



KENYA

Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Rights of LGBTI Persons

Submitted by The Advocates for Human Rights, an NGO in special consultative status, with

The Eagles for Life, Oasis Research, and University of Minnesota Law School Human Rights Litigation and International Advocacy Clinic

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Founded in 1983, **The Advocates for Human Rights** is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact-finding, direct legal representation, education and training, and publications. The Advocates is the primary provider of legal services to low-income asylum seekers in the Upper Midwest region of the United States, including LGBTI individuals who have experienced discrimination and violence based on sexual orientation and/or gender identity and expression in Kenya.

The Eagles for Life Kenya (TEFL-K) is an organization working in Kenya with programs designed to advocate for human rights, especially the rights of LGBTI persons. The organization has been in operation since 2010. In the course of doing its work, TEFL has come to realize that LGBTI persons in Kenya continue to face daunting challenges in their quest for full realization of their fundamental rights and freedoms. The challenges are aggravated by culture and religious traditions that underpin the morality of the local society. TEFL-K's vision is thus: 'A just and Inclusive Society for Sexual and Gender Minorities.' TEFL-K seeks to achieve this by pursuing a mission 'To create a just and inclusive society for gender and sexual minorities by empowering LGBTI Persons to claim for their rights, enhance access to responsive services by engaging duty bearers on policy, stimulating dialogues with the general public to promote tolerance and respect for diversity in Kenya'.

Oasis Research is research consultancy established in 2010 to provide research and advisory services in the fields of good governance, human rights, rule of law, access to justice, law enforcement through comparative approaches and best practices for the benefit of all stakeholders integral to policy making and implementation in Kenya. Oasis Research also provides technical support on applicability of international human rights standards under municipal law. As part of

its outreach activities and pro-bono work, Oasis Research has in partnership with non-governmental organizations undertaken human rights training on sexual and reproductive health rights and punitive laws affecting key populations from accessing medical treatment. The programmes involve training of policymakers, faith-based organizations, law makers on existing practices and policies that prevent access to health through justification of discrimination, violence and stigmatization.

University of Minnesota Law School Human Rights Litigation and International Advocacy Clinic was founded in 2010 with the goals of teaching students client-centered advocacy and providing legal and advocacy assistance on international human rights issues in the United States and around the world. Since August 2019, the Clinic has worked with LGBTQI+ refugees and citizens in Kenya and their advocates, the University's Human Rights Initiative, and NGOs around the world to support Kenyan advocates' goals of increasing respect for LGBTQI+ rights, including through advocacy before the United Nations human rights system.

EXECUTIVE SUMMARY

1. The Government of Kenya fails to prevent human rights violations against individuals based on their sexual orientation and/or gender identity (SOGI). The criminalization of consensual same-sex relations of lesbian, gay, bisexual, transgender, and intersex (LGBTI) adults leaves them at serious risk of harm. LGBTI persons in Kenya report discrimination, violence, lack of protection by law enforcement and government officials, risk of deportation, and limited access to services. LGBTI individuals with disabilities and other marginalized identities are particularly at risk for such human rights violations.
2. This report provides an overview of human rights developments related to sexual orientation and gender identity since Kenya's last review in 2015. It concludes that the Government of Kenya has failed to uphold its human rights obligations regarding sexual orientation and gender identity minorities, resulting in violence, discrimination, and a context of fear for members of these groups. This report will review specific human rights violations that require immediate attention by the Government of Kenya, including the right to freedom from torture and cruel, inhuman or degrading treatment or punishment, discrimination, harassment, and accountability for members of law enforcement and vigilante groups, and disability rights.
3. In January 2019, civil society organizations and human rights researchers conducted fieldwork to map the human rights violations of LGBTI individuals in Kenya. This report is based on first-hand information collected from the interviews and desk-research on news media outlets and reports on the issues of LGBTI individuals in Kenya. Interviews were conducted with twenty LGB¹ individuals living in the areas of Kisii, Nyamira, Homa Bay, Migori, and Nairobi. A portion of the study also focused on interviews with seven Deaf LGB individuals to understand their lived experiences and the intersections between two marginalized identities. The interviews primarily focused on the participants' interactions, as LGB persons, with law enforcement and government officials, health and education service providers, religious

¹ Sample consisted only of individuals who identified as lesbian, gay, and bisexual.

leaders, members of society, and vigilante groups. In addition, researchers visited local NGOs to gather data on cases of LGBTI human rights violations in Kenya.

4. All information in this report is used with express consent of the participants. This report also includes first-hand information used with permission from The Advocates' asylum clients about their experiences, as well as information provided by NGOs in Kenya that work on SOGI issues. Additional information for this report came from interviews with refugees and advocates in northern Kenya near the Kakuma refugee camp.

Kenya fails to uphold its obligations under the International Covenant for Civil and Political Rights (ICCPR)

5. As a State Party to the Convention Against Torture, Kenya has an obligation to protect all people – including LGBTI individuals – from torture or from any cruel, inhuman, or degrading treatment or punishment (Article 2). The Government of Kenya also has an obligation not to expel, return or extradite foreigners to countries where there are substantial grounds for believing that they would be in danger of being subjected to torture (Article 3). Kenya's obligations extend to prohibiting, preventing, investigating, and providing redress for torture and ill-treatment, including by making such acts an offense under domestic criminal law. (Article 4, 13, 14). Moreover, Kenya has a duty to prevent and punish acts of torture, harassment, intimidation, violence, discrimination, and ill treatment (Article 16).

