

**INTERROGATION OF LEGALITY DEBATE AND THE HUMAN  
RIGHTS QUESTION ON HOMOSEXUALITY IN KENYA**

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**DECLARATION**

This research project is my original work and has not been presented for a degree in this or any other university.

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## **DEDICATION**

I dedicate this project to my late grandmother Ruth Kirui, who inspired me to pursue Post Graduate education. Her belief in education, and gaining knowledge for self-development and betterment has motivated me to expand my limits in pursuit of my goals, objectives and potential.

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## Table of Contents

<b>DECLARATION.....</b>	<b>ii</b>
<b>DEDICATION.....</b>	<b>iii</b>
<b>ACKNOWLEDGEMENT.....</b>	<b>iv</b>
<b>ACRONYMS AND ABBREVIATIONS.....</b>	<b>viii</b>
<b>ABSTRACT.....</b>	<b>ix</b>
<b>CHAPTER ONE: INTRODUCTION.....</b>	<b>1</b>
1.1: Background of the study .....	1
1.2: Problem statement .....	4
1.3: Research objectives .....	6
1.4: Research questions.....	6
1.5: Justification .....	7
1.7: Scope and limitation .....	8
1.8: Operational definition of terms.....	9
<b>CHAPTER TWO: LITERATURE REVIEW AND THEORETICAL FRAMEWORK .....</b>	<b>11</b>
2.1: Introduction .....	11
2.2: History of Homosexuality .....	11
2.3: Human rights violations and legal gaps contributing towards LGBT discrimination in Kenya	12
2.4: United Nations fight against discrimination based on sexual orientation .....	14
2.5: The attitudinal evolution towards LGBT agenda and persons .....	16
2.6: South Africa’s journey towards acceptance and recognition of the LGBT community .....	18
2.7: Homophobia and discrimination against LGBT persons .....	19
2.8: Physical and verbal abuse against LGBT persons .....	20
2.9: Health care and social challenges facing LGBT persons .....	22
2.10: LGBT persons socially discriminated.....	26
2.11: Kenya religious stance on homosexuality .....	27
2.12: The Vatican and Pope Francis’s rejection of same-sex unions .....	29
2.13: Homosexuality in Kenya high schools.....	31
2.14: KFCB’s sustained opposition to homosexual content .....	32
2.15: Social media and internet as an avenue for LGBT persons’ communication.....	33
2.16: Kenya high court ruling on anti-gay law.....	34
2.17: Gradual transformation in cinema and media representation of homosexuality .....	35
2.18: Findings of previous study on media representation of homosexuality and its implications ..	37

2.19: Kenya media’s place and role in the LGBT agenda .....	39
2.20: Self-confessed gay gets asylum in Canada after fleeing Kenya due to life threats.....	39
2.21: Global media’s support for LGBT rights and agenda.....	40
2.22: Wanuri Kahiu’s contribution towards acknowledgement of LGBT persons .....	41
2.23: Diplomatic intervention: Canada’s support for Rafiki film and call for recognition of homosexual rights.....	42
2.24: United States reiterates its resolve to embracing LGBT community in its social equality agenda.....	42
2.25: Uproar around Rafiki film and the conversation on legalizing homosexuality as a human rights .....	44
2.26: Theoretical framework.....	45
2.26.1: Intergroup contact theory.....	45
2.26.2: Cultural Imperialism Theory .....	46
2.26.3: Queer Theory .....	48
<b>CHAPTER THREE: RESEARCH METHODOLOGY.....</b>	<b>50</b>
3.1: Introduction .....	50
3.2: Study design.....	50
3.3: Study approach.....	50
3.4: Study Location .....	50
3.5: Target population and sampling .....	51
3.6: Sample size determination .....	51
3.7: Validity and Reliability.....	51
3.8: Data collection instrument and technique .....	52
3.9: Data analysis and presentation .....	53
3.10: Ethical consideration.....	53
<b>CHAPTER FOUR: DATA PRESENTATION, ANALYSIS AND INTERPRETATION .....</b>	<b>54</b>
4.1: Introduction .....	54
4.2: Role played by the Kenya media in the LGBT discourse and its implications .....	54
4.3: NGLHRC lauds Kenya media’s role in LGBT discourse .....	59
4.4: Implications of the legal contradiction between Kenya constitution and the penal codes sections 162-165.....	60
4.5: Implications of existing homosexuality policies on the LGBT community.....	62
4.6: The Church’s position on LGBT discourse in Kenya.....	65
4.7: The human rights question on homosexuality in Kenya; and the positives drawn from the legal pursuits for LGBT rights to be consolidated as part of human rights.....	69
<b>CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS .....</b>	<b>71</b>

