REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI

(CORAM: WAKL NAMBUYE, KOOME. MAKHANDIA &:: MUSINGA, TT.A)

CIVIL APPEAL NO. 145 OF 2015

BETWEEN

NON,GOVERNMENTAL ORGANISATIONS
CO,ORDINATION BOARD ..... APPELLANT

AND

ERIC GITARI ..... 1sr RESPONDENT
ATTORNEY GENERAL ..... 2ND RESPONDENT
AUDREY MBUGUA ITHIBU ..... 3RD RESPONDENT
DANIEL KANDIE. ..... 4rtt RESPONDENT
KENYA CHRISTIAN PROFESSIONAL FORUM ..... 5rtt RESPONDENT
KATIBA INSTITUTE. 6rtt.RESPONDENT

*(Being an appeal against the Judgment and Orders of the High Court of Kenya at Nairobi (l **Lenaola, M Ngugi** &:**G.V. Odunga,jj)** dated 2#4 April 2015*

in

Constitutional Petition No. 440 of 2013)

* *

JUDGMENT OF ASIKEMAKHANDIA. TA

Article 1 of the Universal Declaration of Human Rights (UDHR) is in the context of this case apt. It neatly sums up what lies at the core of this appeal. This Article recognizes that all human beings are born free and equal in dignity. Thus, strip someone of their dignity and you strip off their essence of being a human being.

Dignity since the beginning of the era of human rights has become the foundation of all other rights. It amounts to the recognition that the sole purpose for protecting , promoting and fulfilling human rights is the acknowledgement that all human beings must be accorded respect.

The concept of dignity for all men and women involves the development of opportunities which allow people to realize full human potential within positive social relationships. It is the quest for dignity, equality and equal recognition and protection before the law that made the isrrespondent in this appeal file the petition, subject of this appeal in the High Court.

The facts in this appeal are fairly straight forward and not in dispute. The pr respondent, **Eric Gitari,** is a lawyer by profession. He claims to have worked on equality for lesbian, gay, bisexual, transgender, intersex and queer ("LGBTIQ") persons in Kenya since 2010. He applied to the Non Government al Organisations Coordination Board *"the appe1lant"*, seeking to reserve the names; Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy; Gay and Lesbian Human Rights Organization, for purposes of registration of a non governmentalorganization (NGO).

The broad and core objectives of the proposed NGO was stipulated as the advancement of human rights. Specifically, it was claimed that the proposed NGO would seek to address the violence and human rights abuses suffered by the LGBTIQ community.

The appellant informed the pt respondent that the names he had sought to reserve for purposes of registration were unacceptable and was therefore advised to review them.

On 19th March 2013, the pt respondent then lodged the names - Gay and **Lesbian Human Rights Commission; Gay and Lesbian Human Rights Council** and **Gay and Lesbian Human Rights Collective** for reservation. Together with the names, the pt respondent through his advocate sent a letter to the Board dated 19th March 2013 seeking to know why his earlier application had been rejected.

By a letter dated 2srh March 2013, the appellant wrote to the 1st respondent's advocate advising that sections 162, 163 and 165 of the Penal Code criminalizes gay and lesbian liaisons, and that this was the basis for rejection of the proposed names for the NGO. The appellant relied on regulation 8(3)(b)(ii) of the NGO Regulations of 1992 as the basis for rejecting the request. T his regulation provides that the Director of the Board can reject an application if *"such name is in the opinion of the director repugnant to or inconsistent with any law or* is *otherwise undesi rable."*

In his last attempt he proffered the following names; **National** Gay **and Lesbian Human Rights Commission, National Coalition of Gay and Lesbians in Kenya** and **National Gay and Lesbian Human Rights Association.** This too received the same response that the names were unacceptable. It was then that the pt respondent sought a meeting with the

appellant. He met one Mr. Mugo, a member of the legal department of the appellant, who advised him that any application to register an NGO bearing the names gay and lesbian could not be registered by the appellant because the association would be furthering criminality and immoral affairs. The 1st respondent requested Mr. Mugo to put these reasons in writing but he declined. He however, requested the 1st respondent to drop the names 'gay' and 'lesbian' in the proposed NGO name but he declined to do so.

Following the refusal by the appellant to register the proposed NGO in the names the pt respondent intended, the pt respondent instructed his advocates on record to seek written reasons for the appellant's rejection of the application. The advocate further explained that the 1st respondent was not seeking to further criminalise conduct but was seeking to promote the equality of LGBTIQ persons in Kenya.

In a letter dated 2SCh March 2013, the appellant set out the basis for its rejection of the pr respondent's application; that section 162 of the Penal code criminalises gay or lesbian liaisons; that regulation 8(3)(b) (ii) obliges the Director of the appellant to notify an applicant that a name would not be approved on the grounds that it is already in use, is *"inconsistent with any law or* is *otherwise undesirable".* The appellant further stated that sexual orientation was not listed as a prohibited ground of discrimination in Article 27(4) of the Constitution, nor was same sex marriage permitted in the constitution. The

appellant urged the pt respondent to review the proposed name and provide the appellant with the objects of the proposed NGO.