I. Non-refoulement obligations (Article 3, LOIPR paras. 14-15)

6. In its January 2016 List of Issues Prior to Reporting, the Committee expressed concern and referenced previous concluding observations (para. 20) about cases of deportations without due process. The Committee requested information about legislative reforms and measures taken to ensure that Kenya complies with the non-refoulement obligations under article 3, particularly concerning populations in Nairobi and the Dadaab and Kakuma refugee camps.²
7. In its 2018 State party report under LOIPR, Kenya stated that,

“Articles 25 and 29 of the Constitution of Kenya provide that freedom from torture, cruel, inhuman or degrading treatment or punishment is a fundamental right that may not be limited, suspended or waived under any circumstances. Article 28 recognizes the inherent dignity of the human person and the right to have that dignity respected and protected. Kenya has a robust legal framework for ensuring that acts of torture are not committed and that foreigners are not extradited to countries where there are substantial grounds for believing that they would be in danger of being subjected to torture. Some of the legislative texts include the

² Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *List of Issues prior to Submission of the third periodic report of Kenya*, U.N. Doc CAT/C/KEN/QPR/3. (11 January 2016). ¶14. The Committee also requested statistical data on asylum requests and deportations in ¶15.

Refugee Act, Counter –Trafficking in Persons Act and the Prevention of Torture Act.”³

8. The State party further reported that section 18 of the Refugee Act prohibits refoulement, stating that “no person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected [sic] any similar measure if doing so would result in the persecution of the person or endanger his life, physical integrity, or liberty”.⁴
9. Refugee resettlement has been an ongoing issue globally and we commend Kenya for accepting refugees fleeing areas where they face violence and persecution. The Government has continued to host refugees from neighboring countries in the face of inadequate support from the international community and it is critical to note the external pressure caused by limited options for refugee resettlement and the need for the international community with UNHCR to support the Government under the principle of burden sharing.
10. Despite its own discriminatory laws, Kenya remains one of the few African countries that accepts LGBTI refugees fleeing persecution.⁵ An estimated 350 LGBTI individuals live in Kenya’s Kakuma Refugee Camp and Kalobeyei Integrated Settlement.⁶ This number only accounts for those who self-identified as LGBTI and does not count LGBTI refugees living outside of the camps, with the largest numbers being in Nairobi. In March 2021, the UNHCR estimated that there were about 1000 LGBTI refugees in Kenya.⁷ Individuals fleeing persecution for their LGBTI identities typically spend an average of 2.7 years as asylum seekers.⁸ One reason for fast tracking resettlement for LGBTI refugees is the violence and social stigma they experience in the camps. Over 90 per cent of the asylum seekers reported being verbally assaulted, while over 80 per cent reported having been physically assaulted.⁹
11. On November 17, 2021, Kenyan President Kenyatta signed a new Refugees Act into law, repealing the previous Refugees Act of 2006. The new Act replaces some of the restrictive provisions of the old law, and expands opportunities for refugees to get work permits to become

³ Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, *Third Periodic Report submitted by Kenya under article 19 of the Convention pursuant to the optional reporting procedure, due in 2017*, U.N. Doc CAT/C/KEN/3. (26 December 2018). ¶52.

⁴ Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, *Third Periodic Report submitted by Kenya under article 19 of the Convention pursuant to the optional reporting procedure, due in 2017*, U.N. Doc CAT/C/KEN/3. (26 December 2018). ¶55.

⁵ John Ndiritu, *The Challenges Facing Refugees in Kakuma Refugee Camp, Kenya: A Report by the Organization for Refugees, Asylum and Migration (ORAM) and Rainbow Railroad*, (Oct. 2021), https://af02ef9f-eaff-4f16-a35c-9a7ea58a6250.filesusr.com/ugd/65cf98_db18b86c46744fb98648ccff1640e165.pdf.

⁶ *Id.*

⁷ UNHCR, *Statement on the situation of LGBTIQ= refugees in Kakuma camp* (Mar. 25, 2021), <https://www.unhcr.org/ke/19859-unhcr-statement-on-the-situation-of-lgbtq-refugees-in-kakuma-camp.html>.

⁸ John Ndiritu, *The Challenges Facing Refugees in Kakuma Refugee Camp, Kenya: A Report by the Organization for Refugees, Asylum and Migration (ORAM) and Rainbow Railroad*, (Oct. 2021), https://af02ef9f-eaff-4f16-a35c-9a7ea58a6250.filesusr.com/ugd/65cf98_db18b86c46744fb98648ccff1640e165.pdf.