5.1: Introduction .....	71
5.2: Britain’s gradual repeal of its anti-LGBT laws in comparison to Kenya’s reluctance to embrace LGBT rights .....	71
5.3: Recommendations .....	73
5.4: Suggestions for further studies .....	75
<b>REFERENCES.....</b>	<b>76</b>
<b>APPENDIXES .....</b>	<b>81</b>
APPENDIX 1: INFORMED CONSENT .....	81
APPENDIX 2: KEY INFORMANT INTERVIEW .....	83
KEY INFORMANT INTERVIEW ONE .....	83
KEY INFORMANT INTERVIEW TWO.....	85
KEY INFORMANT INTERVIEW THREE.....	87

## **ACRONYMS AND ABBREVIATIONS**

ACK- Anglican Church of Kenya

BBC- British Broadcasting Corporation

CSCHRCL- Civil Society Coalition on Human Rights and Constitutional Law

FGD- Focused Group Discussion

GALCK- Gay and Lesbian Coalition of Kenya

IGLA- International Gay and Lesbian Association

KEMRI- Kenya Medical Research Institute

KFCB- Kenya Films Classification Board

KHRC- Kenya Human Rights Commission

KNEC- Kenya National Examinations Council

LGBT- Lesbians Gays Bisexual Transgender

MSM- Men having sex with Men

NGLHRC- National Gay and Lesbian Human Rights Commission

TEA- Transgender Education Advocacy

UDHR- Universal Declaration of Human Rights

UNHRC- United Nations Human Rights Commission



## **ABSTRACT**

This study sought to extensively interrogate the legality debate, existing policies, and human rights question in respect to homosexuality. By extension this study also examined the church's position on the LGBT discourse in Kenya. In recent years Kenya has witnessed spirited agitation for recognition and acknowledgment of the LGBT persons, orchestrated by the Lesbian, Gay, Bisexual and Transgender (LGBT) community. This quest has also been boosted by the pro-LGBT human rights activists and organizations, which have been pushing for homosexuality to be considered as a component of human rights. In Kenya LGBT persons still face oppression, stigma and rejection within our conservative societies despite their wish to be accepted as a sexual minority. There are documented homophobic incidents of sexual and physical assaults meted out on the LGBT persons. There is also the pressure on Kenya from the West particularly countries that have legalised homosexuality. The NGO agenda in filmmaking in Kenya has been attributed to Rafiki film. Dr Ezekiel Mutua former KFCB CEO strongly perceived Rafiki film as a Western tool used to sell and popularise homosexuality agenda in Kenya. The ban of Rafiki film raised concerns and uproar on violation of freedom of expression. The ban led to a legal suit pitting the film's director Wanuri Kahiu and KFCB. The intriguing reality was the Penal Code Section 162-165 in Kenya seemed to have been contradicting the provisions of the Kenya Constitution 2010, Article 27 which provides extensive protection from discrimination of any nature. This study keenly interrogated this unlikely scenario. From the findings of the study, the policies against homosexuality in Kenya are still discriminative to the LGBT community and deprives them of even the freedom of expression. There is still a stark disparity between the provisions of the constitution and the penal code sections 162-265. The Kenya media has played a huge role in enhancing visibility of the LGBT community and their agenda, by according considerable airtime and salience to LGBT discourse in Kenya. The church is still reluctant to accepting homosexuality but welcomes LGBT members to worship. Desk study was used to collect secondary data and key informant interviews were used to collect primary data. The data was analysed through content analysis and presented in prose form.

