

SEXUAL ORIENTATION, GENDER IDENTITY, EXPRESSION AND SEX CHARACTERISTICS (SOGIESC) INTER UNIVERSITY MOOT COURT COMPETITION



HEINRICH BÖLL STIFTUNG
NAIROBI
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The Eagles For Life-Kenya



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REPORT OF THE SOGIESC INTER UNIVERSITY MOOT COURT COMPETITION.

Theme: Legal Barriers affecting SOGIECS Community

BACKGROUND

The Eagles for Life Kenya (TEFL-K) is a human rights organisation that exists to create a just and inclusive society for gender and sexual minorities by empowering LGBTIQ+ 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

This was a second moot court competition organized by TEFL-K that rallied the theme; *“Legal Barriers affecting SOGIECS Community”*. The first competition was done in October 2019 that brought together participating students from Kabarak University and Kisii University. The 2020 competition brought together Students from Embu University and Kisii University. The competition took place at Kisii University, School of law.

“Theme: Legal Barriers affecting SOGIECS Community”

“The bench” included; Dr. Victoria Miyandazi, Lecturer, Public Law – Comparative Equality Law, Embu University, Dr. Charles Moitui, the Dean School of Law, Kisii University, and representatives from Help Heal Foundation. Other guests who graced the occasion included Dr. Joash Kerenge, Registrar Academic Affairs, Kisii University and Dr. Julius Angwenyi, COD Commercial Law, Kisii University.

The EFL-K advocates for the sexual and gender minorities in Kisii, Nyamira and other counties. Henrich Boll Foundation is funding TEFL-K to implement the project that seeks to engage higher learning institutions to influence their mindsets to engage openly on SOGIESC issues beyond academics. The Project runs for three years during the period which there shall be 3 moot courts.

The competition therefore created an opportunity to sensitise the participants SOGIESC issues, so they can internalize what is currently ongoing in their communities and deliberate on how they can be very influential in creating an equal and just system that adheres to basic human rights standards for all including the gender minority communities.

The awards in the completion were given to: the best team, the best memorial, the best oralist – female and the best oralist – male. All participants were provided with certificates of participation.

OPENING REMARKS

Dr. Julius Angwenyi, COD Commercial Law, Kisii University.

He welcomed the participants and gave student representative from both universities an opportunity to introduce their teams. He mentioned that Kisii University had a close linkage with Embu University having been part of the pioneering team that saw the establishment of law school and a key player in the designing of the law curriculum at Embu University.

He called upon the students to mingle and interact freely and encouraged the visiting students to appreciate the local culture.

Dr. Charles, Dean School of Law, Kisii University



Figure 1: Dr. J. Agwenyi giving his opening remarks



Figure 2: Dr. Charles, Dean School of Law

He welcomed the visiting team from Embu University led by Dr. Victoria and the host team at Kisii University. He thanked the competing students for their preparations and encouraged them to brace the challenge in the completion. He acknowledged the team of judges and other guests including the Registrar Academic Affairs, who was representing the Vice Chancellor. He mentioned that the mooting exercise was based on human rights and that it would allow for the participating teams to look at how theories can

be translated into reality. He pointed out the fact that most legislations including international instruments provide for human rights particularly under international bill of rights. The challenge, he said was on how we can realize these provision for the gender minorities especially in areas of domestic violence. He challenged the society for discriminating against the minorities despite the legal provisions on equal rights.

Mr. Enosh Abuya, Executive Director The Eagles for Life Kenya (TEFL-K)

He welcomed the entire team and appreciated their participating in such an important event on human rights awareness. He gave a brief overview TEFL-K's effort in advocating for the rights of the sexual minorities in the society. He reiterated the fact that TEFL-K is engaging with institutions of higher learning and influence change and shape the mindsets of young scholars on human rights issues affecting the SOGIESC communities.



Figure 3: Mr. Enosh Abuya, Executive Director TEFL-K

Dr. Joash Kerongo, Registrar Academic Affairs – Kisii University

Dr. Kerongo was representing the Vice Chancellor was held up with another coinciding University



Figure 4: Dr. J. Kerongo, Registrar Academic Affairs

activity. He welcomed the participants including the team from Embu University led by Dr. Victoria saying that the moot completion was a very special activity. He mentioned the contribution of Kisii University in training law students having produced exemplary graduates who joined the Law School. He referred to Kisii University as an Academic giants in as far as training law students is concerned. He appreciated the teams from both universities and the judges of the day and called upon judges to be fair in the completion.

He appreciated TEFL-K for being concerned with human rights issues affecting the sexual and gender minorities in the society and for sponsoring such activities in the University.

He noted that issues affecting the sexual and gender minorities including, family, society and culture, civil rights and discrimination among the LGBTQ, and conflicts with sexual orientation are enormous. He noted the gap in sexual and gender sensitivity in public spaces giving an example of the availability of washrooms for both male and female while completely disregarding other sexual orientations. He highlighted issues of gender intolerance, stereotyping and issues of gender profiling that has engulfed every sector including learning institutions thereby affecting the freedom and expression of these minority groups. He called on participants to appreciate the LGBTQ issues noting that these issues are as old as man and the best we can do is accommodate each other irrespective of sexual orientation. He concluded by declaring the session officially open.

Preliminaries

There were ten (10) competing teams, five (5) from each of the two participating universities. Each team was made up there (3) participants. Every time was to participate as both an applicant and a respondent in the case that had been shared earlier. Every team was given 15 minutes and it was agreed among the participants that it was at the discretion on the team members to apportion their given time appropriately.

HUMAN RIGHTS MOOT COURT COMPETITION
LEGAL BARRIERS AFFECTING SOGIESC PERSON IN ACCESSING SEXUAL AND
REPRODUCTIVE SERVICES

HYPOTHETICAL CASE:

Before the Supreme Court of Kenya in the case between KP Rights Matter (KPRM)
and The Attorney General of Mateso.

Issues of Determination by the court

- A. Whether or not sections 300,301,302 of criminal code violated the constitution and other international human rights.
- B. Whether or not sec 7 and 8 of cybercrime code violate the constitution and other international human rights law
- C. Whether or not the government of Mateso violated the constitution and other human law by its treatment on Msanifu
- D. Whether or not the government of Mateso violated the constitution and international human law by its treatment on Pakawa.

STATEMENT OF JURISDICTION AND ADMISSIBILITY

Applicants Submissions:

Jurisdiction

The Supreme Court has appellate jurisdiction to hear and determine matters from the court of appeal and any other tribunal prescribed by national legislation. This is expressed in article 163[3] b. In addition the *competence de la competence principle* allows the court to determine its own jurisdiction. Saying that this matters of public importance is a reserve of constitutional court, that is, the High Court is a misconstruction of the powers of the High Court vide article 165.