⁹ *Id.*

self-sufficient and integrate into the Kenyan economy.¹⁰ Refugees International welcomed the law, which “will improve Kenya’s refugee response by working toward a whole-of-government approach and unlocking the potential for refugees in the country to contribute significantly to Kenya’s economy.”¹¹ The International Rescue Committee stated that the law will give “renewed hope to over 500,000 refugees living in Kenya to have access to education, livelihoods and integration opportunities.”¹²

12. The effects of these newly enacted provisions are still unknown. There is a possibility that even under the new law freedom of movement for refugees may still be restricted. A November 2021 report by the Center for Global Development and Refugees International stated that refugees in Kenya face restrictions to economic inclusion, the most serious restriction being the encampment policy requiring all refugees to live in one of two designated areas; other obstacles are lack of work permits and work identification.¹³
13. With regard to LGBTI asylum seekers, the bill does not clearly state protection measures towards this community. One concern is that asylum applications could be denied and applicants removed from Kenya for violation of Kenyan law,¹⁴ which could impact LGBTI refugees, if they were found to be in violation of the laws criminalizing same sex sexual conduct. Advocates working directly with refugees state that it is difficult to identify an exact number of people who have been deported because of their sexual orientation or gender identity because the Kenyan government does not make this information public.
14. The central concern is that the underlying discriminatory laws must be abolished to pave the way for the full implementation of the Refugee Bill. Expedient implementation of a Refugee Bill free from discrimination is key to the well-being of asylum seekers and refugees; if the provisions of the bill that allow asylum seekers and refugees access to jobs and education in Kenya are not enforced, this will lead to more LGBTI persons to be subjected or vulnerable to and increased risk of torture and cruel, inhuman or degrading treatment.

¹⁰ Mohammed Yusuf, *New Law in Kenya Allows Refugees to Work*, Voice of America (Nov. 19, 2021), <https://www.voanews.com/a/new-law-in-kenya-allows-refugees-to-work-/6320046.html>.

¹¹ Sarah Miller, *Refugees International Welcomes Kenya’s Refugees Bill*, Refugees International, (Nov. 17, 2021), <https://www.refugeesinternational.org/reports/2021/11/17/refugees-international-welcomes-kenyas-refugees-bill>.

¹² IRC, *Kenya: IRC welcomes President Kenyatta’s move to sign the Refugee Bill into law*, International Rescue Committee, (Nov. 17, 2021), <https://www.rescue.org/press-release/kenya-irc-welcomes-president-kenyattas-move-sign-refugee-bill-law>.

¹³ Center for Global Development and Refugees International, *From Displacement to Development: How Kenya Can Create Shared Growth by Facilitating Economic Inclusion for Refugees* (November 2021), <https://www.refugeesinternational.org/reports/2021/11/15/from-displacement-to-development-how-kenya-can-create-shared-growth-by-facilitating-economic-inclusion-for-refugees>.

¹⁴ The Refugees Bill 2019, cl. 23(5) (“A person who has submitted an application for refugee status shall be under obligation to abide by all the laws of Kenya . . . failure to which the Commissioner shall have powers to strike them out of the asylum process and advi[s]e the Cabinet Secretary to remove them from Kenya subject to the applicable immigration laws.”).

II. Discrimination and ill-treatment of LGBTI persons (Articles 12, 13 and 16, LOIPR para. 33)

15. In its January 2016 List of Issues Prior to Reporting, the Committee specifically requested information on the measures Kenya has taken to combat acts of violence, including sexual violence, and discrimination against lesbian, gay, bisexual, and transgender persons. The Committee also requested that Kenya indicate whether it had repealed any legal provisions that penalize such persons.¹⁵
16. In its 2018 State party report under LOIPR, Kenya responded only that, “The Constitution of Kenya in article 27 protects citizens from any form of discrimination” and that the Penal Code was also undergoing a reform process to align it to the provisions of the Constitution of Kenya 2010.¹⁶ Kenya added that the Persons Deprived of Liberty Act of 2014 protects intersex persons in detention, allowing an intersex individual to choose the sex of the person who searches them and provides separate cells for intersex individuals.¹⁷

A. Criminalization of sexual relations between consenting adults of the same sex

17. Kenya, along with more than 20 other African countries, continues to criminalize consensual adult same-sex sexual relations by law.¹⁸ Under Section 162 of Kenya’s Penal Code, any person who has “unnatural carnal knowledge against the order of nature” is guilty of a crime of up to fourteen years imprisonment. In addition, under Section 165 of the Penal Code, any male person who commits any act of “gross indecency” with another male person is guilty of a felony of up to five years imprisonment. Yet police officers utilize the existing legal provisions to harass LGBTI individuals more often than to prosecute them.¹⁹
18. While sections 162-165 of Kenya’s Penal Code do not criminalize LGBTI identities, they do criminalize same-sex sexual conduct. Even the vocabulary of the legal provisions is vague because it does not define what “unnatural carnal knowledge” constitutes. Therefore, much police officers and government officials have much discretion in their interpretation of the

¹⁵ Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *List of Issues prior to Submission of the third periodic report of Kenya*, U.N. Doc CAT/C/KEN/QPR/3. (11 January 2016). ¶33.

¹⁶ Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment of Punishment, *Third Periodic Report submitted by Kenya under article 19 of the Convention pursuant to the optional reporting procedure, due in 2017*, U.N. Doc CAT/C/KEN/3. (26 December 2018). ¶119.

¹⁷ Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment of Punishment, *Third Periodic Report submitted by Kenya under article 19 of the Convention pursuant to the optional reporting procedure, due in 2017*, U.N. Doc CAT/C/KEN/3. (26 December 2018). ¶120.

¹⁸ International Lesbian, Gay, Bisexual, Trans and Intersex Association, *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, by Aengus Carroll and Lucas Ramón Mendos (Geneva: International Lesbian, Gay, Bisexual, Trans and Intersex Association, May 2017), 26.