In response to that letter, the pt respondent in a letter dated 17th June 2013, forwarded the objectives and articles of the proposed NGO to the appellant and also explained that the proposed NGO sought to defend rights already in the Bill of Rights. No further communication was received from the Board. As a result, the pt respondent filed a petition in the High Court challenging the decision of the appellant claiming that the failure of the appellant to comply with its constitutional duty violated the appellant's and other gay and lesbian persons in Kenya the freedom of association .

The petition was canvassed in the High Court before **Lenaola, J** (as he then was), **Ngugi and Odunga, JJ.** The learned judges found that the petition raised three issues: first, whether the pt respondent had exhausted internal remedies; second, whether persons who belong to LGBTIQ groups have a right to form associations in accordance with the law, and lastly, if the answer was in the affirmative; whether the decision of the appellant to decline the registration of the proposed NGO because of the choice of the name was in violation of the 1st respondent's rights to equality and freedom of association.

In their judgment delivered on 24 th April 2015, the learned judges found that the pt respondent did not have any other known remedy in law that he would have used to have his grievances addressed. On the second issue, the learned judges found that the acts of the appellant in rejecting the p respondent's names for the proposed NGO and by extension its refusal to

register the proposed NGO amounted to a limitation of the pt respondent's rights to freedom of association. On the last issue, the learned judges found that the appellant violated the pt respondent's right to non-discrimination by refusing to accept the names proposed on the basis that the proposed NGO sought to advocate for the rights of persons who are not socially accepted.

As a result of the aforesaid findings; the learned judges issued the following declarations and orders;

a) **We hereby declare that the words 'every person' in Article 36 of the Constitution includes all persons living within the Republic of Kenya despite their sexual orientation.**

b) We hereby declare that the respondents have contravened the provisions of Articles 36 of the Constitution in failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice.

c) We declare that the petitioner is entitled to exercise his constitutionally guaranteed freedom to associate by being able to form an association.

d) **We hereby issue an order of mandamus directing the Board to strictly comply with** its **constitutional duty under Article 27 and 36 of the Constitution and the relevant provisions** of the **Non,Governmental Organizations Co,ordination Act.**

These are the findings and the orders that precipitated this appeal. In the Memorandum of Appeal dated 10 June 2015, the appellant set forth the following grounds:

"I). THAT the learned judges erred in law and fact by identifying lesbian, gay, bisexual, transgender and queer as innate attributes of various persons without any or sufficient evidence in support, and by failing to recognize that these attributes were the consequences of behavioural traits which the society has right to regulate for the sake of the common good.

2). THAT the learned judges erred in law when they held that the refusal to register the isr respondent's proposed NGO was not a decision contemplated under section 19 of the NGO Act for which an appeal lies to the Minister.

3). THAT the learned judges erred in law in failing to recognize the limits of the right of association and the fact that the right is enjoyed by persons qua persons and not based on any attribute they may determine for themselves.

4). THAT the learned judges erred in law in finding that the right of association extended to the proposed NGO of the isr respondent.

5). THAT the learned judges erred in law by adopting and applying ratio from South Africa without recognizing the distinct and divergent constitutional background of the said country.

6). THAT the learned judges erred in law by disregarding the religious preference in the Constitution of Kenya, 2010, and the preambular influence that must be applied in interpreting and applying the various constitutional provisions in issue.

7). THAT the learned judges erred in law by failing to uphold the provision of the Penal Code that outlaw homosexual behavior, as well as any aiding, abetting, counselling, procuring and other related and inchoate crimes.

8). THAT the learned judges erred in law and in fact by effectively reading into the Constitution non discrimination clause on the ground of sexual orientation.

9). THAT the learned judges erred in law by misunderstanding and misapplying the limitation clause in Article 24 of the Constitution of Kenya, 2010.

10). THAT the learned judges erred in law and in fact by rejecting the legitimate role of the moral purpose or public policy test in determining whether to accept registration of proposed applications for associations of persons.

11). THAT the learned judges erred in law and fact by granting the declarations sought and the order of mandamus in the decree appealed against."

The appeal was canvassed through written submissions as well as oral highlights. On the first ground of appeal, **Mr. Kanjama,** learned counsel for the appellant submitted that the High Court erred by failing to recognize that the Bill of Rights in the Constitution applies to human beings by virtue of them being human and not because of certain attributes which they may have determined for themselves. The High Court in affirming the pt respondent's right to associate, identified LGBTIQ persons as having their sexual orientation based on inherent factors which go to their core as human beings, without basing the decision on any concrete evidence as no such evidence was availed by the pt respondent. It was counsel's submission that homosexuality was not caused by genes or prenatal conditions. He submitted that the High Court erred by recognizing the words 'every person' as accommodating people's behavior and sexual preferences as opposed to safeguarding the freedom from discrimination of persons based on their being human beings.