## **CHAPTER ONE: INTRODUCTION**

### **1.1: Background of the study**

Sexuality in Africa has often been shaped and informed by religious systems (Mutua, 2011). Such systems of religion often include codes, rules and regulations for accepted moral behaviour which also includes sexual behaviour. In 2014, a study done in 79 countries confirmed that there were differences in the levels of acceptance towards homosexuals among the religious and non-religious people (Journal of Homosexuality, 2015).

In Africa there is also the aspect of multifaceted religious landscape which involves belief systems often referred to as traditional or ancestral belief system (Epprecht, 2013). Male-to-male sexual acts were thought to have medical effect in some traditional societies. Homosexual acts were perceived as a remedy for impotence, and to improve soil fertility or improve political and economic ambitions (Epprecht, 2013).

Sexual diversity in a social context, is the acceptance of difference but with equal rights, opportunities and liberties within the human rights framework (Davis, 2015). Fundamental human rights and freedoms include, but are limited to, the rights of sexual minorities to respect and dignity, non-discrimination, equality, participation, life, self-determination and access to health services (Johnson, Jackson, and Herdt, 2000).

Even though there have been spirited efforts towards accommodating gender and sexual minorities, sexual minorities are still marginalised, excluded and discriminated on in many societies in the world (Amnesty-International, 2007).

Across the world homophobia is now a serious concern as many people are subjected to human rights violations because of their perceived sexual orientation and gender identity (UNHRC,

Discrimination and Violence against Individuals Based on their Sexual Orientation and Gender identity, 2016).

In many African countries, homosexuality is still perceived to be bizarre and outright violation of nature and human order. Uganda is currently one of the African countries that have one of the harshest legalisations against LGBT individuals known as Uganda's 2009 Anti-Homosexuality Bill. There have been arguments that prior to colonisation, there were no legislations regarding homosexual activity because there was lack of Africans practising the same (Boyd, 2013).

Crusaders of gay rights in Africa have often been perceived to be homosexuals too. This has resultantly discouraged helpful professionals from helping gay community, due to fear of losing credibility in the society. This complicates matters for the gender and sexual minorities to enjoy their human rights as well as developing their potential (Herek, 2014). The stigma, prejudice and discrimination justified by religious beliefs, discourages most helpful professionals in Africa as such they are not in any position to help gay people and this scares away potential LGBT rights activists (Mabvurira, Motsi, Masuka, and Chigondo, 2012).

Homophobic attitude and declarations against homosexuals by some African leaders have made it hard for LGBT community to exist harmoniously in their society. The late Robert Mugabe former President of Zimbabwe called homosexuals 'worse than dogs and pigs', 'gangsters' and 'an abomination', a 'rotten culture' (GALS, 2008). In Namibia the Minister of Home Affairs urged the police recruits to arrest on sight gays and lesbians and to eliminate them from the face of Namibia (GALS, 2008).

There have been theories and propositions that have attempted to define the variety of same-sex behaviours around the world, in various cultures, across time and in many animal species (Muriithi, 2006). Attraction to persons of their own sex in homosexual cases is hard-wired into

their brains. For others, family socialization or traumatic sexual experience (like rape) at young age can influence and affect their long-term sexual preference (Gavrilets and Rice, 2006).

Transgender people are often subjected to violence in order to punish them for transgressing gender barriers or for challenging predominant conceptions of gender roles (Vanderbeck, 2014). Violations directed against lesbians because of their sexual acts are often inseparable from violations directed against them due to their sexual orientation (Genrety, 1987). In Zimbabwe a lesbian was subjected to multiple rapes organised by her own family in an attempt to 'cure' her from homosexuality (Sokoloff and Dupont, 2005).