¹⁹ Human Rights Watch, *The Issue is Violence: Attacks on LGBT People on Kenya’s Coast* (United States: Human Rights Watch, September 2015); see also *Data Collection and Reporting on Violence Perpetrated Against LGBTQI Persons in Botswana, Kenya, Malawi, South Africa and Uganda*, Arcus Foundation (Oct. 2019).

provisions. They often arrest LGBTI individuals under these provisions of the Penal Code based solely on their own perceptions of sexual conduct.

B. Anti-discrimination legislation

19. **Although Kenya has taken some steps towards implementing and adopting a more comprehensive anti-discrimination law, the State party has to date taken no specific actions to provide protection on the basis of sexual orientation and gender identity.** Kenya's Universal Periodic Review Implementation Matrix 2015-2019²⁰ lists several actions that the government claims to have taken as anti-discrimination measures against sexual orientation and gender identity, such as conducting surveys on diversity in the public service sector, finalizing the Draft Equality Policy, and conducting a survey on the number of women in the public and private sectors. These actions do not address the issue of sexual orientation and gender identity; rather, they focus on women's rights and gender diversity. Kenya's government has not taken concrete steps to create inclusive laws that specifically protect individuals from violence and discrimination based on their sexual orientation or gender identity.
20. Sensitization efforts of key law enforcement stakeholders, including police and administrators, about discrimination against LGBTI individuals has largely been left to non-governmental organizations. Further, there are no studies on the impact of existing sensitization programs on stigma and discrimination.
21. Kenya took an important step towards recognizing intersex persons by including in the 2019 National Population census a new option to identify as intersex. In addition, an intersex person was recently appointed as a commissioner on the Kenya National Commission on Human Rights.²¹
22. Not much progress, however, has been made in additional areas of concern to the Kenyan intersex community, including recognition on birth certificates and other official documents as recommended by the Task Force on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya or registration of intersex persons as proposed in the Registration of Persons Bill 2019.²²
23. Further, there has been little progress on reviewing social protection mechanisms to ensure that the dignity and personal security of intersex persons are protected, safeguard against violation of their rights based on the gender identity, protect them against discrimination, stigma, and violence.²³

²⁰ Kenya Office of the Attorney General and Department of Justice, *Universal Periodic Review 2nd Cycle Implementation Matrix 2015-2019*, accessed March, 21, 2019, https://www.upr-info.org/sites/default/files/document/kenya/session_21_-_january_2015/kenya_2nd_cycle_final_matrix_2016.pdf

²¹ Information received from Kenyan NGO (18 March 2022).

²² Information received from Kenyan NGO (18 February 2021).

²³ Information received from Kenyan NGO (18 February 2021).

C. Failure to protect LGBTI individuals from acts of violence, harassment, and abuse, based on sexual orientation or gender identity

1. Violence, including sexual violence, against LGBTI individuals

24. LGBTI individuals in Kenya experience widespread violations of their right to life, liberty, and security. In 2015, for example, two men in Kenya were arrested and charged with committing “unnatural” offenses and the trafficking of “obscene material.”²⁴
25. LGB individuals shared with the authors of this report that they feared being assaulted by family members if they disclosed their sexual orientation. In one case, a lesbian was physically and verbally assaulted by her male family members. While they physically assaulted her, they expressed “you are not enough to be a human being.”²⁵ In another case, a 25-year-old bisexual man was physically assaulted by his father and forced to abandon his house and family because of his sexual orientation. Interviewees reported that they were afraid to report these violations to law enforcement and other government officials because it could potentially exacerbate the situation.
26. The Kenyan government fails to protect LGBTI individuals from human rights violations by members of their communities or to educate the public about LGBTI rights. LGB individuals also reported suffering attacks from members of their local community based on their sexual orientation. LGBTI individuals who present themselves more openly in Kenyan society are more at risk of aggression from people in their communities.²⁶ In addition, a 2016 survey found that in Kenya 40% of respondents strongly agreed that being LGBTI should be a crime.²⁷
27. LGB individuals interviewed reported instances of physical assaults due to their sexual orientation. In one case, a lesbian woman was physically attacked by another woman when trying to explain her lifestyle. While these types of physical assaults were common, verbal assaults constituted the majority of attacks on LGB individuals in Kenya from other community members. Some of the participants stated that “they threaten that they will beat you when you are alone; that is why you never walk alone.”²⁸ Other comments included: “you should be banned and killed”²⁹ and “we should be treated like dogs.”³⁰ Therefore, LGB individuals are forced to protect themselves, without support from members of the community, law enforcement officials, or family members.
28. LGBTI refugees have also been subjected to physical violence. In an October 2021 report on LGBTI refugees in Kakuma Refugee Camp, 83 per cent of LGBTQI+ respondents reported

²⁴ Human Rights Watch, *The Issue is Violence: Attacks on LGBT People on Kenya’s Coast* (United States: Human Rights Watch, September 2015).

²⁵ Interview with participant, Nyamira, Kenya, Jan. 9, 2019.

²⁶ Neela Ghoshal, *Lesbian, Bisexual, and Queer Women Speak Out in Kenya*, Huffington Post, Feb. 20, 2016, https://www.huffingtonpost.com/neela-ghoshal/lesbian-bisexual-and-queer-women-speak-out-in-kenya_b_9280166.html.

²⁷ International Lesbian, Gay, Bisexual, Trans and Intersex Association, *The ILGA-RIWI 2016 Global Attitudes Survey on LGBTI People in Partnership with LOGO* (2016).

