

WRITTEN STATEMENT

Violence and torture against LGBTIQ+ persons in Kenya

There is an overall environment of hostility towards LGBTIQ+ individuals in Kenya, including through the criminalisation of adult consensual same-sex conduct in its Penal Code.(1) LGBTIQ+ persons in Kenya often suffer harassment and discrimination because of their sexual orientation, gender identity, gender expression and sex characteristics. Such discrimination affects LGBTIQ+ persons and prevents them from exercising fundamental rights, such as access to healthcare, employment, and education. It also fuels violence against them, including torture and other ill-treatment, and impacts their access to justice and reparation.

The criminalisation of adult consensual same-sex conduct or other behaviour linked to non-normative sexual orientation or gender identity tends both to legitimise State violence and also to encourage discriminatory and violent behaviour by non-State actors.(2) In the context of such criminalisation, LGBTIQ+ persons face increased risks of arbitrary arrests and detention, direct physical violence upon arrest and in custody, extortion by police officers, societal violence, and also indirect violence due to fear of reporting crimes or seeking support.

Forms of violence against LGBTIQ+ persons in Kenya often amount to torture and other ill-treatment, due to their severity and their discriminatory nature.(3) Acts of violence perpetrated by State and non-State actors against LGBTIQ+ persons in Kenya include murder, arbitrary detention, sexual assault, physical assault, forced anal examinations, conversion therapy practices, extortion, verbal abuse and threats, and other forms of ill-treatment.(4) LGBTIQ+ persons in places of detention also face increased vulnerability to violence, including abuse by security forces and other prisoners.(5) LGBTIQ+ refugees and asylum seekers fleeing to Kenya have also continued to face violence and harassment, both by other refugees and at the hands of police officers, as well as difficulty accessing crucial services as a result of discrimination.(6)

In the past year alone, there have been cases of violent murders, including those of Sheila Lumumba, a queer, non-binary person, who was murdered in their apartment in Kenya. Though not yet officially confirmed, autopsy reports showed signs of rape, broken limbs, and multiple stab wounds in the neck and chest area.(7) This, along with the murders of Joash Mosoti and Erica Chandra Kitula, have saddened and angered the LGBTIQ+ community, not least because there has been no accountability for the perpetrators to this date.

Kenya has enacted the Prevention of Torture Act 2017 (PTA), which incorporates the State's obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) into its domestic legal framework, and adequately criminalises torture for all purposes as included in UNCAT, including "*discrimination of any kind*".(8) This is particularly relevant to address violence against LGBTIQ+ Kenyans perpetrated based on discrimination on grounds of sexual orientation and gender identity. The Mombasa Court of Appeal has also declared forced anal examinations unconstitutional, though these continue to be practiced.(9)

Despite this, and even though violence against LGBTIQ+ people often amounts to torture, it is rarely investigated or prosecuted as such. In practice, violence against the LGBTIQ+ community is often ignored or considered a minor offence or otherwise as an offence not characterised as torture and other

ill-treatment. Where LGBTIQ+ individuals seek to report violence against them, they are subjected to further verbal or physical abuse, or even arrest.(10)

Today in Kenya, there is little or no accountability for torture against LGBTIQ+ persons, and there is an urgent need to address this.

Recommendations

REDRESS recommends that the Human Rights Council:

- a. Acknowledge the significant human rights situation affecting members of the LGBTIQ+ community in Kenya and the Kenyan government's failure to provide protection to the LGBTIQ+ community.
- b. Call on the government of Kenya to conduct a review of the current legal framework and repeal laws and specific provisions that directly or indirectly discriminate against LGBTIQ+ persons, and/or encourage or legitimise torture, other ill-treatment, and other forms of violence based on sexual orientation and gender identity.
- c. Call on the government of Kenya to introduce a specific anti-discrimination law to safeguard discrimination based on SOGIE.
- d. Call on the government of Kenya to develop and adopt a best practices protocol and/or guidelines into the effective investigation of allegations of LGBTIQ+ violence, based on international standards and following consultation with relevant stakeholders, including experts and civil society organizations.
- e. Assess the implementation of the forgoing recommendations by the Government of Kenya.