On the second ground of appeal, counsel submitted that the appellant has a statutory obligation to refuse registration of any proposed association if satisfied that its proposed activities are not in national interest. **ln** the appellant's view, the refusal to register the proposed NGO was on grounds that it would promote and perpetrate homosexual activities which are criminal and unlawful. He contended that having been aggrieved by the decision to register the NGO, the pt respondent ought to have appealed to the Minister (Cabinet Secretary) responsible for matters relating to NGO as provided for by section 19 of the NGO Act. It was counsel's submission that where a statute has established a dispute resolution procedure, then that procedure must be strictly followed in resolving the dispute. On this submission, counsel relied on the case of **Speaker of the National Assembly v James Nien2:a Karume (1992) eKLR.** It was Mr. Kanjama's submission therefore that the learned judges misdirected themselves in hearing and determining the pt respondent's petition whose grievance ought to have been determined by the Minister in the first instance.

On the third, fourth and ninth grounds of appeal, Mr. Kanjama argued that Sections 162, 163 and 165 of the Penal Code criminalizes acts of homosexuality. In his view therefore, the freedom of association cannot extend to formation of organizations or groups which will promote acts that have been criminalized by law. He further argued that Article 36 of the Constitution applied to persons *qua person.* He submitted that the provision does not apply to persons who belong to the LGBTIQ community, whose attributes are based on

sexual preferences and inclinations they have determined as opposed to inherent attribute of being a human being.

It was his further submission that the freedom of association does not extend to the pr respondent's proposed NGO. Article 24 of the Constitution limits certain rights. He submitted that the High Court erred by interpreting Article 24 of the constitution in a manner that accords the pc respondent a right to associate irrespective of the fact that the NGO would perpetuate the rights of the LGBTIQ persons against the express provisions of the Penal Code. He argued that the pr respondent does not have the right to associate with activities that are criminal and hence this right is limited by law. And that the mere recognition of the pr respondent's freedom to associate amounts to indirect legitimization of acts which are illegal in Kenya.

On the fifth and sixth grounds of appeal, counsel contended that the High Court erred in adopting and applying decided cases from South Africa in Kenya, whose constitutional background is distinct and divergent from Kenya. He pointed out that the Constitution at Article 45 recognizes the family unit as the natural and fundamental unit of the society thus enjoying recognition and protection from the state . That the Constitution recognizes marriage as between two people of the opposite sex. He added that homosexuality in Kenya is considered a taboo and is repugnant to the cultural values and morality. In converse, he submitted that South African Constitution outlaws discrimination based on sexual orientation that has as a result legalized same sex marriages. It was therefore his submission that the High Court erred in failing to recognize

the unique features of the Kenyan society and in particular the umque preambular reference to God in the Constitution . In counsel's view, while interpreting the Constitution, the court had an obligation to consider the religious, moral, cultural and social values.

On the last ground of appeal, Mr. Kanjama submitted that Article 27(4) of the constitution stipulates the grounds for discrimination and sexual orientation is not listed as one of them. He thus argued that the High Court overstepped its ambit in interpreting Article 27(4) to include sexual orientation as a ground on which the state shall not discriminate against.

In conclusion, Mr. Kanjama urged the Court to consider the role of public policy and morality in the governance of a society. In his view, laws do not operate in a vacuum and must be supported with social efforts. He warned against disallowing the appeal as that would amount to a 'slippery slope' where this appeal could be used to legalize same sex marriages and ideally promote homosexuality. He therefore urged us to allow the appeal and set aside the High Court's decision in its entirety.

The pt respondent opposed the appeal through **Mr. Waikwa,** learned counsel, who held brief for **Mrs. Ligunya,** learned counsel for the 1st respondent. Mr. Waikwa also appeared for the 6th respondent. He started off by clarifying that the appeal was not about legalizing same sex marriage or homosexual conduct rather it was based on the right of persons who are of the LGBTIQ sexual orientation to associate freely. He submitted that fundamental rights are enjoyed by every person. He claimed that the pt respondent's

proposed NGO was not aimed at encouraging or supporting the contravention of the criminal law rather it was aimed at advancing the interests of LGBTIQ persons through among other things research and documentation, impartial reporting, effective use of the media, strategic litigation and targeted advocacy.

Qn the ground that the High Court erred in identifying LGBTIQ as innate attributes without sufficient evidence on the same, Mr. Waikwa submitted that the High Court did not identify sexual orientation as an innate attribute and the court did not deal with that issue at all. He argued that the court found that LGBTIQ individuals were entitled to the rights in the Constitution by virtue of them being human beings and deserving of the rights in the Bill of Rights which belong to each individual.