Legal Standing

The locus before the supreme court of Mateso is governed by article 22[2][b] of the constitution, the court proceedings may be instituted by a person acting as a member of or in the interest of a group or class of persons claiming that a right or fundamental freedom in the Bill of Rights has been violated infringed or is threatened.in the case of N v republic of south Africa [1] 2006[6]SA 543[D],the question of standing should be interpreted broadly in the interest of justice.

Admissibility

The matter herein fulfills the admissibility under Mateso constitution and international instruments of Mateso. The admissibility requirements herein are this appeal be filed at the supreme court of Mateso which has appellate jurisdiction to determine appeals from court of appeal, pleadings herein are subject to admissibility of Mateso jurisdiction.

Respondents Submissions:

Jurisdiction

The respondents submitted that this court lacked jurisdiction on any grounds to hear and determine this matter. They recognized that the issue as to whether a Court of law had jurisdiction to entertain a matter before it, is not one of mere procedural technicality, but rather, a matter that goes to the very heart of the powers of a court for without jurisdiction, the Court cannot entertain any proceedings. They argued that on matters of Appellate Jurisdiction, the appeal had to come from the Court of Appeal or any other tribunals prescribed by legislation and for the appeal to be heard at the court, it had to be for either, a matter involving the interpretation/application of the Constitution, or matters which this court or the CoA certifies as a matter of general public importance. Therefore, the respondents noted with concern that the court had no jurisdiction with regard to the issues before for the following reasons;

- The first and second issues questioned or sort to address the Constitutionality of Acts of parliament (Criminal Code and Cybercrime Code) and therefore, would have better been addressed at the High Court, which has the relevant Jurisdiction, specifically the powers to determine whether any laws are inconsistent with or in contravention of the Constitution.
- The third and fourth issues sort to establish whether the actions of the Government violated the Constitution and the Petitioners rights. Again, both issues would have been best suited for address by the high court which has the specific Jurisdiction to hear and determine matters concerning whether a right or a fundamental freedom has been violated and to answer the question whether anything said to be done under the authority of this constitution is inconsistent with or contrary to the constitution.

The respondents averred that the issue brought forth by KPRM before the Supreme Court did not fall under the scope of the court's jurisdiction and could therefore not be heard and determined to that effect. They submitted that the matters brought before the courts should have been exhausted by the High Court and the Court of Appeal before the petitioners could approach the highest court of the land. It amounts to an insult of the intelligence and capabilities of the inferior courts and the hierarchy of courts.

Admissibility

The team contested the admissibility of the four matters before the Court arguing that Jurisdiction answers the question of "whether a court has the power to hear a case" whereas admissibility answers the question of "whether it is appropriate for the court to hear it". Therefore, the two go hand in hand. The clear outline on why the court did not have requisite Jurisdiction informed the court on the lack of admissibility of the contested matters. The failure by petitioners to exhaust available avenues, which included approaching the High Court first and then Court of Appeal, before proceeding to the highest Court in the land, rendered the matters inadmissible.



**“JURISDICTION IS EVERYTHING.
WITHOUT IT, A COURT HAS NO POWER
TO TAKE ONE MORE STEP”**

Justice Nyarangi

SESSION ONE.

Applicant: TEFL A001K (Kisii University)

Respondent: TEFL R006K (Embu University)

Team Members:

TEFL A001K Kisii University	TEFL R006K Embu University
1. Mark Makomere	1. Sayo Stephanie Esther
2. Jacinter Ogallo	2. Silaha Hamisi
3. Faith Mueni	3. Rodney Amenya

APPLICANTS SUBSTANTIVE ARGUMENTS

A. Whether or not sections 300,301,302 of the criminal code violate the constitution and other international human rights law

- The team submitted that these sections of the criminal code violates the constitution and other international human rights law in 6 various ways, for instance
 - i. Article 259 of the constitution provides for the interpretation of the constitution to be in a manner that promotes its purpose, values and principles.
 - ii. Section 300 which has been widely used as the basis for conviction of persons engaged in consensual same sex relationship is in contravention with article 27.
 - iii. Sub Article 4 provides; states shall not discriminate directly or indirectly against any person on any ground; race, sex, health status, ethnic or social origin etc.
 - iv. Every person in article 27 (1) and also any person in article 27 (4) of the constitution are all persons living in Mateso despite their sexual orientation.
 - v. Section 300 is inconsistent with article 27 of the constitution in failing to accord just and fair treatment to other sexual oriented.
 - vi. In the case of State vs T. Makwanyane and M.Muchunu¹; it was held that the constitution protects human rights of both the minority and the majority. In exercising its constitutional jurisdiction with the regards to the bill of rights the duty of the court is to uphold the constitution and not the popular views of the majority.

B. Whether sections 7 and 8 of Cybercrime Code are in violation of the Constitution and other international human rights treaties.



Figure 5: Jacinter Ogallo - TEFL A001K Kisii University

The team submitted that Section 7 and 8 of Cybercrime code is in violation of the constitution particularly article 31 and 35(3) as the section provides an absolute right or freedom to the Minister in charge of Communication to intercept both external and internal communication there by infringing the right to privacy as provided for under article 31. In the case of *Marbury vs. Madison*, Chief Justice John Marshall observed that the Constitution is: “the fundamental and paramount law of the nation” and that it cannot

be altered by an ordinary act of the legislature. Therefore, “an act of the Legislature repugnant to the Constitution is void... It would be an “absurdity” to require the courts to apply a law that is void. Rather, it is the inherent duty of the courts to interpret and apply the Constitution, and to determine whether there is a conflict between a statute and the Constitution:

C. Whether or not the government of Mateso violated the constitution and other human law by its treatment on Msanifu

The team submitted that the government of Mateso violated the constitution and other international human rights law. Article 19 (3) of the constitution which is a cornerstone of democracy in Mateso, provides that the rights and fundamental freedoms in the Bill of Rights belongs to each individual and are not granted by the state. Forcing of Musanifu and others to obtain samples of STI testing amounted to a serious violation of their right to privacy and dignity respected pursuant to article 28. The medical reports or evidence arising from the forceful medical examination and undertaken at the instance of Musanifu and others are unconstitutional and incapable of being used and/ or relied upon.

D. Whether the government of Mateso violated the Constitution and /or other international human rights law by its treatment of Pakawa

The team submitted that indeed there were serious violations of the constitutional and international violations of Pakawa’s rights by the government of Mateso. His right to privacy as provided for by article 31 was seriously violated by first unlawfully obtaining his confidential information by the Minister of Health from Huruma’s server. Also his name and HIV Status were also entered onto the Ministry of Health’s database and posted on its website. Disclosure of Pakawa’s HIV status amounted to violation of his rights to privacy and confidentiality, both under section 22 of the HIV and AIDS Prevention and Control Act (HAPCA), 2006 and Article 27, 28, 29 & 31 of the Constitution of Mateso. Section 22 of HAPCA provides that (1) No person shall disclose any information concerning the results of HIV test or any related assessments to any other person except with the written consent of that person.