²⁸ Interview with participant, Homabay, Kenya, Jan. 12, 2019.

²⁹ Interview with participant, Homabay, Kenya, Jan. 12, 2019.

³⁰ Interview with participant, Migori, Kenya, Jan. 8, 2019.

physical violence and 26 per cent reported sexual violence; of transgender respondents, 100 percent reported physical assaults and 67 per cent reported sexual assaults.³¹ The majority of that violence was committed by fellow refugees.³² 88 per cent of those interviewed reported that police denied them assistance due to their sexual identify; other reports were that police demanded bribes that they were unable to pay.³³

29. Law enforcement officials actively target and persecute LGBTI individuals by utilizing Section 162(a),(c) and 165 of the Penal Code.³⁴ They threaten LGBTI individuals and use violence to extract confessions.
30. LGB individuals interviewed for this report described frequent persecution and arrests of LGB individuals by law enforcement officials. A common pattern emerged from the interviews in which LGB individuals were arrested because of their sexual orientation, but charged for other crimes like loitering, gambling or simply detained without a formal charge. In one instance, an MSM³⁵ man was attacked by a law enforcement officer because he was walking late at night with his partner. He stated, “He gave me a slap I will never forget. They have never been friendly to us.”³⁶ A common experience among the LGB individuals interviewed for this report was for law enforcement officials to pressure them for bribes in exchange for their release, in large part because there were no official charges to bring against them.
31. Police also use violence against LGBTI individuals in detention. One client of The Advocates, a gay man, was meeting with other LGBTI activists in a restaurant when police barged in and arrested them, telling them they were “evil.” One police officer hit the client on the back of the neck with an AK47 pistol. The officers took him and his friends to a detention center, where a police officer sexually assaulted and verbally abused the client due to his sexual orientation. The police officer justified his actions, claiming “this is what you wanted.” Ultimately, the client fled Kenya for fear of further abuse and being outed to his family.³⁷
32. Vigilante groups are another primary source of fear for LGBTI individuals because of their violent attacks on LGBTI individuals that are supported by members of the community and even LGBTI individuals’ family members. Vigilante groups specifically target LGBT individuals in Kenya by creating fear and promoting violence. Most of the participants interviewed expressed great fear of vigilante groups, especially those living in rural areas. For example, interviewees said, “If they know you are gay they will kill you. They just kill,”³⁸ and “They think you are promoting satanism, them murdering you would be very easy.”³⁹ The LGB

³¹ John Ndiritu, *The Challenges Facing Refugees in Kakuma Refugee Camp, Kenya: A Report by the Organization for Refugees, Asylum and Migration (ORAM) and Rainbow Railroad*, (Oct. 2021), https://af02ef9f-eaff-4f16-a35c-9a7ea58a6250.filesusr.com/ugd/65cf98_db18b86c46744fb98648ccff1640e165.pdf.

³² *Id.* at 22-23 (87 per cent of physical assaults were by fellow refugees; 73 per cent of sexual assaults were by fellow refugees; other violence was by the host community or family members).

³³ *Id.* at 24.

³⁴ Human Rights Watch, *The Issue is Violence: Attacks on LGBT People on Kenya’s Coast* (United States: Human Rights Watch, September 2015).

³⁵ Men who have sex with men

³⁶ Interview with Participant, Migori, Kenya, Jan. 8, 2019.

³⁷ Interviews with clients of The Advocates (2015-2018). On file with authors.

³⁸ Interview with participant, Nyamira, Kenya, Jan. 9, 2019.

³⁹ Interview with participant, Kisii, Kenya, Jan. 12, 2019.

individuals interviewed for this report universally observed that law enforcement officials are unwilling to prevent attacks or protect LGBTI individuals from vigilante groups.⁴⁰

33. There have, however, been some positive steps forward in Kenya. One example is a three-year partnership between an NGO based in Kisumu, Keeping Alive Societies Hope (KASH) and the Kisumu police to address arbitrary arrests and physical attacks of female sex workers and men having sex with men and other security threats and harassment. The project involved training programs for the public and police and media campaigns. It resulted in a reduced number of arrests and sexual violence against and enhanced protection of LGBTI people as well as better relations between the LGBTI community and police.⁴¹

2. *Lack of accountability for law enforcement and vigilante groups who commit human rights violations against members of the LGBTI community*

31. Because of their experience of arrests and persecution by law enforcement, LGB individuals in Kenya reported that they distrust law enforcement officials. LGB individuals interviewed expressed their inability to report criminal cases to the police and government agencies because it would affect them negatively. In some instances, respondents suffered crimes and human rights violations, but they did not seek services because the complaint was about a situation that happened because of their sexual orientation. For example, when one gay man was blackmailed by someone from his local community, he decided to pay 10,000 KSh, the equivalent of about 100 US dollars, rather than report the incident to the authorities out of fear that it would damage his reputation.

D. Failure to protect LGBTI individuals from discrimination and ill-treatment based on sexual orientation or gender identity

1. *Discrimination against LGBTI persons*

32. **LGBTI individuals in Kenya face discrimination daily because of their sexual orientation and/or gender identity.** Although constitutional provisions ensure equality for every person under the law, neither sexual orientation nor gender identity are explicitly protected identities under the Constitution.