In response to the argument that the Ist respondent failed to exhaust remedies availed under the NGO Coordination Act, counsel submitted that the petition concerns the enforcement and interpretation of the Constitution that could only be determined by the High Court as opposed to the Minister.

It was counsel's further submission that the right of association 1s enjoyed by all persons by virtue of them being human beings irrespective of any sexual orientation. Article 24 of the Constitution could not be used arbitrarily to restrict fundamental rights and freedoms. He submitted that there was no legal provision which amounted to a restriction on the right to freedom of association within the meaning of Article 24(1) of the Constitution. And in any event, any purported limitation of the right of association in the context of this

appeal would fail the test of reasonableness and justification as provided for in Article 24(1) and (2).

On the submission that the High Court erred by disregarding the religious preferences in the Constitution, Mr. Waikwa submitted that the Constitution does not contain any religious preferences. That Article 8 of the Constitution prohibits any state religion and Article 32 provides for the right to exercise freedom of conscience, religion, thought, belief and opinion. According to the pt respondent therefore the preamble to the Constitution only acknowledges the supremacy of the Almighty God of all creation but does not grant preference to any religious beliefs or morals. It was his position therefore that the NGO Board could not deny the right of the LGBTIQ to associate based on religious views.

He went on to submit that exercising his right to form an association does not in any way violate the provisions of the Penal Code. He argued that the objectives of the proposed NGO do not include the promotion of any prohibited acts whatsoever and are confined to lawful purposes such as research, advocacy, reporting and social welfare for the LGBTIQ. In addition, he submitted that the Penal Code does not criminalize sexual orientation but sexual conduct.

M.r. Waikwa further submitted that the grounds of discrimination enumerated in Article 27(4) of the Constitution were not exhaustive. That the High Court had a responsibility for determining which other grounds beyond those expressly provided for are prohibited by the constitution.

For these reasons, the pt respondent urged the Court to dismiss the appeal in its entirety and uphold the judgment of the High Court.

The 2nd respondent supported the appeal. His case was presented by **Mr. Obura,** learned State Counsel. He submitted that the right of association is not an absolute right and it could be limited by the application of Article 24 of the constitution. He opined that the proposed NGO was meant to advance criminal acts prohibited under the Penal Code and therefore the appellant acted in accordance with the law by refusing to register the proposed NGO.

According to counsel, if the court allowed the registration of the proposed NGO, it would amount to legal recognition of homosexuality in Kenya, as a result giving effect to the same sex marriages in violation of Article 45 of the constitution. The 2nd respondent argued that the proposed NGO aims at destroying the cultural values of Kenyans and should be prohibited based on public interest. That homosexuality destroys society and families and increases immorality. He submitted that the Penal Code criminalizes homosexual conduct and by the petition, the pt respondent had attempted to legalize same sex practices through the back door. He thus urged the Court to allow the appeal in its entirety.

The 3rd and 4th respondents were not represented at the hearing nor did they file written submissions.

The 5th respondent supported the appeal. **Mr. Kinyanjui** reiterated the appellant's position and added that the pt respondent had failed to utilize the mechanism and procedure provided for in section 19(3) of the NGO

Regulations. He urged the Court to find that the pt respondent had failed to exhaust the mechanisms laid down in the statute and as such the dispute was not ripe for adjudication. He urged us to allow the appeal.

The 6th respondent in opposing the appeal through Mr. Waikwa submitted that the High Court had jurisdiction to determine the violation of fundamental rights and freedoms and the mechanisms established under section 19 of the NGO Coordination Act do not oust the High Court's jurisdiction to determine the petition. On the right to associate, it was his submission that this right extends to any person by dint of the provisions of Article 20(1) of the Constitution.

On the appellant's submission that the High Court erred in failing to uphold the religious preferences in the preamble of the Constitution, he submitted that the Constitution does not recognize any particular religion. And that in interpreting the constitution, the court is to be guided by the national values stated in Article 10 of the constitution.

It was his further submission that the grounds listed in Article 27 of the Constitution are not exhaustive. Further, that the right to associate and the protection from discrimination is not limited by law and any purported limitation does not comply with the requirements of Article 24 of the constitution. He contended that morality and religion are irrelevant considerations in the limitations of the right to associate. For that submission he relied on the South African Case **National Coalition for** Gay **and Lesbian Equality and another v Minister of Justice and Others (1998)** ZACC 15. Also

on the Republic of Philippine case **AngLadlad LGBT Partyv Commission on Elections, G.R No. 190582,** where it was held that the denial of Angladlad registration on purely moral grounds amounted to more of a dislike and disapproval of homosexuals, rather than for any substantial public interest.

