



Photo: NGLHRC

CHALLENGING THE CONSTITUTIONALITY OF FORCED ANAL EXAMINATIONS IN KENYA

This case study was conducted by the National Gay and Lesbian Human Rights Commission (NGLHRC) of Kenya, a Bridging the Gaps partner. Founded in 2012, NGLHRC is a team of dedicated lawyers and justice defenders that engage in strategic litigation to ensure that the protections contained within Kenya's 2010 Constitution are respected for all citizens, regardless of their sexual orientation and gender identity. NGLHRC also runs a legal aid clinic, which provides legal services to the LGBTIQ+ community and documents rights violations.

COC Netherlands, a member of the Bridging the Gaps Alliance, provides both institutional and advocacy support to NGLHRC.

Background

In February 2015, two men at a bar in Kwale County were arrested and escorted to the police station, where they were detained and interrogated for four days before being subjected to forced anal exams and HIV and Hepatitis B tests to prove that they were practicing 'unnatural sex'. The two men were forced to sign consent forms for the exams to be undertaken and the tests were conducted in the presence of police. This was not an isolated incident, and a significant number of gay men/transgender persons and sex workers

FACTS AND FIGURES

- Kenya has a high HIV prevalence rate, with 1.6 million people living with HIV and prevalence amongst adults at 5.4%.
- According to a 2014 study amongst MSMs (men who have sex with men) in Kisumu, over 60% of participants were not comfortable seeking health services from a public hospital due to stigma around being gay or transgender.

have similarly experienced forced anal examinations. In 2015 alone, 400 people were arrested in the city of Kisii and subjected to **forced medical examinations**, yet many LGBTIQ persons that experienced forced anal testing did not report it. These practices cause severe injuries to the dignity and self-worth of many LGBTIQ persons, and perpetuate stigma against LGBTIQ persons.

Having analysed the impact of these exams on the LGBTIQ+ community, NGLHRC saw the value of **pursuing the case in the public interest**. In seeking a judgment that would set a precedent

Bridging the Gaps is an international HIV programme with a focus on the health and rights for LGBT people, sex workers and people who use drugs, currently operating in fifteen countries. For more information on the programme, visit www.hivgaps.org.

BRIDGING THE GAPS
Health and rights  for key populations

on the unconstitutional nature of the exams, the practice would be ended and protections for the LGBTIQ+ community expanded. NGLHRC therefore petitioned the High Court on the grounds that the treatment of the two men constituted **cruel, inhumane and degrading treatment**, in violation of Article 24 of the Kenyan Constitution and the United Nations Convention against Torture, as well as a breach of medical ethics.

In June 2016, the Kenya High Court of Mombasa ruled that the forced testing constituted a legitimate means of collecting police evidence to prove that individuals had engaged in homosexual sex, a crime in Kenya. NGLHRC **appealed this verdict**, and strategized on ways forward, with the awareness that both rallying the LGBTIQ community and engaging the public in conversations on human rights and equality of all individuals would be essential.

An **online petition** was launched, calling upon the director of public prosecutions to put an end to forced anal examinations, which provided a platform to engage with both the LGBTIQ+ community and the wider public to increase knowledge and awareness. A **Litigation Collective** was established, where other LGBTIQ organisations could learn about NGLHRC's strategic litigation, provide suggestions on how to increase the chances of success, and possibly join forces. **Educational pamphlets** on forced anal examinations and how they relate to the law and to human rights were created and disseminated, while a **Litigation Exhibit** used art to illustrate the impact of homophobic laws on the lived realities of LGBTIQ persons in Kenya. NGLHRC also worked with a few key **allies**. Human Rights Watch provided valuable background information on forced anal examinations and on the regional context. The Kenya National Commission on Human Rights joined the litigation as amicus to the case, therefore making the case a general human rights issue. And finally, and critically, a partnership was established with **Kenya Medical Association (KMA)**, which works to improve the welfare of doctors in the country and advocates for quality healthcare for all Kenyans. In September 2017, the KMA issued a resolution banning the practice, on the basis that the tests have no scientific or medical utility. Health practitioners were then trained to use the authority of the KMA resolution to refuse to conduct examinations when coerced by police.

Finally, on 22nd March 2018, the appeal was heard and the High Court ruling **was overturned**. The KMA resolution was key in demonstrating the unlawful nature of the exams.

“Justice works!”

Despite the lengthy process of litigation and the initial setback of the first court ruling, it was necessary to persevere to ensure **respect for the rule of law**. This case was critical for sexual and gender minorities to experience equality in Kenya. NGLHRC found that it was important not to give up, but to build **resilient advocacy movements** around litigation. It is also important to also look at the value of a ruling for other countries, where judicial precedent can be relied on when litigating the same human rights issues. In addition, even a loss in strategic litigation can have its positive side, as an unfavourable judgment can become a powerful advocacy tool.

RESULTS

- Banning forced examinations by declaring them unconstitutional has been crucial in on-going efforts to **create a safe and non-discriminatory environment** for the Kenyan LGBTIQ community to fully realise their sexual and reproductive health rights.
- The litigation has also resulted in **increased visibility** of the LGBTIQ community and more partnerships between different LGBTIQ organisations.
- The case has underlined the continued **need to sensitise health care practitioners** and, as a result, NGLHRC is conducting training in several towns in Kenya. The organisation also plans to conduct extensive monitoring in the coming two years, via community consultations, to observe whether the judgment will be implemented.

RECOMMENDATIONS

- **Find strong allies:** Engaging with the Kenya Medical Association, Human Rights Watch and the Kenya National Commission on Human Rights were critical. In particular, partnering with the medical community and the key medical authority helped to strengthen the case and build legitimacy.
- **Document violations:** This case underlined the importance of documenting and responding to rights violations in order to hold the government and other institutions accountable. Such data can also be used to in shadow reporting, such as the Universal Periodic Review process or, like HGLHRC, with the treaty mechanisms such as the Committee on the Elimination of Discrimination against Women (CEDAW).
- **Engage the public and the community:** Litigation must be complemented by efforts to sensitise and educate the public, as well as steps to engage the LGBTIQ community to assess their needs and build their support. It is important for organisations to be visible to their constituents.

