

## **The Impact of Outdated Laws on Sexual Orientation and Gender Identity in Kenya Today**

In the complex landscape of Kenya's human rights struggles, the historical implications of colonisation echo through the present, particularly regarding the rights of lesbian, gay, bisexual, trans, and gender-diverse (LGBTQ+) individuals. Inherited from its colonial past, Kenya's legal system bears the burden of archaic laws criminalising same-sex sexual activity. Despite the Constitution of Kenya (2010) explicitly advocating for human rights and security for all citizens and the [British government](#) issuing a statement taking responsibility for the colonial laws, the government continues to blatant disregard for its constitution reflecting the marginalisation and dehumanisation of LGBTQ+ individuals in the country. Unyielding political, legal, religious, and social resistances perpetuate extreme hostility and violence against sexually and gender-diverse people. Even amidst these challenges, LGBTQ+ organisations tirelessly operate within a deeply conservative, patriarchal, and sexist environment.

The Penal Code has sections [162\(a and c\), 163, and 165](#) that criminalise sexual activities that are perceived to be against the order of nature and compound the oppression faced by the community. While these sections apply to all Kenyans, they are selectively used to criminalise same-sex relationships. The ambiguous language used in these sections also makes it difficult to define gross indecency since it criminalises even innocent actions like hugging or holding hands between people of the same sex and was part of the reason the judges [ruled against decriminalisation](#) on the Repeal Case (Petition 150 of 2016) citing that these sections of the Penal Code don't directly target LGBTQ+ Kenyans. These laws also affect the transgender and intersex communities. The misguided narrative that limits people's understanding of the difference between sexual orientation and gender identity leads many Kenyans to assume that transgender and intersex persons are homosexual or bisexual. Although few people have been charged under these laws, they are often used to justify violence and discrimination against LGBTQ+ individuals, creating a perception that they are criminals; a perception that subsets of the state and religious institutions to further perpetuate human rights violations and acts of violence.

Kenya has achieved significant milestones in establishing laws and policies that support Gender Equality and Social Inclusion. However, several factors including limited resources, weak links between ministries and between the national and county levels, negative pervasive norms, and attitudes about GESI, hinder the effective implementation of policies and laws. (USAID Final Gender Analysis Report, March 2020). An overview of Kenya's key legislation and policies on GESI include;

1. Children's Act 2001, revised 2022 - Safeguards the rights of children. For example, forbids early or forced marriage.
2. Persons With Disabilities Act 2003 (revised 2012) - Establishes the National Council for Persons with Disabilities, whose main duty is to promote equal opportunities for people with disabilities by making sure they have access to education and employment opportunities, as well as sporting, recreational, and cultural activities.
3. The Sexual Offences Act, 2006 - Outlaws acts of all forms of sexual violence.
4. The Employment Act 2007 Revised 2012 - Provides the rights of employees to primary conditions of employment. It addresses issues of discrimination and sexual harassment in the workplace.

5. Constitution of Kenya 2010 - Emphasises principles of equity, inclusion, equality non-discrimination, dignity, protection, and social justice for all, including marginalised groups. Provides for not more than 2/3 of either gender representation in all appointive and elective positions. It also provides for the special application of rights for groups like children, persons with disabilities, youth, minorities and marginalised groups, and older people.
6. Counter Trafficking in Persons Act, 2010 - Criminalises acts of trafficking
7. National Gender and Equality Commission Act, 2011 - Spells out the National Gender Equality Commission's function which is to promote, monitor and facilitate gender equality and freedom from discrimination in the country's laws at national and county.
8. Prohibition of Female Genital Mutilation (FGM) Act, 2011 - Prohibits FGM
9. National Land Commission Act, 2012 - Created the National Land Commission, which is empowered to investigate past and current land injustices.
10. County Government Act, 2012 - Places a strong emphasis on meeting citizens' basic needs while emphasising equity, efficiency, accessibility, non-discrimination, transparency, accountability, participation, and information sharing. Provides for the representation of minorities in the public sector by establishing a requirement that 30% of open positions be filled by people from communities other than the dominant ethnic group.
11. The Matrimonial Property Act (2013) - Safeguards women's property rights during and upon the dissolution of marriage. Emphasises a women's right to buy and register land individually, inherit land from their parents, and make decisions about the land that is bought and sold in their name.
12. The Public Benefits Organisation (PBO) Act, 2013 - The PBO Act 2013 creates a single legal framework for all voluntary grouping of individuals or organisations that are operated locally or nationally to support or promote public benefit.
13. Marriage Act, 2014 - Provides a minimum age of marriage of 18 for women and men.
14. The Prevention Against Domestic Violence Act (2015) - Outlaws all forms of domestic violence
15. The Political Parties (Amendment) Act, 2016 - Provides for one-third representation of women in political parties.
16. Climate Change Act, 2016 - Provides a regulatory framework to address climate change, enhances climate change resilience in the country and emphasises the state's duty in ensuring the principles of gender and intergenerational equity in access to climate change funds to engage in climate-smart economic activities.
17. National Drought Management Authority Act, 2016 - Requires the Authority to establish mechanisms, either independently or in collaboration with stakeholders, to end Kenya's drought emergencies. It also requires the Authority to exercise overall coordination over all issues related to drought risk management. This is most relevant to ASAL Communities.
18. Community Land Act, 2016 - Acknowledges community control over and ownership of land. Relevant for ethnic minorities like some Indigenous groups.
19. The Refugees Act, 2021 - Reaffirms the Government of Kenya's commitment to protecting the rights of refugees and asylum seekers in Kenya.