RESPONDENTS SUBSTANTIVE ARGUMENTS

A. Whether or not sections 300,301,302 of criminal code violates the constitution and other international human rights.



“...Morality is not law neither is law morality but the two are so intimately connected with majority if not all laws being based on various moral principles of society.”

Figure 6: Sayo Stephanie Esther - TEFL R006K Embu University

The responded submitted that Article 1 of the Constitution of Mateso stipulates that all sovereign power vests on the people of Mateso and sub article 4 of the same goes ahead to reiterate that the sovereign power of the people is exercised at the national and county level. They based their argument on the fact that the Criminal Code was passed in its entirety by National Assembly which falls under the purview of the exercise of sovereignty of the people and section 300,

being a part of this legislation, was constitutional and thus proving that there was no violation of the Constitution.

B. Whether or not sec 7 and 8 of cybercrime code violate the constitution and other international human rights law

The responded argued that it would be a gross misconstruing of the law if the court were to find the sections in violation of the constitution and International Human Rights because of the following:

1. **Doctrine of Separation of powers:** The functions of the different arms of the government must inevitably overlap and that in modern governance, a strict separation of powers is neither possible or desirable¹
2. **Judicial restraint:** For the law to be passed it has to be procedurally accurate meaning that the law represents the interest and the will of the people.
3. **Limitations of rights in the constitution:** The right to privacy is recognized and respected in the constitution of Mateso as a fundamental right under article 3, but then a question arises whether the right to privacy outweighs national security. A safe and secure nation or society provides room for a pluralist inclusive society encouraging integration and cohesion among its citizens.
4. **Limitations of rights under international instruments:** The African Charter on Human and People’s Rights mandates every citizen of the member state not to compromise the security of the state who’s national or resident he/she is.

¹ Bhim Singh Vs U.OI and 7 others (2010) INSC 358, Council of Governors and 3 others Vs Senate and 53 others (2015) para, 38 eklr’

C. Whether or not the government of Mateso violated the constitution and other human law by its treatment on Msanifu

The Respondents argued that the government of Mateso did not violate the Constitution and other International Human Rights by its treatment of Msanifu. Msanifu made a film based on lived experiences of the KPs through a documentary that anonymised the identities of the participants. However, during the filming and production of the documentary, he ended up violating provisions of the laws of Mateso and attracted several penalties as illustrated below;

1. Msanifu's film contained scenes that were "promoting sexual conduct contrary to the Criminal Code of Mateso". The Criminal Code contains a provision on 'offenses against the order of nature', under section 300, which has been widely used as the basis to convict persons engaged in consensual same-sex relations.
2. The Documentary mainly featured MSM's and sex workers who narrated their lived experiences and it was therefore established by the Film Commission that most of the conduct that was portrayed in the film encouraged and promoted the activities of the subjects of the film. This thus justified the denial of the distribution license to Msanifu.
3. Msanifu's film work and activism had become a national security concern. In particular, Msanifu and the KP's were abetting the transmission of HIV at such an alarming rate that they threatened the state's national security. This therefore attracted the Governments action of seizing copies of the film and interception of all communication by the team in lieu of protection of national interests and security, according protocol and guidelines provided for in sections 7 and 8 of the Cybercrime Code.

D. Whether the government of Mateso violated the Constitution and /or other international human rights law by its treatment of Pakawa

The Respondents argued that the Government of Mateso did not violate the Constitution and/or other international human rights law by its treatment of Pakawa.

1. Based on Pakawa being found to have become infected with gonorrhoea subsequent to being notified that he was positive for HIV, and his refusal to cooperate with the Ministry of Health's investigation of his sexual contacts, the DPP filed criminal charges against Pakawa for engaging in conduct which puts others at risk of HIV infection in violation of section 302 of the Criminal Code.
2. On the matter of Pakawa's testing, the government through the Preventive Health Act, gave the guidelines that; if an individual refuses testing, the MoH may order specimens to be taken for involuntary testing. The individual is also asked to identify his/her sexual contacts. If the individual refuses to cooperate with the disease control investigation, the Ministry of Health can obtain a court order to force cooperation. This is a clear indication that the Governments actions followed all procedural requirements. Therefore, in his protests and refusals to cooperate with the MoH, Pakawa was actively committing the offence of resisting, obstructing and willfully hindering public officers from conducting their duties.

SESSION TWO.

Applicant: TEFL A002K Kisii University

Respondent: TEFL R007K Embu University

Team Members:

TEFL A002K Kisii University	TEFL R007K Embu University
1. Kevin Ondongo	1. Munene Njoroge
2. Miriam Obae	2. Kipkoech Kelvin
3. Donatus Makori	3. Munyua Melody

PETITIONER'S SUBSTANTIVE ARGUMENTS

A. Whether or not sections 300,301,302 of criminal code violates the constitution and other international human rights.

By virtue of one being infected with HIV does not mean that such person's sex drive is benumbed. They should be left to vent their emotional drive. It is unconstitutional to use the section to take away the rights of such individuals. Infringing their right to private life. Criminalization of conduct that exposes others to deliberate contraction of HIV and/or other life-threatening diseases by section 302 of the criminal code of Mateso is similar to the provision of section 2610 of the Sexual offences act

B. Whether or not sec 7 and 8 of cybercrime code violate the constitution and other international human rights law

This section violates the citizen's right to: access information from whichever quarter of the world and right to expression, right to association. The warrant of interception cannot be unlimited. This is subject to abuse. This section violates the right to privacy. It will not be proper to bug or intercept private communications of citizens. The citizenry may have in perpetual fear not knowingly whether their communication or conversation is bugged. The MOHs junior official used an advanced algorithm to harvest Pakawa's information from SuperMed including individuals that had named him as an intimate contact was an overreach of the provisions of article 31 of the constitution and section 3 (c) of the Data protection act. Article 8 of AUCCPDP obligates states to protect personal data and article 9 provides that processing of personal data must be in respect to the data subject's privacy.

PETITIONER'S SUMMARY OF ARGUMENT

Sections 300, 301 and 302 of the criminal code of Mateso are in violation of the constitution's provisions for equality of persons before the law.

Exposing a person's personal information and their HIV status through the ministry of health's database and website is a violation of the right to privacy as provided for in article 31 of the constitution.

The government was in breach of Msanifu's right to access justice as per article 48, right to fair hearing as per article 50 and the rights of arrested people as provided in article 49 and article 1 of ACHPR'.

The Government violated Pakawa's right to access of the highest attainable standards of health as per article 43, right to access of bail as per article 49 (1) (h) and section 123 of the criminal procedure code, his right to access of justice and fair hearing as well as his right to privacy as article 31.

C. Whether or not the government of Mateso violated the constitution and other human law by its treatment on Msanifu

The 2012 constitution of Mateso provides rights to citizens including right to information and right to expression by art, writing and/or speech. The harassment of Msanifu by virtue of him engaging to document the happenings in Mateso country is by itself a violation of his constitutional right. By virtue of being denied a license to express himself by making a film by itself is a violation of his right.



