norms to promote equality, the U.S. can promote LGBTIQ+ rights by:

1. **Ensuring that ambassadors are supportive of LGBTIQ+ rights, building more sustained engagement with LGBTIQ+ human rights defenders, and fighting for LGBTIQ+ rights at the international level:** Over the last four years, we experienced a vacuum of support for LGBTIQ+ rights at the embassy. U.S. embassies

²¹ <https://www.unhcr.org/ke/16647-statement-unhcr-reiterates-protection-commitment-for-lgbti-refugees.html>

²² <https://www.unhcr.org/ke/19949-unhcr-deeply-saddened-by-the-tragic-death-of-lgbtiq-refugee-calls-for-accountability.html>

²³ <https://www.nbcnews.com/feature/nbc-out/following-pride-event-kenya-s-gay-refugees-fear-their-lives-n885136>

must consistently stand in solidarity and engage with our community as we fight to promote equality within our countries. At the same time, the United States should actively support efforts to integrate language that is inclusive of LGBTIQ+ people at the international level.

2. **Investing in LGBTIQ+ rights programs:** Studies suggest that, globally, only \$0.04 out of every \$100 of foreign assistance goes to LGBTIQ+ rights, exacerbating resource constraints and this is only more dramatic amidst the COVID pandemic. The United States should increase its funding to programs that combat violence, stigma, and discrimination and more deeply engage LGBTIQ+ led organizations, especially those providing family planning and HIV treatment and prevention services which are often stigmatized.
3. **Permanently repealing the global gag rule:** Though President Biden rescinded this policy, the effects of the global gag rule are still felt within the LGBTIQ+ community. Permanent repeal is needed to prevent this harmful policy from being put in place once again.
4. **Upholding non-discrimination in U.S. foreign assistance and tracking organizations that are undermining sexual and reproductive health and rights abroad:** Non-discrimination in service delivery, including in health care, should be a priority for the U.S. government to reach those in our community. There must be a way to track denials of services, or other abusive treatment, as it perpetuates stigma and harms for LGBTIQ+ people. The United States should also actively track the export of anti-LGBTIQ+ rhetoric and funding to Kenya and other countries, which have undermined the advancement of rights and equality.
5. **Increasing resettlement of LGBTIQ+ refugees:** Harassment and violence during displacement put LGBTIQ+ refugees at high risk and efforts to quickly resettle LGBTIQ+ refugees, including priority process, should be encouraged.

Thank you for your time and I look forward to your questions.