However, limited but important progress has been made on the rights of LGBTQ+ people in Kenya over the last 10 years. There have been notable developments at the regional level, through the [East African Community Sexual and Reproductive Health Bill](#) in 2021, which emphasises the importance of

comprehensive sexual education. These efforts reflect a growing recognition of the need to address the specific needs and rights of LGBTQ+ individuals. In Kenya, these wins have largely been through victories in the court where Kenyan activists have challenged criminalising provisions and treatment of LGBTQ+ people and organisations. These victories included a case that established that [the use of forced anal examination is illegal](#), a case that upheld the right of LGBTQ+ people to [form and register organisations](#) (the right of association and assembly), and a case that upheld the [rights of transgender individuals](#) to change names on legal documents. A constitutional challenge to the laws criminalising same-sex sexual activity was rejected in 2019 by the High Court and is currently being appealed. In July 2019, Kenya became the first country in Africa to incorporate an [intersex category](#) into the national census and became the first African country to grant universal rights and recognition to intersex people.

Despite these significant legal victories for the LGBTQ+ community, these achievements are consistently undermined by a relentless [propaganda machine](#) that spreads misinformation and disinformation. This misinformation has profound consequences, leading to offline violence and pervasive harm throughout both online and offline spaces. The community has become a prime target for such attacks, often fueled by politicians who employ [inflammatory rhetoric](#) to divert attention from pressing issues or to gain popularity. Consequently, LGBTQ+ individuals and organisations are unjustly scapegoated and blamed for unresolved matters. These [misguided statements](#) exacerbate vulnerability and expose the community to increased human rights violations in various domains, including workplaces, homes, schools, and recreational settings. Additionally, the opportunistic actions of [Christian Right opposition](#) groups like [Citizen Go](#) and the [Kenya Christian Professionals Forum](#) (KCPF), have posed significant challenges. These groups have leveraged their unrestricted access to platforms, engaging in extensive organising and mobilising efforts against our community. Meanwhile, we are left grappling with limited resources and opportunities to counter their harmful narratives effectively.

Moreover, it is disheartening to witness the persistence of colonial laws that provide an entry point for the opposition to exploit legal loopholes and to review and insert moral clauses into other legislation. A troubling trend can be observed in their efforts to insert moral clauses into various laws, such as Clause 19 of the Refugee Act 2021, Section 13 of the [Community Groups Registration Act 2022](#), and Section 8 of the recently assented [Children's Act of 2022](#). The regressive language being pushed by the opposition echoes the legacy of colonialism, endangering the progress made towards equality and reinforcing outdated and discriminatory norms. These actions highlight the urgent need for comprehensive legal reform to ensure the protection and fulfilment of the rights of all individuals, regardless of their sexual orientation or gender identity. The presence of the Draft [Family Protection and Promotion](#) Bill, [the Presidential Executive Decree No.1](#), and the discussions surrounding the potential [Anti-homosexuality Bill](#) further emphasize the critical importance of addressing these issues. It is imperative to challenge and dismantle discriminatory laws and practices, replacing them with inclusive legislation that upholds human rights, equality, and the well-being of all Kenyan citizens.