Figure 7: TEFL Miriam Obae - A002K Kisii University

Dismissal of his appeals at the HC and the CA was an overreach of his right to free and fair trial in a public court provided for in article 50 (10) and article 7 of ACHPR and article 6 of ACHPR¹⁶ that provides that each and every person the right to the liberty and protection from arbitrary arrest. The right to fair trial and fair hearing is enshrined in the constitution under article 25 (c).

Subject to article 31¹⁵, each and every person is accorded the right to privacy that includes the right not to have their possessions seized, person, home or property searched or information relating to private affairs revealed unnecessarily required as well as the privacy of one's communications.

Confiscation of the copies of Msanifu's film by the special government unit that went over the raw footage of the film and obtained the identity of the interviewees of the film and the forcibly obtaining of samples for testing was in itself a breach of the right to privacy.

D. Whether the government of Mateso violated the Constitution and /or other international human rights law by its treatment of Pakawa

It is unconstitutional for Pakawa to be denied access to anti-retroviral drugs and the publishing of his status unto a public website, is a violation of his rights. The Government violated its constitutional mandate by breaching Pakawa's right to the highest attainable standards of health as per article 43 (1) (a) and freedom and security of person including the right to not be treated in a cruel, inhuman and degrading manner as Pakawa is denied access to ARVs and gonorrhoea treatment and when his health had deteriorated prison authorities obtained some expired medicine that was administered in a haphazard manner.

RESPONDENTS SUBSTANTIVE ARGUMENTS

It is misleading for the Petitioner to allude that Pakawa and Msanifu were maltreated due to the nature of their sexual orientation. We agree with the three-judge bench in the Kenyan case of *EG v Non-Governmental Organisations Co-ordination Board & 4 others*. The learned judges observed that the law does not criminalize homosexuality or the state of being homosexual, but only certain sexual acts “against the order of nature.”

What is deemed to be criminal under the above provision of the Penal Code is certain sexual conduct “against the order of nature”, it is also our submission that the Government has not violated the Constitution and its International Law obligations concerning the protection of human rights.



Figure 8: Munene Njoroge - TEFL R007K Embu University

A. Whether Sections 300, 301 and 302 of the Criminal Code violate the Constitution and/or other international human rights law

We submit that the sections above of the Criminal Code do not violate the Constitution and international human rights law. 19. The Respondent submits that the Preamble to the Constitution acknowledges the supremacy of the Almighty God, the objective moral law giver. This informed the decision to retain the impugned provisions.

B. Whether Section 7 and 8 of the cybercrime code violate the Constitution and/or other international human rights law

We submit that Mateso has not violated the Constitution or any international law since, Sections 7 and 8 seek to promote national security, public order and detection and prevention of serious crimes for the sake of safeguarding the economic interests of Mateso.

C. Whether the Government of Mateso violated the Constitution and /or other international human rights law by its treatment of Msanifu

We submit that Mateso has not by any culpable means violated Msanifu's freedom of expression which extends to artistic creativity as enshrined under Article 33 of the Constitution. With no doubt, we acknowledge that freedom of expression is not absolute and is one that can be limited by the mere virtue that it does not fall among the rights and freedoms which cannot be limited as per Article 25.

D. The Government of Mateso has not violated the Constitution and/or other international human rights law by its treatment of Pakawa

We submit that we were made aware that Pakawa was allegedly denied access to antiretroviral treatment and treatment for gonorrhoea. Similarly, when his health deteriorated, the prison authorities obtained expired medicine for him which they administered haphazardly. This is deeply saddening and a clear affront to Article 26 of the Bill of rights in the Constitution of Mateso.

SESSION THREE.

Applicant: TEFL A003K (Embu University)

Respondent: TEFL Roo8K (Embu University)

Team Members:

TEFL A003K Embu University	TEFL Roo8K Embu University
1. George Nyanaro Nyambuqa	1. Alganono Kamuyu John
2. Tracy Kawera Kaburu	2. Kanana Kimathi
3. Samson Maroro	3. Mogambi Munene

APPELLANT SUBSTANTIVE ARGUMENTS

A. Sections 300, 301, and 302 of the Criminal Code violated the Constitution and/or other International Human Rights Law.

The interpretational approach has been touted as the requisite canon when construing the statute or the constitution at large. It is the appellant's argument that the section 302 is vague, and marred with linguistic ambiguity. It neither states the scope nor provides specification of the conduct i.e. Act or omission that attracts the sanctions under the Criminal code. Moreover, it mutilates the rule of law and the legality principle that provides a requirement that the body of laws ought to be succinct, clear and over broadly devoid of ambiguity. The appellant submits that the classification of the MSMs' orientation as an unnatural act infringes the international treaties and conventions that Mateso has ratified by virtue of Article 2(6) read Article 2 of the ICCPR

Article 2 of the ICCPR

Each state party to the present covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

B. Section 7 and 8 of the Cybercrime Code violate the Constitution and/or other International human rights law

The Minister of Communications is authorized to apply to a High Court judge for a warrant allowing the interception of internal communications in the interest of national security, public order, and the detection or prevention of serious crimes, or for the purpose of safeguarding Mateso's economic interests, according to Section 7 of the Cybercrime Code. The phraseology "...interest of national security, public order, safeguarding the economic interest" and "interception" under the same Act seem rather contradictory. The contradiction in the wording lies from the essence that interception of communication is an infringement of the right to privacy as contemplated under 31 of the CoM 2010. The citizens' interests come first as encapsulated under Article 1 of the constitution, and sacrificing their rights at the expense of "national interests" seems rather vague, broad and ambiguous devoid of the characteristics of a law that is supposed to be certain.

C. Whether or not the government of Mateso violated the constitution and other human law by its treatment on Msanifu

- 1. Freedom of media:** This freedom is enshrined under article 34 of the constitution. It provides that the media is guaranteed of freedom and independence of electronic print and all other types of media. Msanifu is a filmmaker and a producer whose intent was to document the challenges of KP and raise awareness on the challenges that this population go through. Therefore, by the films board denying him the license to distribute the product even after giving him the license to produce it in the first place was a show of bad faith on the part of the state. The Constitution prohibits the interference of the state on the broadcasting of any content by the state media or independent persons



Figure 9: Tracy Kawera Kaburu - TEFL A003K Embu University

- 2. Freedom of expression:** The freedom of expression is guaranteed to all however the same shall not extend to propaganda for war, incitement of violence, advocacy for hatred or hate speech. Msanifu's film was intended to highlight challenges faced by KP and not to promote any acts that had been prohibited. Moreover, his actions do not fall within the areas exempted as the same does not advocate for hatred or hate speech
- 3. Right to Fair Administrative Action:** The appellant submits that the right to administrative action that is lawful and reasonable was denied by the respective authorities. The films' board denied him the license to distribute his film on the basis that it promoted sexual conduct which in this case is not correct as the film was intended to highlight some of the challenges faced by the KP and not to promote any prohibited act
- 4. Right to human dignity:** The appellant avers that where other fundamental freedoms and rights of a person have been violated, the right to inherent human dignity has also been violated. This was the holding in the case of VMK v CUEA.

