



**#REPEAL162**

# COMMUNITY PACK

**LITIGATION & ADVOCACY**

**TOWARDS SOGIE EQUALITY AND NON-DISCRIMINATION**

## INTRODUCTION

**Article 27.4 of the Kenyan constitution states “ The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”. However, the state and the citizens of Kenya have engaged in the systematic discrimination, stigma and violence against LGBTI persons in Kenya.**

It is not illegal to be homosexual in Kenya. However, the wording in the Penal Code of Kenya in section 162 (a) & (c) and 165 criminalize private consensual sexual conduct between two adults of the same sex.

162: Any person who—

- (a) has carnal knowledge of any person against the order of nature; or
- (c) permits a male person to have carnal knowledge of him or her against the order of nature,

165: Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five year.

## WHAT IS A PETITION?

A petition is a request to an authority. A petition can be made to a government agency, parliament, or the judiciary.

## PETITIONS 150 OF 2016 & 234 OF 2016

In 2016, the National Gay and Lesbian Human Rights Commission (NGLHRC), the Gay and Lesbian Coalition of Kenya (GALCK), and the Nyanza, Rift Valley and Western Kenya Network (NYARWEK) together with partners filed petitions 150 & 234 of 2016 respectively, at the high court.

## WHAT DOES SECTION 162 (A) AND (C) AND 165 SAY?

Sections 162 (a) and (c) say that any person who has 'carnal knowledge against the order of nature' or permits a person to have 'carnal knowledge against the order of nature' against them has committed a crime.

'Carnal knowledge against the order of nature' is any sexual activity between two or more persons that does not involve the penis penetrating the vagina. This includes anal sex, oral sex, frottage (sexually rubbing and touching a clothed body part as a way of achieving sexual pleasure), thigh sex, hand-jobs, anilingus (sexual stimulation of the anus by the tongue or mouth) and blowjobs.

If a person is found guilty for a crime under Section 162 (a) and (c) of the Penal Code, that person can be sentenced to a maximum of 14 years in prison.

Section 165 states that any person who commits an act of 'gross indecency with another male person' has committed a crime. 'Gross indecency' is any sexual activity between two men that does not involve penetration whether committed in public or in private. Gross indecency involves kissing, hugging, holding hands, cuddling, sleeping on the same bed, or touching and rubbing of any body part as a way of achieving sexual pleasure.

Section 165 only applies to sexual conduct between men. If someone is found guilty under this law, he can be sentenced to a maximum of 5 years in prison.

## WHAT HAPPENS IF THE CASE IS WON?

We look forward to a victory in the decriminalisation cases before the High Court as a major step for equality and non-discrimination for all in Kenya. Should the case be won, we will continue working to ensure full compliance with the court ruling and working with stakeholders to expand protections on grounds of sexual orientation, gender identity and expression (SOGIE).



## WHAT HAPPENS IF THE CASE IS LOST?

We strongly believe that the constitution promotes human rights and equality for all, regardless of a person's sexual orientation, gender identity or expression. we are actively involved in planning and preparing for all the outcomes of the case. If the case is lost, in collaboration with partners, we have security, advocacy, and communications systems in place to immediately address any cases of violence and discrimination against persons on grounds of sexual orientation and gender identity and/or expression.

We recognise that, even if the case is lost in the High Court, there are other ways of achieving equal rights for the LGBTIQ+ community in Kenya.

## THE PETITIONS IS NOT ABOUT

The petitions do NOT refer to rape or any form of non-consensual acts including sexual conduct with minors or sexual conduct in public.

The petitioners hold the view that those should be punished as provided for in The Sexual Offenses Act (2006).

The Petitions are NOT about legalizing gay marriage. Article 45 (2) of the Constitution recognizes marriage between a man and a woman.

The Petitions seeks to promote constitutionalism, equality and the rule of law and to ask for the protection of human rights for all as enshrined in the Constitution of Kenya.

This case speaks to the right to privacy where adults should be able to engage in consensual sexual conduct in private without external intrusion; the right to dignity providing for humane treatment and personhood; the right to the highest attainable standards of health accorded to every citizen; the right to equality and non-discrimination; and freedom and security of the person.

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