After the bench hearing this appeal retired to consider and craft the judgment in this appeal, an unusual and exceptional phenomenon occurred. The pr respondent through the Registrar of this Court took the unprecedented course of seeking to re open the hearing of the appeal on the basis of a decision of the **Indian Supreme Court in Navtej, Singh Johar and others v Union of India, Write petition (Criminal) No. 76 of 2016** where the court declared section 377 of the Indian Penal Code unconstitutional. Section 377 is a direct analogue of section 162 of the Kenyan Penal Code. Though unprecedented, we nonetheless acceded to the request as none of the parties opposed the request and in view of the public interest in the matter as well as weighty constitutional issues raised. Consequently, this bench reconvened on 2Yh October 2018 to hear the parties' submissions on the *Johar's case.*

This time round Mrs. Ligunya appeared and relied on her written submissions which were to the effect that, firstly, fundamental rights protected by the Constitution apply regardless of popular of majoritarian views. Second, LGBTIQ are persons recognized as human beings and are entitled to their fundamental rights and freedoms. That the Constitution is a living document that speaks to the evolving nature of the rights in the Constitution. Third, the court has an obligation to curb any attempt by the majority to usurp the rights

of the minority and to provide redress whenever there is a violation of fundamental rights and freedoms.

On *Johar's case,* she submitted that the Supreme Court of India determined that criminalization of consensual homosexual conduct pursuant to section 377 of the Indian Penal Code, same as section 162 of our Penal Code violated the Indian Constitution with regard to the rights protected under Article 14 (equality before the law), Article 15 (personal liberty, dignity, privacy and health). Counsel urged us to be guided by the constitutional interpretation adopted by the Indian Supreme Court inmatters, equality and non discrimination. To counsel, the case was relevant as it demonstrated the trends in the development of the law within the Commonwealth countries.

Counsel for the appellant also filed written submissions on the issue. He submitted that there were contextual differences between the constitution of Kenya and India . Such differences included the age of the Constitution and level of public participation in the drafting of the same, differences in theories of constitutional interpretation, that whereas the Kenyan Constitution is more susceptible to the original public meaning while the Indian Constitution is more on legal analysis . The Kenyan Constitution was based on a liberal individual philosophy with an African communication philosophy and Indian Constitution was influenced heavily by the western liberal philosophy propounded by **John Stuart Mill.** Lastly, he submitted that the Kenyan Constitution protects family, culture and religion which rights are not expressly provided for in the Indian Constitution.

Counsel further submitted that the *Johar's case* was guided by Jeremy utilitarianism and John Stuart Mill's libertarianism which are flawed philosophies. According to counsel, the problem with the philosophy that guided the decision in the *Johar's case* was that it ignored the fact that society is harmed by other acts that do not necessarily cause direct physical pain to a specific person. In counsel's view, homosexual behavior was as destructive as any other form of abuse.

It was counsel's further submission that international law is deeply unsettled and divided over the issue of legalizing homosexuality. In addition, he submitted that the court found that sexual orientation is innate to a human being and is an important attribute of one's personality and identity despite lack of evidence being produced in court to show sexual orientation is innate. It was his submissions that homosexuality is not innate and does not compel behavior. In conclusion, counsel urged this court to treat the *Johar's case* decision with caution.

Having considered the record of appeal, the memorandum of appeal, the oral and written submissions as well as the authorities that were cited, I must start by stating that in considering these rival and equally persuasive arguments, I bear in mind, like this Court did in Selle & Anor vs. Associated Motor Boat Co. Limited and Others [1968] EA 123 and pursuant to rule 29(1)(a) of the rules of this Court, that an appeal to this Court from a trial by the High Court is by way of a retrial except that I have not had the opportunity of

seeing, and hearing the witnesses. Just like in a retrial, the appellate court is required to reconsider the evidence on record, evaluate itself and draw its own independent conclusions.

let me first clarify what this appeal is all about. It was correctly in my view observed by the High Court that this case is not about marriage or morals. The facts of the case as pleaded by the 1st respondent demonstrate that the case concerns the enforcement of the rights of association, non discrimination and equality before the law with regard to persons who identify themselves as LGBTIQ.

Having said that, it is also clear to me that the case is not about legalization of the same sex relations and the constitutionality of sections 162 and 165 of the Penal Code. Mr. Kanjama accurately pointed out that there is a substantive case, being **PT 150 and 234 of 2016** pending in the High Court that seeks to challenge the constitutionality of the provisions of section 162 and 165 of the Penal Code. The High Court is therefore best placed to determine the issue. I will therefore not delve into the matter.

I think it is also important to state at this point that having read the *Johar's case,* it emerges that the crux of that case was on the decriminalization of same sex consensual sex matters within the armpit of section 162 and 165 of the Penal Code; hence best left for determination by the High Court in PT *150 and 234* OF *2016* as well. The *Johar's case* therefore has very little if any relevance in this appeal. I will only refer to it in the instances that it is relevant if at all.