33. LGBTI individuals face discrimination in the workplace, both when applying for jobs and while employed. One gay individual expressed that he had to leave a position with a tourism company after his boss found out he was dating a man. The boss expressed that by having him as an employee he was “destroying the business.” In addition, he mentioned when he was trying to apply for a job at a catering company, the job application said they were only looking for straight people. Many other cases showcased the struggle of LGBTI individuals when

⁴⁰ Katy Migiro, *Homophobic Mobs Attack LGBT People in Kenya with Impunity*, All Africa, Sept. 28, 2015, <https://allafrica.com/stories/201509280135.html>.

⁴¹ Analysis and documentation of Sexual Orientation, Gender Identity and Expression and Sex Characteristics (SOGIE-SC) norm shift in Kenya, *Public Health Innovations* (Jul. 2020) at 16.

trying to enter the job market. In some instances, documented discrimination in the workplace pushed LGBTI individuals to go into sex work as their only option for employment.

34. LGBTI individuals experience discrimination when accessing public spaces. For example, most interviewees reported that they were denied access to some bars, clubs or restaurants. In some instances, LGBTI individuals were attacked in public spaces because of their sexual orientation. One individual expressed that “in a restaurant, someone drunk started calling me names. I was told to walk out of the room because more people kept joining; there were ten.”⁴² Another LGB individual stated, “When I go to restaurants you hear them talking about me. Some may come and mock me. I have lost a lot of friends because of who I am.”⁴³ LGB individuals interviewed were aware of the public spaces where they faced more danger and spread the word to each other to prevent further confrontations.
35. Sexual encounters for LGBTI individuals tend to be unsafe and risky because of social prejudice and stigmatization. One participant mentioned two males could never rent a room together in a hotel which made the sexual encounters dangerous and unprotected. He mentioned this practice further advanced the lack of protection in sexual encounters between LGBTI individuals.
36. LGBTI individuals face discrimination from religious leaders in Kenya. On some occasions, LGBTI individuals have been particularly targeted by religious leaders who perceive them as an evil that needs to be addressed. Many of the participants shared the sentiment that they were excluded from religious settings both by religious leaders and religious practitioners. One LGB individual expressed, “I stopped going to church. They stigmatize you and do not let you sit near people. You cannot pray or sing, they would preach about you.”⁴⁴ Many participants expressed they stopped going to church because of the treatment and hate speech they received on the basis of their sexual orientation or gender identity and expression; when asked if they would like to go to church if the treatment and conditions changed, they expressed an interest in returning.
37. Many of the LGB individuals interviewed noted the importance of training religious leaders about LGBTI issues to decrease discrimination based on sexual orientation and gender identity. For example, the Nyanza Rift Valley and Western Kenya Network (NYARWEK) has focused on training religious leaders around LGBTI issues as part of their work. They expressed that much of the discrimination against LGBTI individuals is based on religious reasons. For instance, denying services to LGBTI individuals often occurs because service providers discriminate based on their religious beliefs.

2. Discrimination in Access to Education

38. Our interviews also suggest LGB individuals do not enjoy the right to access to education in Kenya despite the government’s international and constitutional obligation to provide the right to education. According to Article 53 (1) (b) of the Constitution, every child has a right to free

⁴² Interview with participant, Migori, Kenya, Jan. 8, 2019.

⁴³ Interview with participant, Migori, Kenya, Jan. 8, 2019.

⁴⁴ Interview with participant, Kisii, Kenya, Jan. 9, 2019.

and compulsory education. In addition, Article 56 (b) provides protection for minorities and marginalized groups to ensure special opportunities for their educational development.

39. Multiple LGB individuals reported being expelled from schools based on their sexual orientation. School administration expelled and suspended students who were seen engaging in same-sex conduct. School staff members expressed concern about LGB students “influencing” other students into same-sex relations. According to interviewees, schools maintained policies to actively identify LGBTI students. One of the LGB participants described how headmasters would physically abuse LGBTI students until they confessed their sexual orientation and were encouraged to give up other LGBTI students’ names.
40. LGB individuals interviewed also experience harassment at school from other students and enjoy little protection from school administrators. In one case, a perceived gay student was targeted with physical and verbal abuse from other students because of his sexual orientation. When he decided to go to the Deputy Director of the school with his mother to inform them of the situation and demand protection, he was asked to pay (2,000 Ksh), the equivalent of about twenty US dollars, to the Deputy Director in order to ensure his protection.

3. *Discrimination in Access to Healthcare*

41. Interviewees expressed that they faced significant barriers to accessing healthcare. Participants’ experiences with health care providers showcase the barriers that exist as LGB individuals try to access essential services. There was a clear distinction between experiences with public healthcare providers versus private NGOs which provide services to key populations. Although a platform allowing government agencies to work with key populations exists, LGBTI individuals’ distrust of healthcare professionals may prevent them from attempting to access these services.⁴⁵
42. Most of the LGB individuals interviewed for this report decided not to disclose their sexual orientation to health care providers because they feared it could affect their treatment. In addition, interviewees expressed fear regarding the lack of privacy for patients and how it could affect their reputation in the community. In one case, an LGB individual stated that “It is impossible, I would feel ashamed. I do not want doctors to start talking about me.”⁴⁶ In another case, a gay man changed his name when looking for STI treatment services out of fear of confidentiality issues. It was clear from the interviews that LGB individuals mistrust health care providers, especially providers in public hospitals. Further, some health care providers have reportedly conducted forced anal examinations.⁴⁷
43. Health care providers refuse to treat LGB individuals because of their sexual orientation. Health care providers often use Section 162-165 of the Penal Code and their religious beliefs to deny services to LGB individuals. In one instance, a gay man decided to go to a public

⁴⁵ Levis Nderitu, *Key Population Hero: Addressing stigma and discrimination among LGBT people in Kenya*, Linkages, Dec. 9, 2016, <https://linkagesproject.wordpress.com/2016/12/09/key-population-hero-addressing-stigma-and-discrimination-among-lgbt-people-in-kenya/>.