In a region like East Africa where state agents themselves are the main human rights violators of LGBT persons, maintaining discriminatory laws undermine efforts to reduce inequality, whether by legal or any other way (Njagi, 2011). Discriminative laws and homophobia they bring forth is evident in a variety of ways. While research has shown that providing condoms in prisons is crucial in preventing spread of HIV Kenya doesn't do so. This is simply because this is thought to encourage homosexual behaviours in the prisons (Kinyili, Uhai 2012 Annual Report, 2013).

The United Nations Human Rights Committee (UNHRC) in May 2010 concluded a Universal Periodic Review of the human rights situation in Kenya. In the review regarding same-sex relationships, Kenya admitted that; there had been serious intolerance due to overwhelming opposition and cultural beliefs to the decriminalization of such relationships as observed during the constitutional review process (UNHRC, Eight Universal Periodic Review, 2010). Unfortunately, the Kenyan Government did not support discrimination in terms of access to services.

## **1.2: Problem statement**

Kenya is one of the countries in Africa that has criminalized homosexuality. There is a severe Penal Code, Sections 162-165 to punish those found guilty of homosexual conduct. The Western countries such as UK and US have been calling on Kenya to amend their laws to accommodate the LGBT persons, so that they can fully enjoy their human rights and freedoms.

This continued criminalisation of homosexuality has immensely affected the LGBT persons in all aspects of their lives. Condemnation of LGBT persons in Kenya has been viewed as a violation of human rights.

In the Kenya Constitution 2010 Chapter 4, The Bill of Rights; Article 27 has clearly outlined equality and freedom from discrimination.

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

In the above-mentioned Article 27 (4), the constitution is clear on protection from discrimination on grounds of sex. Whereas criminalization of homosexuality falls under this, the Penal Code seems to contradict the constitution. It is on this ground that LGBT organizations and persons are agitating for the dropping of anti-homosexuality laws. The

LGBT organizations in Kenya have been trying to seek legitimization of homosexuality constitutionally, in the spirit of it being a human rights that shouldn't be denied by anyone.

Stigma, isolation, physical and verbal abuse are some of challenges LGBT persons face in Kenya. They also have to contend with discrimination when seeking health services. The ill-treatment of LGBT persons also denies them the opportunity to enjoy their rights.

This study was quite timely as it interrogated the legal contradictions between the constitution, and the Penal Code Section 162-165. Policy makers in Kenya have often alienated the LGBT community in Kenya through discriminative and punitive policies, a move which has only fuelled homophobic tendencies against them. There is also the question of whether gay rights are human rights in Kenya. This debate often elicits mixed reactions in the social, legal and religious spaces. In recent days there have been calls for discriminative laws on the grounds of sexual orientation to be dropped. Human rights activists have also been in the frontline calling for the recognition of LGBT persons under the sexual diversity banner.

The position of the church in the LGBT discourse will be examined in the study. This is because the religion has a great national influence on sex-related practices particularly sexual relationships and marriage. A move that was perceived to be a blow to the LGBT agenda was the banning of the Rafiki film on the ground that it was glorifying lesbianism. It got global attention and triggered intense social debate locally. The film was screened at Cannes Film Festival and it became Kenya's first film ever to be screened at the festival. Whereas the Western countries such as France lauded the film it was banned in its home county which was a great irony indeed. The ban was perceived as a claw-back on the gains achieved over time on rights and freedoms of expression. By extension the ban not only denied the director her creative right of expression but also denied the Kenyan adult audience their right to access the film seeing that it was adult-rated after all. The ban was a blatant curtailment of filmmaking-

which is a reflection of the social realities. Additionally our policy makers are still hesitant to confront the ‘uncomfortable’ social realities in Kenya. There is also the aspect of media role in the LGBT discourse in Kenya, and how this is shaping the conversations around LGBT community and agenda

The aspect of human rights is also a crucial aspect of this study. With the violations of the rights of the LGBT members going on in Kenya, does this mean that LGBT members are exempted from enjoying the human rights protection in Kenya? We have policies in place regarding homosexuality. How are they impacting on the welfare of the LGBT community and what are the ramifications of these policies?