The appeal raises the question of the right to freedom of association and non discrimination and equality before the law with regard to persons who belong to the LGBTIQ group. In my view, the grounds of appeal can be collapsed into two core issues for determination as follows:

(a) **Whether the pt respondent had an obligation to exhaust the remedies available under the NGO Coordination Act.**

(b) **Whether the appellant's decision not to allow the registration of the proposed NGO violates the pt respondent's right of association, freedom from discrimination and equality.**

On the first issue, two important facts are not in dispute. First, the NGO Coordination Act provides the procedure for a party dissatisfied with a decision of the appellant made under the Act to appeal to the Minister. Second that, this mechanism was not utilized by the pt respondent. The appellant submitted that the pt respondent had not exhausted the available remedy under the Act before approaching the High Court. It was therefore the appellant's submission that the petition in the High Court was not ripe for determination. On his part, the pt respondent contended that the NGO Coordination Act did not provide him with a procedure that would sufficiently address his grievances.

It is settled principle of law that where a statute provides mechanisms for the resolution of disputes, the procedures and processes set out in the said statute must be exhausted before a party is allowed to come knocking on the doors of the courts. See Speaker of the National Assembly v Karume (2008) 1 KLR 4 25 where this Court emphatically stated *inter alia;*

"in our view there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance presented by the constitution or an act of parliament that procedure should be strictly followed..."

See also Diana Kethi Kilonzo &: Anor v Ahmed Isack &: Anor [2014] eKLR and Africog v IEBC f2013l eKLR.

Section 19 of the NGO Coordination Act provides for a procedure to be used by a party dissatisfied with a decision of Board made under the Act to appeal to the minister. It provides:

"19 (1) Any organization which is *aggrieved by* decision *of the Board made under this part may, within sixty days from the date of the* decision *appeal to the Minister*

(2) On request from the Minister, the Council shall provide written comments on any matter over which an appeal has been submitted to the minister under this section.

(3) The Minister shall issue a decision *on the appeal within thirty days from the date of such an appeal.*

(4) Any organization aggrieved by the decision of the Minister may, within twenty eight days of receiving the written decision of the minister appeal to the High Court against that decision *and in the case of such appeal_*

(a) The High Court may give such direction and orders as it deems *fit*

(b) the decision or the High Court shall be final."

In this appeal, the appellant was not dealing with the registration of the proposed NGO but the question as to whether or not the proposed names that

the pr respondent sought to reserve for the registration of the proposed NGO were acceptable. To that extent, the applicable provision was Regulation 8 as opposed to Part III of the Act that deals with the process and requirements for registration of NGOs. I say so because, the isr respondent did not get an opportunity to make an application for registration of his proposed NGO to the board. All he did was to apply to reserve the name of his proposed NGO. Regulation 8 provides for the process for the approval of names for registration of NGOs . It provides as follows:

> *"The director shall, on receipt of an application and payment of the fee specified in regulation 33; cause a search to be made in the index of the registered organizations kept at the documentation center and shall notify the applicant either that*
>
> *(a) Such name is approved as desirable; or*
>
> *(b) Such name is not approved on the grounds that/*
>
> *(i) It is identical to or substantially similar to or is so formulated as to bring confusion with the name of a registered body or organization existing under any law;or*
>
> *(ii) Such name is in the opinion of the Director repugnant to or inconsistent with any law or is otherwise undesirable."*

The facts of this appeal demonstrate that the Board placed reliance on Regulation 8(3)(6)(ii) and advised the isr respondent that the names sought to be reserved for the registration of the proposed NGO were not acceptable in the opinion of the Director. There is nothing in the Regulations that provides

an aggrieved applicant a right to appeal a decision made in terms of regulation 8(3)(b)(ii) for refusal of a name by which an organization can be registered. Section 19 of the Act applies to substantive decisions concerning the actual registration or refusal for registration. Section 19 is invoked once the Board has made a decision in regard to the actual registration. After three attempts to register the proposed NGO - each with different variations in the names; and receiving the same response that the names were unacceptable; it is on record that the Board urged the pt respondent to review the proposed name and provide the Board with the objects of the proposed NGO. The facts demonstrate that a decision had not been made in respect to the registration of pt respondent proposed NGO. The mechanism provided for in section 19 was therefore not applicable in the circumstances of the case.

In any event, the pt respondent instituted the petition in the High Court alleging a violation of his right to associate, protection from discrimination and equality allegedly on the advice of the appellant. Article 165 of the Constitution provides that the High Court has the jurisdiction to interpret the Constitution and determine a claim for the enforcement of fundamental rights and freedoms. In the High Court, it was also not in dispute that the appellant's officers advised the pt respondent to seek the guidance of the court on whether the appellant could allow LGBTIQ associations to enjoy government recognition on an equal basis with other associations through registration. The Minister does not have the power to enforce the Constitution or interpret whether any conduct was in violation of the Constitution. I would add that the respondent,

in any event, was entitled to seek remedy that was efficacious and I do not think that pursuing an appeal to the Minister will have afforded the ℘ respondent such remedy. I therefore find that the petition was properly before the High Court.