⁴⁶ Interview with participant, Nairobi, Kenya, Jan. 17, 2019.

⁴⁷ Human Rights Watch, *The Issue is Violence: Attacks on LGBT People on Kenya’s Coast* (United States: Human Rights Watch, September 2015).

hospital for Pre-Exposure Prophylaxis (PrEP) medication but was refused treatment from the doctors because they stated: “we do not treat people like you here.”⁴⁸ Other concerns include, lack of clinics that will treat LGBTI patients,⁴⁹ high costs, an insufficient number of providers, understaffed medical centers, and geographic barriers.⁵⁰

44. Interviewees emphasized the importance of training health care service providers on dealing with LGBTI individuals. Many LGB individuals stated that they would only go to NGOs and civil society organizations for health care services because of the relationship of trust that existed between them. Some of the participants expressed a lack of civil society organizations and NGOs providing direct services, however, specifically in rural areas. Therefore, LGBTI individuals are dependent on the existence of private entities to provide them with adequate access to health services.
45. Transgender people in Kenya interviewed for a recent study stated that mental health services tailored to the needs of transgender persons, such as gender dysphoria or body dysmorphia, were only available in a small number of organizations and also noted negative attitudes from healthcare workers and lack of knowledge or experience in working with transgender patients to meet their needs, which made it necessary for the patient to educate the provider.⁵¹ Transgender respondents felt it was especially difficult for them to access healthcare services, as providers did not have the requisite knowledge to deal with gender dysphoria and comorbidities affecting transgender persons. Respondents also noted that the lack of access to mental health services resulted in negative coping mechanisms such as substance use within these communities.⁵² LGBTI refugees and asylum seekers in Kenya also noted major barriers to accessing healthcare services, due to lack of necessary documentation and insufficient clinics and service providers in refugee camps.⁵³
46. A July 2020 report states that the Ministry of Health is “generally considered an ally in the struggle for LGBTI equality,” and highlights the role of the National AIDS & STI Control

⁴⁸ Interview with participant, Migori, Kenya, Jan. 8, 2019.

⁴⁹ Stephanie Haase, Virginia Zweigenthal, Alex Muller, *Barriers in Access to Healthcare for Kenyan Queer Womxn and Trans Men: Findings of a Cross-Sectional Online Survey and Interviews*, (Dec. 1, 2021), <https://assets.researchsquare.com/files/rs-1076697/v1/5ccce701-feda-4a12-bdcb-cfedf2e932cb.pdf?c=1638377442>

⁵⁰ Analysis and documentation of Sexual Orientation, Gender Identity and Expression and Sex Characteristics (SOGIE-SC) norm shift in Kenya, *Public Health Innovations* (Jul. 2020).

⁵¹ Stephanie Haase, Virginia Zewigenthal & Alex Müller, *Barriers in Access to Healthcare for Kenyan Queen Womxn and Trans Men: Findings of a Cross-Sectional Online Survey and Interviews*, Research Square (Dec 1, 2021), <https://assets.researchsquare.com/files/rs-1076697/v1/5ccce701-feda-4a12-bdcb-cfedf2e932cb.pdf?c=1638377442>.

⁵² Analysis and documentation of Sexual Orientation, Gender Identity and Expression and Sex Characteristics (SOGIE-SC) norm shift in Kenya, *Public Health Innovations* (Jul. 2020).

⁵³ John Ndiritu, *The Challenges Facing Refugees in Kakuma Refugee Camp, Kenya: A Report by the Organization for Refugees, Asylum and Migration (ORAM) and Rainbow Railroad*, (Oct. 2021), https://af02ef9f-eaff-4f16-a35c-9a7ea58a6250.filesusr.com/ugd/65cf98_db18b86c46744fb98648ccff1640e165.pdf.

program in addressing discrimination and violence.⁵⁴ It is important to point out, however, that the HIV and AIDS framework highlights interventions targeting men who have sex with men, but not LGBTI interventions.⁵⁵

47. The Ministry of Health is currently working with the transgender community to develop a “National Transgender Health Strategy” and the Government has also committed to support the first National MSM Transgender and Research Conference in Kenya.⁵⁶ The Ministry of Health, however, has not yet developed other specific policies related to LGBTI persons.⁵⁷
48. In 2020, the Ministry of Health Taskforce on Mental Health recommended that the Government declare “mental health” a national emergency,⁵⁸ but the Taskforce failed to mention LGBTI persons as a key population in their strategy or identify gender identity and sexual orientation as factors linked to mental health concerns.
49. The Kenya Mental Health Policy 2015-2030 states several guiding principles including that “mental health is a human right which should be respected regardless of religion, gender, culture and socioeconomic status” and that “services should be provided equally to all individuals in a community irrespective of their gender, age, caste, color geographical location, culture, and social class.”⁵⁹ It does not mention sexual orientation or gender identity in its definition of non-discrimination. The Policy also identifies several vulnerable groups, including women and children, but does not mention LGBTI persons.⁶⁰