D. Whether the government of Mateso violated the Constitution and /or other international human rights law by its treatment of Pakawa

Equality and freedom from discrimination	<ul style="list-style-type: none">•The appellant submits that the respondent violated the rights of Pakawa, a sexual minority living with HIV, on non-discrimination on the basis of sexual orientation and health status.
Right to privacy	<ul style="list-style-type: none">•The respondent obtained and shared information about Pakawas' HIV status without his consent and thus a violation of the HAPCA section 22.
Rights of arrested persons	<ul style="list-style-type: none">•The Courts did not give sufficient reasons as per the Bails and Bond Guidelines, in the continued incarceration of Pakawa whereas the alleged offence is not a serious one that would warrant a denial.
Right to health	<ul style="list-style-type: none">•The respondents' actions of denying Pakawa access to ARV drugs violated the appellant's right to health under the Constitution on the right to the highest attainable standard of health.
Right to human dignity	<ul style="list-style-type: none">•The appellant avers that where other fundamental freedoms and rights of a person have been violated, the right to inherent human dignity has also been violated. This was the holding in the case of VMK v CUEA.

RESPONDENTS SUBSTANTIVE ARGUMENTS

A. Whether Sections 300, 301, 302 of the Criminal Code violate the Constitution and other international human rights law

The Respondent submits that the impugned provisions are constitutional; the Respondent does recognize that the preamble to the Constitution acknowledges the supremacy of the



Figure 10: Kanana Kimathi - TEFL R008K Embu University

almighty God, who is the objective moral lawgiver that this informed the decision to retain the impugned provisions. The Respondent submits that article 45 of the Constitution recognizes marriage as a union of two consenting adults, male and female and that Parliament exercises the legislative function of the state; hence, the Court cannot compel the government to legalize homosexuality by amending the impugned provisions.

B. Section 7 and 8 of the Cybercrime Code violate the Constitution and/ or other International human rights law

SECTION 7 and 8 of the CyberCrime Act are constitutional. The sections of the Cybercrime Act meet the Article 24 analysis test in that:

1. It is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors, including the nature of the right or fundamental freedom;
2. The importance of the purpose of the limitation;
3. The nature and extent of the limitation;
4. 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;
5. The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

C. Whether or not the government of Mateso violated the constitution and other human law by its treatment on Msanifu

We contend that Mateso has not infringed on Msanifu's right to freedom of speech, which includes creative innovation, as guaranteed by Article 33 of the Constitution. Without a doubt, we agree that the right is not absolute and that it can be limited simply because it does not belong under the category of rights and freedoms that cannot be limited. Mateso is a country where individuals still hold strong beliefs about their culture, and eighty percent of people are Christians. Sections 162, 163, and 165 of the Penal Code criminalizes sex between persons of the same gender with between seven to twenty years in jail because it is 3 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Annex (1985). U.N Doc.E/CNA/1985/4. Considered 'against the order of nature.' The film by Msanifu wanted to encourage such behaviors which are against our laws

D. Whether the government of Mateso violated the Constitution and /or other international human rights law by its treatment of Pakawa

The Respondents submit that with respect to the fact sheet, in 2018 an independent think-tank, Social Research Consultants, carried out a study on the prevalence of HIV/AIDS in Mateso. The study showed that there was an alarmingly high rate of HIV transmission among KPs. The respondents thus submit that we had implemented programmes such as sensitizing the society and these communities as such, about the prevalence of HIV and AIDS, as well as highlighting issues related to sexuality and sexual health to address the underlying problems to no avail. It is thus our respectful submission that Pakawa's limitation to the right to privacy was justified to this effect. The Respondent relied on the case **Cortez and Others vs. El Salvador** where the Court held the state had the right, and indeed the duty, to adopt measures to prevent the spread of the virus.

SESSION FOUR.

Applicant: TEFL Aoo4K (Embu University)

Respondent: TEFL RoogK (Kisii University)

Team Members:

TEFL Aoo4K Embu University	TEFL RoogK Kisii University
1. Mburu Nahashon	1. Anemba Emmanuel
2. Joseph Amaganga	2. Emmanuel Adams
3. Sauda Ahmed	3. Mutuko Damaris

APPELLANT SUBSTANTIVE ARGUMENTS

A. Whether Sections 300, 301, 302 of the Criminal Code violate the Constitution and other international human rights law

According to article 2(4) of the constitution, any law that is inconsistent with the constitution is void to the extent of the inconsistency. 6 6 Ibid. Article 27 of the constitution provides for the right to freedom from discrimination.⁷ It uses the word ‘including’ meaning the grounds of discrimination set out are not exhaustive therefore showing that the provision relates to all grounds of discrimination in accordance with article 259. Counsel on behalf of the petitioner contend that sections 300, 301 and 302 of the criminal code are unconstitutional as they violate the rights set out in the Bill of Rights and other international instruments.

B. Section 7 and 8 of the Cybercrime Code violate the Constitution and/ or other International human rights law

Article 31 of the constitution provides for the right to privacy which includes the right not to have the privacy of their communications infringed. Article 24 further provides for the reasonable and justifiable limitation of rights and fundamental freedoms. In R V Oakes, it was stated that the objective which the measures responsible for a limit on a right and fundamental freedom are designed must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. We submit that the provision on continuous interception of private communication in the long term leads to the exposure of private information which if leaked may be detrimental to the dignity of an individual

We further submit that the provisions would interfere with the right to freedom of association and the right to freedom of expression. There is created a fear that associating with some people or self-expression in a certain way would attract interception of any communications. The fear is worsened by the fact that the interception is not disclosed and neither is the period of interception. The fear is therefore over a long period

C. Whether or not the government of Mateso violated the constitution and other human law by its treatment on Msanifu

Counsel on behalf of the petitioner submit that in the treatment of Msanifu the government violated his rights to; freedom of media, fair administrative action, and freedom from degrading treatment. Article 21 of the constitution bestows on the government the duty to ensure the implementation of the rights and fundamental freedoms in the Bill of Rights.



The government violated the rights of Msanifu.