### **1.3: Research objectives**

- 1) To interrogate the role played by Kenya media and its implications in the LGBT discourse
- 2) To interrogate the implications of the legal contradiction between the Kenya Constitution 2010 and the Penal Code, Section 162-165
- 3) To assess the implications of existing policies on homosexuality on the LGBT community
- 4) To ascertain the church’s position in the LGBT discourse

### **1.4: Research questions**

- 1) What role has Kenya media played in the LGBT discourse and what are the implications?
- 2) What are the implications of the legal contradiction between The Kenya Constitution 2010 and the Penal Code, Section 162-165?
- 3) What are the implications of existing policies on homosexuality to the LGBT community?
- 4) What is the church’s position on the LGBT discourse?

## **1.5: Justification**

In a liberal world and society nobody should be denied an opportunity to enjoy their human rights. A liberal society needs to have policies and structures that aren't discriminative to any person regardless of their sexual orientation. There has been a moral dilemma in Kenya on whether homosexuality is normal or abnormal sexual orientation. More often religious doctrines have clashed with the views of the human rights activists with each side trying to prove whether homosexuality is a basic human rights or just unnatural behaviour, which should be shunned at all cost. There is also the pro human rights agitation for same-sex sexual orientation to be upheld and respected as an individual sexual decision; rather than seeing it from a general condescending social-religious lens.

LGBT persons in Kenya are still struggling to get their space, acceptance and recognition. In a society that largely loathes homosexual behaviour, LGBT persons have had to make a tough decision between their pursuit for love and safety.

This study was crucial as it endeavoured to explore on the policy and legal gaps that are promoting homophobic and discriminative tendencies against the LGBT community. Whereas homosexuality might be morally unacceptable in Kenya; it doesn't take away the fact that members of the LGBT community are human beings who don't deserve to be persecuted, discriminated on or assaulted just because of their sexual minority status; albeit in this era where we have a progressive constitution.

There is also the question of sexual diversity which the Kenyan laws particularly the Penal Code has failed to recognise. The Penal Code Section 162-165 has punitive jail sentences of up to 14 years imprisonment for those convicted of engaging in homosexual activities. The mere fact that homosexuality-related convictions are almost similar to those of serious criminal offences, paints a sad picture of laws that are colonial, draconian, primitive and detached from



the spirit of the progressive Kenya Constitution 2010. As a researcher it was important to examine this legal contradiction, as well as the policies and how they are influencing the wellbeing and the fate of the LGBT community. Ascertaining the role played by the media in the discourse was also a critical aspect of the study.

### **1.6: Significance**

The findings of this study will add a layer of knowledge in terms of the role Kenya media has played in the LGBT discourse and the subsequent implications. It is noteworthy that media is a powerful tool that can shape perceptions and mind-sets. The findings will also shed more light on the church's position, legal gaps and how they have influenced LGBT agenda. Subsequently this study provides the way forward and recommendations on how to manoeuvre the difficult subject of homosexuality so that as a society, we don't lose the fact that we are dealing with human beings who have rights. In light of the Western calls for Kenya to decriminalize homosexuality this study will examine whether this has had any impact on the struggle towards decriminalization of homosexuality in Kenya. There is also the West's and LGBT groups' insinuation that LGBT agenda should be addressed as a matter of individual sexuality rather than a morality subject. There has also been the tussle between religious stance and human rights activists on homosexuality topic. It was therefore crucial to bring this into perspective in the study. This study provides information on whether sustained LGBT conversations has helped in influencing policy making, to accommodate the LGBT community, towards neutralizing the homophobic environment created by anti-LGBT laws and policies.