On the second core issue; while it was not contested that 'person' as used in Article 260 of the Constitution includes a company or association or other body of persons whether incorporated or unincorporated, the appellant contends that the High Court erred by failing to recognize that the right of association is enjoyed by *persons qua persons* and not based on any attribute that persons may determine for themselves. It was the appellant's submission that sexual preference is not innate and thus is a preference made by an individual.

At this juncture, I must clarify that as I understand it, this appeal or even the petition at the High Court was not about sexual orientation and whether or not sexual orientation is innate or not. In the High Court, the appellant alleged that special rights do not accrue to persons who have made conscious decision to be gay or lesbian because homosexual lifestyle is an acquired behavior that has nothing to do with genetic makeup. The court treated this submission as a matter of opinion that had not been estab lished. Indeed, and correctly so, the High Court did not get into that arena of determining whether or not being LGBTIQ is an innate attribute. I do not propose to get in there as well.

I agree with the High Court's findings that the ℘r respondent is entitled to fundamental rights and freedoms provided for in the constitution by virtue of him being a human being irrespective of his sexual orientation. His rights

and freedoms can only be curtailed in accordance with the law. Indeed, world over, the sole purpose for protecting, promoting and fulfilling human rights is the acknowledgement that all human beings must be accorded respect irrespective of their membership to particular groups or other status. In the circumstances, I do not find any merit in the submission that a human being may be denied fundamental rights and freedoms because of how that person chooses to live his sexual life. It matters not which attributes persons have determined for themselves. The only test is whether those attributes violate any law.

I now turn to examine whether the decision of the appellant to refuse the names for the proposed NGO was a violation of the right of association, freedom from discrimination and equality before the law of the pr respondent. The appellant claimed that it had a problem with the names proposed for the NGO on the grounds that it would further an illegality. I understand the appellant's position to be that the names suggested were for a certain target group who allegedly engage in illegal activities contrary to section 162 and 165 of the Penal Code. The appellant rejected the objects of the proposed NGO on the same ground. The question therefore is whether the decision of the appellant violated the pr respondent freedom of association.

Article 36 of the constitution guarantees freedom of association in the following terms;

"36 *(i) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.*

(ii) A person shall not be compelled to join and association of any hind.

*(iii) Any legislation that requires registration of an association of any kind shall provide that_*

(a) Registration may not be withheld or withdrawn unreasonab ly."

Article 36 of the constitution extends to every person's right to form an association of any kind. This right can only be limited in terms of law to the extent that the limitation is reasonable and justifiable in an open and democratic society as provided for in Article 24(1) of the Constitution. Subject to the limitations, a person's rights under Article 36 extends to all hum an beings without discrimination, whatever their ethnicity, religion, sex, place of origin or any other status such as age, disability, health status, sexual orientation or gender identity. I agree with the High Court's finding that Article 36 extends to all individuals and juristic persons and that sexual orientation does not in any way bar an individual from exercising his right under Article 36 of the constitution. In **Civil Liberties Organisation v Nigeria, Communication No 101/9 3**, the African Commission found that the freedom of association is an individual right. The state has an obligation to refrain from interfering with the formation of association and there must be mechanisms that allow citizens to join without state interference in associations to enable them attain various ends.

By refusing to accept the names for the proposed NGO, the appe llant violated the pr respondent's freedom of association. It matters not the views of

the appellant that the name of the association was not desirable. In a society as diverse as Kenya, there is need for tolerance. I say so well aware of the preambular provisions in the Constitution that acknowledge the supremacy of the Almighty God of all creation. Further, the constitution recognizes the right of persons to profess religious beliefs and to articulate such beliefs including the belief that homosexuality is a taboo that violates the religious teachings . However, the Constitution does not permit the people who hold such beliefs to trod on those who do not or subscribe to a different way of life. They too have the right not to hold such religious beliefs. It cannot therefore be proper to limit the freedom of association on the basis of popular opinion based on certain religious beliefs that the Board believes amounts to moral and religious convictions of most Kenyans.I do not see how the Bible and Quran verses as well as the studies on homosexuality relied on by the appellant would help its case. Religious texts are neither a source of law in Kenya nor form the basis for denying fundamental rights and obligations.

For avoidance of doubt, and because of the submission made by the appellant that the High Court erred in rejecting the role of morals or public policy in determining whether to register the proposed NGO, I am clear in my mind that morality and religion are irrelevant considerations. The decision of the appellant to refuse to accept the proposed names of the NGO, in my view amounts more to a statement of dislike and disapproval of homosexuals rather than a tool to further any substantial public interest. It is true that a Constitution is to some extent founded on morals and convictions of a people,

but what is not true is that a constitution is not founded on division and exclusion.