1. Violation of the right to freedom of media.
2. Violation of the right to fair administrative action.
3. Violation of the right to dignity and freedom from degrading treatment

Figure 11: Nahashon Mburu - TEFL A004K Embu University

D. Whether the government of Mateso violated the Constitution and /or other international human rights law by its treatment of Pakawa

We most humbly submit that the government in their treatment of Pakawa violated his rights to highest attainable standard of health, access to justice and right to privacy

- **Violation of the right to the highest attainable standard of health.** The government failed to provide ARVs to Pakawa contrary to the provisions of the laws above. It further provided expired drugs when Pakawa's health began to deteriorate.
- **Violation of the right to access to justice and arrested persons.** The chief magistrate denied Pakawa bail on discriminatory grounds that his work is like a curse in society. This violated his right of arrested persons.
- **Violation of the right to privacy.** The right to privacy is secured to all by article 31 of the constitution. The ICCPR also prohibits arbitrary interference with the right to privacy. The government in disregard of the provisions went ahead to acquire private information on the status of Pakawa without his consent. Furthermore, the government posted Pakawa's HIV status on the Ministry of Health website where it is accessible to the public thereby violating his right to privacy.

RESPONDENTS SUBSTANTIVE ARGUMENTS

A. Whether Sections 300, 301, 302 of the Criminal Code violate the Constitution and other international human rights law



Figure 12: Emmanuel Adams - TEFL R009K Kisii University

Section 300 of the Criminal Code of Mateso provides for offences against order of nature. Section 301 is constitutional as the prohibition of prostitution is for the benefit of our societal moral values. Section 302 is constitutional as it seeks to protect our citizens from the deadly virus, HIV. This is in line with Article 43. As 43 (1) stipulates that every person has a right to the highest attainable standard of health care services, including reproductive health care

B. Section 7 and 8 of the Cybercrime Code violate the Constitution and/ or other International human rights law

We submit before this court that every person has a freedom to expression under our constitution Article 33 but this freedom is not absolute. Sections 7 and 8 of the cybercrime code give the minister of information and communication the authority to intercept all internal and external communications that are considered threat to our national security.

C. Whether or not the government of Mateso violated the constitution and other human law by its treatment on Msanifu

Msanifu`s film was against the law, stipulated under section 300, which is against the order of nature. The government acted rightfully and under the confines of the law when it did not give Msanifu the license to broadcast his films. The limitation of freedom of expression contemplated under article 27(4) is one based on race ,sex , pregnancy, mental status , health status ,ethnic or social origin ,colour, age among others .It is therefore correct to say, that freedom of expression is not absolute but again, it is only subject to limitations contained in the constitution.

D. Whether the government of Mateso violated the Constitution and /or other international human rights law by its treatment of Pakawa

The HIV and AIDS prevention and control act (2006), section 12 provides that, a person who, in the course of his professional practice, knowingly or negligently causes another to be infected with HIV through unsafe or unsanitary practices or procedures contrary to the provisions of this part, or of any guidelines prescribed hereunder, commits an offence.

SESSION FIVE.

Applicant: TEFL A005K (Kisii University)

Respondent: TEFL R010K (Kisii University)

Team Members:

TEFL A005K Kisii University	TEFL R010K Kisii University
1. Roxana Nyachiri	1. Joseph Omari
2. Elijah Chaha	2. Mitchel Hayombe
3. Felix Odera	3. Benjamin Mkapa

APPELLANT SUBSTANTIVE ARGUMENTS

A. Whether Sections 300, 301, 302 of the Criminal Code violate the Constitution and other international human rights law

To substantively argue this matter we must be guided by the 8 principles of Law by Lon Fuller which are;

- (i) Generality
- (ii) Publicity and promulgation
- (iii) Non retroactive laws
- (iv) Clarity
- (v) Non contradictions
- (vi) No laws requiring the impossible
- (vii) Constancy of the law through time
- (viii) Congruence between the official action and the declared rule.



Figure 13 3. Felix Odera - TEFL A005K Kisii University

No system of laws could even govern conduct unless those rules are normally forward looking, mutually consistent and realistically performable by well-being human beings of ordinary virtue. Fuller insists that the 8 Principles are aspirational in the ideas that they represent which we ought to strive toward.

Only when the 8 principles of legality are met to at least some reasonable degree, we can speak of a genuine legal order.

Failure in this regard does not only simply result in a bad system of the law but it result in something that is not properly called a legal system at all. There should exist a kind of reciprocity between the government and the citizen. Respect for the constituted authority

does not mean fidelity to the law. Every departure from the principles of the laws inner morality is an affront to a man's dignity as a responsible agent

B. Section 7 and 8 of the Cybercrime Code violate the Constitution and/ or other International human rights law

The said provisions violate the right to privacy by interfering with an intimate and personal aspect of life that is not harmful to the public interest or public good. The impugned provisions, although at face value, they appear as non-discriminatory. Its effect is discriminatory in that it perpetuates negative stigma against homosexuals.

The sections contain examples of structural stigma i.e. social stigma that is institutional or made into law. Unless deliberate attempt is made by the society; acting through the agency of the law to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality, which is in brief and crude terms, not the laws business, Sir John Wolfended²

C. Whether or not the government of Mateso violated the constitution and other human law by its treatment on Msanifu

Msanifu's conduct of interview was in the best interest of the people because from the research, there were violations against MSMs and sex workers and were unreported due to fear of retaliation which defies the dictates of the constitution under article 10, 27 and 28 as read together with article 19 of UNDHR. There was infringement of freedom of the media when Msanifu and his team acquired prefilming license as required by the law to distribute the research content which was educative on sexuality. Denial of license to distribute the content was against the constitutional freedom of expression under article 33.

D. Whether the government of Mateso violated the Constitution and /or other international human rights law by its treatment of Pakawa

There was violation of article 31 of the constitution when samples were obtained from the applicant forcefully against his odds. Entering personal data onto the web page of Ministry of Health violated the applicant's privacy because the act caused stigmatization due to disclosure of personal health status. WHO recommends that people diagnosed with HIV should be offered and linked ART following diagnosis and periodically monitored to measure the viral load. All PLHIV, whether on ART or not should have access to a set of core interventions known to promote health, improve the quality of life, prevent further HIV transmissions and for some delay the disease progression and prevent mortality. These interventions are simple, relatively inexpensive and widely available and emphasizes on prevention of opportunistic infections and other associated illnesses.

² UK's Committee on Homosexual offences and prostitution (1957)pg 187-188

RESPONDENTS SUBSTANTIVE ARGUMENTS

A. Whether Sections 300, 301, 302 of the Criminal Code violate the Constitution and other international human rights law

According to article 24 of the constitution, a right and fundamental freedom may be limited reasonably and justifiably. We most humbly submit that the provisions of the criminal code are meant to curtail some practices which are unconstitutional and if not curtailed may lead to the violation of rights and fundamental freedoms of others and breach of peace.



“...there will be times when this requires it (the state) to adopt a holistic approach to the larger needs of society rather than focus on the specific needs of particular individuals within society.” ~ Soobramoney v Minister of Health (KwaZulu-Natal)

Figure 14 2. Mitchel Hayombe - TEFL R010K Kisii University

We most humbly submit that

homosexuality is not recognized by the constitution of Mateso due to cultural and moral position. We refute allegations that the law is discriminatory since it applies equally to heterosexuals who engage in coitus outside the order of nature.