A recent survey found that 83% of Kenyans did not believe that society should accept homosexuality (Pew Research Centre, 2019). This hostility is underpinned by discriminatory laws, including the law that criminalises same-sex activities and other laws which are used by state actors to target LGBTQ+

people. The police regularly use the law criminalising same-sex activities and other laws to harass and arrest LGBTQ+ people including laws criminalising 'loitering', 'solicitation', and 'impersonation'; to extort money or sex from LGBTQ+ people, or to deny services to LGBTQ+ survivors of violence (Article 19, 2022; Human Rights Watch, 2019). Kenyan human rights and LGBTQ+ organisations report that the laws have been used to justify employment and housing discrimination, expel or suspend students from schools, censor artistic expression related to LGBTQ+ issues, and prevent LGBTQ+ organisations from registering (Human Rights Watch, 2019).

There is evidence that discrimination against LGBTQ+ people denies them their right to access quality healthcare, resulting in poorer health outcomes. A [study](#) by PEMA Kenya and Human Rights Watch noted that there were specific hotspots in Kenya where violence against LGBTQ+ people was rampant and this was the outskirts of major cities that is why many LGBTQ+ youth opted to move to bigger cities because they find a greater sense of belonging and community and togetherness. Further, several healthcare providers present a loophole around cultural competence in addressing the specific health needs of LGBTQ+ individuals. This creates barriers to healthcare services, including HIV/AIDS prevention, testing, treatment and management, exacerbating the vulnerability of the community to health risks.

Additionally, persistent discrimination and social stigma take a toll on the mental health and well-being of LGBTQ+ individuals in Kenya. The effects of the mentioned issues result in higher rates of depression, increased anxiety/panic attacks, and suicide ideation amongst others. The fear of rejection and the mounting societal pressure including profound homophobia contribute to these mental health challenges. In a study on [Mental Health Challenges and Needs among Sexual and Gender Minority People in Western Kenya](#), they found that 11.7% of participants reported clinically significant levels of psychological distress, 53.2% said clinically significant levels of post-traumatic stress disorder (PTSD) symptoms, and 26.1% reported clinically significant levels of depressive symptoms. These are the dire consequences that Kenyan LGBTQ+ people face due to verbal and emotional abuse, pervasive violence, covert and overt [conversion practices](#), pathologisation, marginalisation, discrimination in various facets of life, and exclusion from state-supported social and economic protection measures.

Further, these laws contribute to economic disparities and employment discrimination against LGBTQ+ individuals leading to lower employment opportunities, unequal pay and job insecurity. Many LGBTQ+ individuals may even be forced to conceal their sexual orientation or gender identity to avoid harassment or even termination (job insecurity). These persistent adversities have made it extremely difficult for the LGBTQ+ community to thrive in Kenya. These laws and customs are enforced through the criminal justice system, including police raids and arrests, trials, and imprisonment.

Human Rights advocates in Kenya have been working to challenge them through strategic litigation and advocacy efforts, as well as employing a multi-sectoral approach in building alliances and coalitions to foster a stronger collective voice in advocating for LGBTQ+ rights. These efforts aim to influence transformative change including the legal and cultural frameworks that perpetuate discrimination and violence against LGBTQ+ people and to promote a more inclusive and accepting society in Kenya.

It is crucial to highlight that the perception of LGBTQ+ identities as "Western" and the notion that homosexuality is not part of Kenyan culture are false narratives used to further stigmatise and marginalise the community. These beliefs seek to maintain a notion of "normalcy" based on heteronormative ideals while disregarding the lived experiences and diversity of sexual orientations and gender identities within Kenyan society. These narratives ignore evidence that speaks to the [existence of queerness in pre-colonial Kenya](#) indicating that homophobia and discrimination against LGBTQ+ individuals were imported through colonial influences rather than being inherent to Kenyan culture. The criminalisation of same-sex sexual activity and the negative attitudes towards LGBTQ+ individuals stem from colonial-era laws and societal prejudices imposed during that time. These laws and prejudices continue to shape the social and legal landscape, perpetuating discrimination and hindering the full freedoms and enjoyment of human rights by LGBTQ+ persons.

The impact of outdated laws on sexual orientation and gender identity in Kenya is a multifaceted issue that requires comprehensive approaches to change. Addressing these nuances and challenging discriminatory laws, and false narratives around LGBTQ+ identities is vital for promoting understanding, acceptance, and respect for the human rights of LGBTQ+ individuals in Kenya. It requires continued advocacy efforts to debunk misconceptions, raise awareness about the diverse cultural histories of sexual orientation and gender diversity, engage policymakers and push for legislative reforms that protect the rights and dignity of all individuals, regardless of their sexual orientation or gender identity. Collaborating with International Human Rights Organisations is a major way Kenyan human rights activists are continuously contributing to legal progress.

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