In interpreting the provisions of the constitution, I am guided by the provisions of Article 10 of the Constitution that sets out the national values and principles. Such values include human dignity, equity, social justice, inclusiveness, equality, human rights, non discrimination and protection of the marginalized which are central in the interpretation of the bill of rights.

The pt respondent seeks to have an association registered that would protect the human rights of those who belong to the LGBTIQ. I did not hear the pt respondent claim that the proposed organization would promote homosexual sexual conduct in furtherance of criminal conduct as alleged by the appellant. I also did not hear the pt respondent allege that the proposed NGO would seek to legalize same sex marriage as the appellant is apprehensive about. It is not lost to me that the legalization of same sex marriage can only be possible through the enforcement of Article 45 of the Constitution. Again, for clarity purposes, the case before us does not concern in any way Article 45 of the Constitution. It must be understood that the pt respondent only sought to exercise his freedom to associate in an organization recognised by law.

In any democratic society, there will always be a marginalized group incapable of protecting their rights through the democratic process. Once we, as a society understand there are people, whose sexual orientation is different from the norm and human rights belong to all persons by virtue of them being human beings, it will be easier to respect their fundamental rights and

freedoms. I do not understand the Bill of Rights as meant to protect only the individuals that we like and leave unprotected those we find morally objectionable or reprehensible. In any case, Article 10 of the Constitution obliges us to protect the marginalized.

This finding must perforce also dispose in similar fashion, the question of discrimination and equality before the law.

I will now address the question on limitation of rights. The pt respondent sought to register an NGO that would inter alia conduct accurate fact finding, research and documentation, impartial reporting, effective use of the media, strategic litigation and targeted advocacy in partnership with local human rights groups on human rights issues relevant to LGBTIQ communities living in Kenya. I have found that the appellant has a right to seek to register such an organization. Thus far, the appellant has not been able to prove that the alleged objects of the proposed organization are not in accordance with the law. Accordingly, the I[st] respondent's right to form an association can only be limited within the parameters provided for in Article 24 of the constitution.

Article 24 of the Constitution provides for the limitation of rights and freedoms as follows;

> *"24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation* is *reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including--*
>
> *(a) the nature of the right or fundamental freedom;*
>
> *(b) the importance of the purpose of the limitation;*
>
> *(c) the nature and extent of the limitation;*

(a) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(b) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

The appellant claims that section 162 and 165 of the Penal Code limits the freedom of association. Section 162 of the Penal Code is to the effect that;

"162 Any person who:

(a) Has carnal knowledge of any person against the order of nature; or

(b) Has carnal knowledge of an animal; or

(c) Permits a male person to have carnal knowledge of him or her against the order of nature, is *guilty of a felony and* is *liable to imprisonment for fourteen years..."*

Section 165 of the Penal Code criminalises what is termed as the commission of acts of 'gross indecency' between males;

"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 years.

I am in agreement with the High Court that the provisions of section 162 and 165 the Penal Code do not criminalize the state of being homosexual but sexual acts that are against the order of nature. I also agree with the interpretation of the High Court that section 162 and 165 of the Penal Code does not prevent people to form an association based on their sexual orientation. It is clear therefore that the appellants have misapprehended the

law in determining that sections 162 and 165 of the Penal Code 'criminalises gays and lesbians' liaisons' and therefore should not allow such persons to register an association. I find that there is no connection between the acti vities prohibited by section 162 and 165 and the request by the pr respondent to register a LGBTIQ organization that would promote the rights of people who belong to that community. I therefore find that there is no law that limits the freedom of association. There is therefore no need to undertake an inquiry on the remaining criteria established under Article 24 of the Constitution.

Lastly, the appellant contends that the High Court erred in finding that sexual orientation amounts to a ground against discrimination in Article 27 of the Constitution. Article 27(4) 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."**

I agree with the High Court's finding that Article 27 (4) does not include 'sexual orientation' as a prohibited ground of disc rimination. I am also in agreement that the word 'including' in Article 27(4) is not exhaustive of the grounds listed there. Article 259(4)(b) defines the word 'including' as meaning 'includes, but is not limited to'. In the circumstances, I do not find any merit in the submission that the High Court was guided by the South African constitution that includes 'sexual orientation' as a prohibited ground. A purposive interpretation of the grounds listed in Article 27(4) is to the effect

that they are not exhaustive. The Court will therefore have to determine on a case to case basis other grounds that may form part of Article 27(4) whenever called upon to.

I have determined all the issues that the appeal raised. I have found that the pr respondent's right to form an association was violated by the refusal of the appellant to accept the names of the proposed NGO. The appellant has failed to establish any grounds to justify the limitation of the right to associate. The appeal lacks merit and is accordingly dismissed.

Each party shall bear its own costs.

Dated and delivered at Nairobi this 22nd day of March, 2019.

ASIKE MAKHANDIA

JUDGE OF APPEAL