### **1.7: Scope and limitation**

This study focussed on interrogating the possible legal gaps, policies and the church's position on the LGBT discourse in Kenya. How Kenya media has handled the LGBT discourse as well

as its implications was tackled. This study was also confined to examining the missing congruence between the Penal Code Sections 162-165 and the Constitution, and how this disparity affects the LGBT community in their pursuit for harmonious coexistence and their struggle for recognition and acceptance in Kenya.

The limitation of this study is that it did not factor in other LGBT members' issues such as the LGBT lifestyles, beliefs, sexual practices and cultures.

### **1.8: Operational definition of terms**

**Bisexual-** a person who is equally attracted to both people of their own gender and another gender.

**Coming out-** the process of acknowledging one's sexual orientation or gender to others.

**Gay-** synonym in many parts of the world used to describe a sexual orientation of a man whose primary sexual and romantic attraction is toward other men.

**Gender and sexual diversity-** a term used to refer to all the diversities of sexual orientations, characteristics and gender identities, without the need to specify each of the identities, behaviour or characteristics that form this plurality.

**Homophobia-** a range of negative attitudes and feeling towards homosexuality or people who are perceived as being lesbians, gays, bisexuals and transgender. This can be expressed as antipathy, contempt, prejudice, aversion or hatred and may be based on irrational fear, and is at times related to religious beliefs.

**Homosexual-** a person who is exclusively or almost exclusively romantically attracted to members of his/her own sex.

**Lesbian-** a sexual orientation of a woman whose primary sexual and romantic attraction is toward fellow women.

**Sexual minorities-** a group whose sexual identity, orientation or practice, differ from the surrounding majority in the society. This term is primarily used to refer to lesbian, gay, bisexual, transgender, and intersex individuals.

**Sexual orientation-** refers to each person's capacity for emotional affection and sexual attraction to, and intimate and sexual relations with individuals of a different gender or the same gender or more than one gender.

**Transgender-** The gender identity of people whose genders (which were declared at birth) does not conform to their lived gender (gender which they are comfortable expressing themselves in). A transgender person usually adopts, or will likely prefer to adopt a gender expression in consonance with their preferred gender.

**Transphobia-** the fear or hatred of transgender people or generally gender non-conforming behaviour. Just like biphobia, transphobia can exist among lesbians, gays and bisexual people as well as heterosexual ones.

**Transsexual-** a person whose gender identity is different from their biological sex, and who could have undergone medical treatment to alter their biological sex, at times to align it with their gender identity.

## **CHAPTER TWO: LITERATURE REVIEW AND THEORETICAL FRAMEWORK**

### **2.1: Introduction**

This chapter will provide historical chronology of homosexuality, case studies of homosexuality in Africa as well as in the West. Most African countries are yet to legalize homosexuality with a handful of them decriminalizing homosexuality. The social challenges facing LGBT persons in Kenya, legal contradictions and policies on homosexuality, will be covered as well as the Western and religious stance on homosexuality in Africa.

### **2.2: History of Homosexuality**

Homosexuality is often considered by many as a modern day phenomenon. However, from studies conducted there is evidence that homosexuality has been documented in the Western society from as far as the ancient Greek. Civilization in Victorian England to ancient Rome and Greece had records of the presence of homosexuality. Greek philosopher Plato regarded homosexuality as shameful and barbaric (Boswell, 1979). Ancient Greece regarded homosexuality as a normal way of life but with specific limitation. A homosexual relationship was permitted between a beardless youth and an older man, with the youth barred from the act of penetration (Dover, 1978).

In ancient Rome a master could be in a homosexual relationship with a young slave and this had to end the moment the slave grew beard. It was only after the introduction of Christianity in Rome that homosexuality became illegal particularly during the reign of Emperor Justinian known to castrate those charged with engaging in homosexuality. With the collapse of Roman Empire, homosexuality thrived since there were no laws prohibiting it (Veyne, 1985).