4. *Discrimination against LGBTI persons with disabilities*

50. Deaf LGB individuals interviewed reported experiencing widespread human rights violations because of their intersecting marginalized identities in the Kenyan context. Participants expressed that LGBTI advocacy groups often overlook their specific needs, and therefore they still experience human rights violations.
51. Deaf LGBTI individuals lack access to information compared to other members of the LGBTI community. LGB participants expressed a need for documents and training around LGBTI advocacy tailored to the Deaf community. Further, interviewees expressed a lack of knowledge

⁵⁴ Analysis and documentation of Sexual Orientation, Gender Identity and Expression and Sex Characteristics (SOGIE-SC) norm shift in Kenya, *Public Health Innovations* (Jul. 2020).

⁵⁵ Information received from Kenyan NGO (18 March 2022).

⁵⁶ Analysis and documentation of Sexual Orientation, Gender Identity and Expression and Sex Characteristics (SOGIE-SC) norm shift in Kenya, *Public Health Innovations* (Jul. 2020).

⁵⁷ Information received from Kenyan NGO (18 March 2022).

⁵⁸ Mental Health Taskforce urges government to declare mental health a National Emergency, *Ministry of Health*, (Jul. 7, 2020), <https://www.health.go.ke/mental-health-taskforce-urges-government-to-declare-mental-health-a-national-emergency-nairobi-tuesday-july-7-2020/>.

⁵⁹ Kenya Mental Health Policy 2015-2030, *Ministry of Health*, (Aug. 2015).

<https://publications.universalhealth2030.org/uploads/Kenya-Mental-Health-Policy.pdf>.

⁶⁰ *Id.*

around safe sex practices because they are excluded from key populations training due to their disability.

52. Deaf LGB individuals interviewed expressed fear of coming out in their own community due to homophobia in the Deaf community. Because of this, most of the participants expressed that they would only discuss LGBTI topics with hearing people. Since the Deaf community is so small, they feared discussing LGBTI topics would damage their reputation throughout the entire Deaf community. One participant expressed, “there are so many in school, no one stands up. For us is so difficult, if you talk, everyone knows.”⁶¹ Deaf LGB individuals express fear about coming out since it could leave them without the protection of their Deaf community.

III. Suggested recommendations to the Government of Kenya

53. Suggested recommendations related to non-refoulement and protection of LGBTI refugees:

- Immediately cease any deportations based on sexual orientation or gender identify or expression.
- Abolish the underlying discriminatory laws to pave the way for the full implementation of the Refugee Bill.
- Expediently implement a Refugee Bill free from discrimination to allow asylum seekers and refugees access to jobs and education in Kenya

54. Suggested recommendations related to legislation:

- Decriminalize sexual relations between consenting adults of the same sex under the Penal Code by repealing sections 162 and 165.
- Enact and implement a comprehensive equality and anti-discrimination law outlawing discrimination on grounds of sexual orientation, gender identity and expression as per the commitment made during the 2nd and 3rd cycle of the Universal Periodic Review in 2015.
- Enact law and policy that affirm the rights if intersex persons and transgender persons to change names and gender markers in government issued documentation.

55. Suggested recommendations relating to acts of violence, harassment, abuse, and discrimination against LGBTI individuals:

- Take steps to raise awareness in order to mitigate social prejudices, stigmatization, harassment, discrimination, and violence against individuals because of their sexual orientation.
- Include gender and sexuality concerns, specifically LGBTI concerns, and health information in university and medical school criteria.

⁶¹ Interview with participant, Nairobi, Kenya, Jan. 15, 2019.

- Provide training for government officials, educators, healthcare providers, and law enforcement with respect to LGBTI issues.
- Stop the practice of expelling LGBTI students from schools because of their sexual orientation and/or gender identity.
- Collaborate with civil society organizations working on LGBTI issues and support their work by creating joint projects to prevent violations and build protections for LGBTI individuals?
- Put measures in place to protect individuals from discrimination and abuse based on their sexual orientation by religious leaders.
- Take measures to prevent law enforcement from arbitrarily arresting individuals based on their sexual orientation.
- Prevent human rights violations perpetrated by vigilante groups and prosecute the perpetrators.
- Improve data collection efforts and disseminate information when arresting individuals under sections 162-165 of the Penal Code.

56. Suggested recommendations relating to lack of accountability for abuse and harassment committed by members of law enforcement and vigilante groups:

- Take steps to ensure inclusion of LGBTI issues in the curriculum used to train law enforcement officers.
- Hold members of law enforcement and vigilante groups accountable for human rights violations against LGBTI individuals.
- Take steps to ensure LGBTI persons whose fundamental rights are violated are accorded compensation.
- Establish an independent and impartial mechanism to investigate allegations of torture and abuse of LGBTI individuals in detention.

57. Suggested recommendations related to LGBTI persons with disabilities:

- Take steps to engage with deaf LGBTI individuals in order to gain information about their specific needs.
- Provide training to government officials, law enforcement, and the community at large to educate them about the specific needs of deaf LGBTI individuals.
- Provide protection to LGBTI persons with disabilities, such as deaf individuals, who are more vulnerable to discrimination, harassment, and violence.