The constitution provides for the justified and reasonable limitation of rights. Prostitution is against the morality measures of our society. Furthermore, decriminalization of prostitution endangers the right of the child not to be involved in prostitution which is provided for by the ACRWC. With regard to the transmission of HIV, we submit that it is reasonable and justifiable to require an HIV-positive person to follow the given measures to prevent exposing their partner to the risk of infection.

B. Section 7 and 8 of the Cybercrime Code violate the Constitution and/ or other International human rights law

According to Githunguri V Republic, 16 rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community. We most humbly submit that sections 7 & 8 of the Cybercrime Code are not unconstitutional but rather within the justifiable and reasonable limitation of rights. According to the Cybercrime Convention, each state is mandated to empower its relevant authority with regard to the collection of information in instances of serious offenses through inter alia, legislative measures. We submit that it is in this regard that sections 7 & 8 of the Cybercrime Code were enacted.

C. Whether or not the government of Mateso violated the constitution and other human law by its treatment on Msanifu

Counsel on behalf of the respondent aver that the government did not violate any of Msanifu's rights.

Alleged violation of the right to media. We aver that Msanifu's right to freedom of media was not violated but rather limited. We further aver that the limitation was justifiable and reasonable.

Alleged violation of the right to fair administrative action. We aver that the government in both decisions acted in the borders of the law. In *JSC V Mbalu Mutava & another*, it was stated that the right to fair administrative action can be limited in accordance with the law.

Alleged violation of the right to dignity and fair treatment. We aver that the government acted purely within the law. There exists a law in Mateso to the effect that where an individual refuses to submit to testing, the ministry of health may order specimens to be taken involuntarily. In *Susan Wambui Kaguru & others V A.G and another*³, it was stated that every statute passed by the legislature enjoys a presumption of legality and it is the duty of every citizen to obey the laws.

D. Whether the government of Mateso violated the Constitution and /or other international human rights law by its treatment of Pakawa

In *Githunguri v Republic* (supra), it was stated that rights cannot be absolute and that they must be balanced against other rights and freedoms and general welfare of the community. We submit that the government did not violate any of Pakawa's rights.

- 1. Alleged violation of the right to the highest attainable standard of health.** We submit that the realization of this right is subject to the availability of resources in accordance with article 20 of the constitution.
- 2. Alleged violation of the right to privacy.** The law mandates the government to ensure the full realization of the right to the highest attainable standard of health. This right is broad requiring inter alia, preventive measures. We submit that the interference with the right to privacy of Pakawa was in realization of the right to the highest attainable standard of health.
- 3. Violation of the right to access to justice and arrested person.** We contend that the right to access of justice was not violated but rather limited due to failure to comply with due process. The court is very keen and gives a lot of importance to procedure to avoid the miscarriage of justice. On the issue of bail, we contend that it would have been inappropriate to grant bail given the gravitas of the matter to the public.

³ (2012) eKLR.

FINAL SESSION.

Applicant: TEFL A010K (Kisii University)

Respondent: TEFL A004K (Embu University)

Team Members:

TEFL A010K Kisii University	TEFL Roo4K Embu University
1. Joseph Omari	1. Mburu Nahashon
2. Mitchel Hayombe	2. Joseph Amaganga
3. Benjamin Mkapa	3. Sauda Ahmed

APPELLANT SUBSTANTIVE ARGUMENTS

A. Whether Sections 300, 301, 302 of the Criminal Code violate the Constitution and other international human rights law

According to article 2(4) of the constitution, any law that is inconsistent with the constitution is void to the extent of the inconsistency. Article 27 of the constitution provides for the right to freedom from discrimination. It uses the word ‘including’ meaning the grounds of discrimination set out are not exhaustive therefore showing that the provision relates to all grounds of discrimination in accordance with article 259. Counsel on behalf of the petitioner contend that sections 300, 301 and 302 of the criminal code are unconstitutional as they violate the rights set out in the Bill of Rights and other international instruments.

B. Section 7 and 8 of the Cybercrime Code violate the Constitution and/ or other International human rights law



Figure 15 1. Joseph Omari - TEFL A010K Kisii University

Counsel on behalf of the petitioner submit that sections 7 & 8 of the Cybercrime Code violate the constitution and other international laws as they form the basis for the violation of various rights provided for in the constitution and other laws. Article 31 of the constitution provides for the right to privacy which includes the right not to have the privacy of their communications infringed. Article 24 further provides for the reasonable and justifiable limitation of rights and fundamental freedoms. We submit that

the provision on continuous interception of private communication in the long term leads to the exposure of private information which if leaked may be detrimental to the dignity of an individual.

C. Whether or not the government of Mateso violated the constitution and other human law by its treatment on Msanifu

Counsel on behalf of the petitioner humbly submit that the government by its treatment of Msanifu, upset, undermined and violated various human rights set out in the constitution and other international laws, therefore violating the instruments themselves.

Violation of the right to freedom of media. The right to freedom of the media is provided for in article 34 of the constitution. We submit that the film was not meant to promote the said sexual conduct but rather to create awareness on the rights of KPs and the violation of this right.

Violation of the right to fair administrative action. Contrary to article 47 of the Constitution, the government ordered the seizure of all copies of Msanifu's film and interception of his communication without giving him a chance to explain his intention and seek review on the government's decision, thereby violating his right to fair administrative action

Violation of the right to dignity and freedom from degrading treatment. The right to dignity is provided for in article 28 of the constitution. The ICCPR and ACHPR provide for the freedom from degrading treatment including medical experimentation without consent⁴. Msanifu was subjected to forceful HIV testing thereby violating his right.

D. Whether the government of Mateso violated the Constitution and /or other international human rights law by its treatment of Pakawa

Counsel on behalf of the petitioner humbly submit that the government by its treatment of Pakawa; upset, undermined and violated various human rights set out in the constitution and other international laws, therefore violating the instruments themselves.

Violation of the right to the highest attainable standard of health. Article 43 of the constitution provides that everyone has the right to the highest attainable standard of health. The right is further provided for in the ICCPR. The government failed to provide ARVs to Pakawa contrary to the provisions of the laws above.

Violation of the right to access to justice and arrested persons. The chief magistrate denied Pakawa bail on discriminatory grounds that his work is like a curse in society. This violated his right of arrested persons. Pakawa's appeal to the COA was dismissed merely because he had failed to attach the chief magistrates ruling. This is contrary to article 259 relating to the regard to procedural technicalities.

Violation of the right to privacy. The government in disregarded the provisions article 31 of the constitution and ICCPR went ahead to acquire and publicise private information on the status of Pakawa without his consent.

⁴ Article 7 of the ICCPR and article 5 of the ACHPR.

RESPONDENTS SUBSTANTIVE ARGUMENTS

A. Whether Sections 300, 301, 302 of the Criminal Code violate the Constitution and other international human rights law

Counsel on behalf of the AG (hereinafter respondent) most humbly submit that sections 300, 301 and 302 are constitutional and only seek to limit the enjoyment of certain rights in accordance with the constitution and international laws.