- (1) Though Sections 162 and 165 of the Penal Code were challenged in court, the High Court dismissed the case, ruling that the offences did not violate any constitutional right, and that striking them would open the door to same-sex unions, contrary to the spirit of the Constitution. See High Court of Kenya at Nairobi, *EG & 7 others v. Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2019], Petition No. 150 of 2016, 2019, paras. 271, 296-297, available at <http://kenyalaw.org/caselaw/cases/view/173946/>. The decision is now under appeal. Human Dignity Trust, 'Eric Gitari & Others v. Attorney General Kenya (2019)', 2019, available at https://www.humandignitytrust.org/hdt-resources/?type_filter=&tag_filter=&country_filter=Kenya&keyword_filter=.
- (2) See International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), 'State Sponsored Homophobia 2019', March 2019, available at https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf.
- (3) See UNCAT, Article 1.
- (4) See generally National Gay & Lesbian Human Rights Commission (NGLHRC), '2020/2021 Annual Legal Aid Report', 2021, available at https://static1.squarespace.com/static/581a19852994ca08211faca4/t/620aff8a94673a4ebb7c3ee7/1644887955628/2020_2021+ANNUAL+LEGAL+AID+REPORT.pdf; 'July 2019/July 2020 Legal Aid Report', 2020, available at https://static1.squarespace.com/static/581a19852994ca08211faca4/t/620aff3c0b17db5c830751be/1644887872195/2019+_2020+LEGAL+AID+REPORT.pdf and '2018/2019 Legal Aid Brief', 2019, available at https://static1.squarespace.com/static/581a19852994ca08211faca4/t/620aff0766e95f0d73bee753/1644887815958/2018_2019+LEGAL+AID+BRIEF.pdf; Human Rights Watch (HRW), 'The Issue is Violence – Attacks on LGBT People on Kenya's Coast', September 2015, available at <https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast>; Equal Rights Trust, 'Submission to the United Nations Human Rights Council for a universal periodic review (21st session) of Kenya', 2015, available at <https://www.refworld.org/docid/54c0f1444.html>; Kenya Human Rights Commission, 'The Outlawed Amongst Us', 2011, available at <https://www.khrc.or.ke/mobile-publications/equality-and-anti-discrimination/70-the-outlawed-amongst-us/file.html>.
- (5) For example, 20 LGBTIQ+ refugees were arrested and detained, supposedly for "*public nuisance, trespassing and even defecating in public*", and suffered physical abuse and sexual assault at the hands of both prison guards and other prisoners. Six of the detainees, who identified as trans women, were also kept in the men's prison: The Washington Post, 'These LGBT refugees came to Kenya seeking freedom. Now they say they've been imprisoned and abused.', 19 March 2019, available at <https://www.washingtonpost.com/world/2019/03/19/these-lgbt-refugees-came-kenya>

[seeking-freedom-now-theyve-been-imprisoned-abused/](#); See also Case No. SO E 093/2021, pending at Mombasa Law Courts.

- (6) Rainbow Railroad and Organization for Refuge, Asylum & Migration (**ORAM**), 'The Challenges Facing LGBTQI+ Refugees in Kakuma Refugee Camp, Kenya', October 2021, pp. 5-6, available at <https://www.rainbowrailroad.org/news/rainbow-railroad-and-oram-release-report-on-lgbtqi-refugees-in-kakuma-refugee-camp-kenya>; The Washington Post, '“We were so ready”: LGBT refugees in Kenya live in fear as global resettlement is put on hold', 26 May 2020, available at https://www.washingtonpost.com/world/africa/kenya-coronavirus-lgbt-refugees-resettlement/2020/05/26/3550cd0c-83ef-11ea-81a3-9690c9881111_story.html; Human Rights Centre, University of Minnesota, 'Submission for the List of Issues: Kenya, 128th Session of the UN Human Rights Committee', January 2020, available at https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/KEN/INT_CCPR_ICO_KEN_41037_E.pdf.
- (7) NGLHRC, Initiative for Equality and Non-Discrimination, Voices of Women in Western Kenya, Amnesty International Kenya, Change.org, 'Joint Statement on the Brutal Murder of Sheila Lumumba', 26 April 2022, available at <https://static1.squarespace.com/static/581a19852994ca08211faca4/t/6268165f2e5e68054723fd3b/1650988640650/Statement+on+Sheilla%27s+Murder-3.pdf>.
- (8) UNCAT, Article 1.
- (9) NGLHRC, 'July 2019/July 2020 Legal Aid Report', 2020, p. 24 (para. 15.2). See also NGLHRC, '2018/2019 Legal Aid Brief', p. 4.
- (10) HRW, 'The Issue is Violence – Attacks on LGBT People on Kenya’s Coast', September 2015; See also NGLHRC, '2020/2021 Annual Legal Aid Report', pp. 12 (para. 42.), 18 (paras 5.1, 5.2, 5.4 and 5.5); 'July 2019/July 2020 Legal Aid Report', pp. 21 (para.14.2), 22 (para. 14.3), 23 (para. 14.5) and '2018/2019 Legal Aid Brief', pp. 3, 10-11 (para. 6.2).