Limitation of homosexual practices.

The ACHPR mandates the country to ensure the protection of the cultural practices and morality of Africans. It further allows the limitation of rights where they are in contravention of the morals of society. We refute allegations that the law is discriminatory since it applies equally to heterosexuals who engage in coitus outside the order of nature.



Figure 162. Joseph Amaganga - TEFL R004K Embu University

Prevention of intentional transmission of HIV. The constitution also mandates the state to take all measures necessary to ensure the realization of social rights which include the right to the highest attainable standard of health. In *Federation of Women Lawyers of Kenya & others V A.G and another*, it was noted that the legislature does not act in a vacuum but will always respond to a situation in which they and the court are very cognizant. We, therefore, submit that each legislation is meant to remedy certain mischief in society. That is why there exists a presumption of the constitutional validity of legislation until the contrary is proved by the person challenging the constitutionality. This was stated in *Nyanabo v A.G.*

B. Section 7 and 8 of the Cybercrime Code violate the Constitution and/ or other International human rights law

Counsel on behalf of the AG most humbly submit that sections 7 and 8 are constitutional and only seek to reasonably limit the enjoyment of certain rights in accordance with the constitution and international laws. According to the Cybercrime Convention, each state is mandated to empower its relevant authority with regard to the collection of information in instances of serious offenses through inter alia, legislative measures. We submit that it is in this regard that sections 7 & 8 of the Cybercrime Code were enacted

C. Whether or not the government of Mateso violated the constitution and other human law by its treatment on Msanifu

Counsel on behalf of the respondent most humbly submits that the treatment of Msanifu by the government was constitutional and only went as far as the reasonable and justifiable limitation of his rights and fundamental freedoms.

Alleged violation of the right to media. The press are tasked to exercise their right cautiously failure to which it would be limited. We submit that Msanifu failed to exercise responsibility in the production of his film therefore warranting limitation for the benefit of society.

Alleged violation of the right to fair administrative action. We submit that Msanifu was reasonably in accordance with the law informed of the reason why he was denied a license for the distribution of his film. He, however, in disregard of the law asked local and international media houses to highlight the violation of KPs rights.

Alleged violation of the right to dignity and fair treatment. We aver that the government acted purely within the law. There exists a law in Mateso to the effect that where an individual refuses to submit to testing, the ministry of health may order specimens to be taken involuntarily.

D. Whether the government of Mateso violated the Constitution and /or other international human rights law by its treatment of Pakawa

Counsel on behalf of the respondent most humbly submits that the treatment of Pakawa by the government was constitutional and only went as far as the reasonable and justifiable limitation of his rights and fundamental freedoms.

Alleged violation of the right to the highest attainable standard of health. In *Rashid Odhiambo Allogoh and 254 others V Haco Industries LTD*, 27 it was that; that which is alleged must be proved and that anyone who alleges that his/ her rights have been infringed must clearly support with facts and instances. We therefore in absence of facts proving as the court to find no violation of right.

Alleged violation of the right to privacy. In *Cortez and others V El Salvador*⁵, the court recognized the role of the government in preventing the spread of HIV. We contend that by disclosing the status of an individual, the government will encourage those who engage in coitus to exercise a certain level of care.

Violation of the right to access to justice and arrested person. After his arrest, there was public knowledge on the sexual orientation of Pakawa and the reason for his arrest, his release on bail terms could have angered the public to take action into their own hands. In *Republic v John Kahindi Karisa & 2 others*⁶, it was stated that the right to bail could be limited due to compelling reasons. We contend that the reason was compelling.

⁵ Case 12. 249 20th March 2009

⁶ [2010] eKLR

AWARD SESSION

Best Memorial

Team TEFL004K from Embu University was won the Best Memorial Award with 81%. The second position went to Team TEFL007K with 75% and the third position went to Team TEFL003K with 73.5% all from Embu University. The awards were presented by Mr. Odongo Peter.



Figure 17: Best Memorial - TEFL004K, Embu University

Best Female Oralists

Kanana Kimathi of Embu University won the Best Female Oralist Award with 85%. Mitchel Christine Hayombe from Kisii University was second with 82.5% and the final position went to Tracy Kawera from Embu University who scored 81%. The awards were presented by Dr. Charles Mutui.



Figure 18: Best Female Oralist - Kanana Kimathi, Embu University

Best Male Oralists

In the male category, Munene Njoroge from Embu University emerged the best oralist with 86%. Elijah Chacha from Kisii University was second with 85% and Mugambi Munene from Embu University came in third with 84%. The awards were presented by Mr. George Onyango.



Figure 19: Best Male Oralist - Munene Njoroge, Embu University

Best Team

Team TEFL010K from Kisii University was awarded the best team with 86.5%. Team TEFL004K from Embu University was second with 83.2% while Team TEFL005K from Kisii University was third with 80%. The awards were presented by Dr. Victoria Miyandazi.



Figure 20: Best Team - TEFL K, Kisii University

CLOSING REMARKS

The judges appreciated the participants and encouraged them to keep working hard. They encouraged those who didn't make it to the finals, telling them to remember that there is always another time. Everybody did well but like in any competition, there has to be a winner. They further



Figure 21: Team of Judges at the Moot Court Competition

observed that listening to the students' presentations, one would almost think that they were listening to seasoned lawyers. The submissions were interesting and gave a good learning experience. Dr. Mutui noted that the two institutions presented very intelligent students. He said that their level of intelligence and grasp of legal matters was very high. With this kind of advanced reasoning based on the arguments presented.

Key Take Homes:

- ✓ Intersex is such a broad spectrum that consists of 47 variations
- ✓ Even though the presented case of Msanifu Vs Mateso was hypothetical, there are people to whom that is their daily reality.
- ✓ It is unfortunate that in some African cultures to date, children born as intersex are killed by traditional birth attendants as many communities have not yet embraced the issue of SOGIESC. Therefore, as future defenders of human rights, it is important that law students embrace SOGIESC issues as they continue to advocate for their rights.

Memorable Quotes.

- ❖ “Sexual Autonomy is an important pillar and as in segregable facet of individual liberty” – Elijah Chacha of Team TEFL005K Kisii University, quoting the Chief Justice of India, Justice Dipak Misra in *Navtej Singh Johar & Ors v. Union of India*, September 6th 2018.
- ❖ “...According to Nelson Mandela, a paragon and epitome of humility, dignity, sagacity and tolerance, in response to some divergent views that homosexuality was un-African. He stated that homosexuality was just another form of sexuality that had been suppressed for years. It was something we were living with”. – Elijah Chacha of Team TEFL005K Kisii University, while referring to the ruling by the Botswana High court in *Letsweletse Motshidiemang v Attorney General*, June 11th 2019.
- ❖ “Success is when preparation meets opportunity”. – Dr. Victoria Embu University, stating Hilary Hinton's (Zig Ziglar) quote.