Makau Mutua, a prominent law scholar and agitator of homosexual rights argues that, “homophobia is not necessarily home grown in Africa because much of the revulsion of homosexuality can be traced to Christianity and Islam.” The two religions which both express

homophobia against homosexuality in their doctrines, and he therefore fails to understand why Africans who subscribe to either of the faiths, describe homosexuality as alien to Africa; while the two faiths were actually introduced by the West (Mutua, 2009).

Kenya is one of the African countries that are yet to recognize and legalise homosexuality as a component of human rights. In recent times, Kenya has been under the international radar for its continued tough stance on legalizing same-sex relationships. The promulgation of the constitution in 2010 was much celebrated owing to its progressive provision of an extensive framework of protected rights. In this constitution the bill of rights is one major highlight which aptly clarified the rights.

### **2.3: Human rights violations and legal gaps contributing towards LGBT discrimination in Kenya**

Anti-sodomy laws in Kenya have contributed towards fuelling homophobic tendencies and creating an atmosphere of stigmatization, leading to discrimination and abuse of fundamental human rights. The paradox therein is that whereas the Kenyan 2010 constitution is deemed progressive, the Kenya anti-sodomy laws violates the same constitution (Courtney, 2012)

Human rights are socially constructed and they don't emanate from any mysterious universe above. Human rights are derived from struggles for freedom and identity (Klare, 1991). Rights begin as claims by a group and they attain the right status the moment when such claims achieve some measure of success and social ceasefire declared by contending interest or forces (Mutua, 2000).

A number of organizations, including the Gay and Lesbian Coalition of Kenya (GALCK), the Kenyan Human Rights Commission (KHRC) and National gay and Lesbian Human Rights Commission (NGLHRC) have condemned homophobia and urged the Kenyan Government and the general public to support LGBT rights, recommending the removal of certain sections

in the Penal Code and enacting a comprehensive equality and non-discriminative legislation (SIDA, 2015).

LGBT persons in Kenya, still grapple with hostility in the society and this is manifested in discrimination, stigma, physical violence and even gender-based violence. Religious organizations and leaders publicly condemn homosexuality in Kenya and this has only increased levels of homophobia and transphobia against these LGBT persons. HIV training workshops for men who have sex with men MSM and LGBT persons were once tracked in Likoni, Mombasa. The attack was reported to have been organised by religious leaders opposed to the homosexual agenda. In 2014 ground breaking decision regarding LGBT agenda were made in High Court. National NGO council was ordered by the High Court to register the Transgender Education and Advocacy (TEA), while a transgender person Audrey Mbugua was granted the right to change name and gender on her academic certificate (SIDA, 2015).

Whereas the Kenyan constitution 2010 is still described as a progressive one because of its explicit provisions for human rights protection, it has come under sharp scrutiny by the LGBT community and the pro-LGBT activists; for failing to protect the rights of the Lesbian, Gay, Bisexual, Transsexual (LGBT) community in Kenya. There are punitive laws to discourage homosexual acts in Kenya. According to Penal Code sections 162-165 termed as carnal knowledge against nature, under which one can be jailed for up to 14 years.

The homophobic environment created the existences of Penal Code section 162-165 deprives the members of the LGBT community an array of rights such as the rights to privacy, rights to education, rights to non-discrimination, rights to health, rights to life, rights to access justice and the rights to dignity.

Whereas the Kenya constitution has placed responsibility on state organs and public officials to promote and protect individual rights, it begs the question of why the same government isn't

keen on considering repelling laws that hinder full enjoyment of the same rights it's supposed to uphold and protect (Wekesa, 2016)

Failure to drop Penal Code Section 162-165 continues to violate the privileges of equality, freedom and human dignity. This is therefore an affront to the constitutional provisions particularly Article 27 which outlines equality and freedom from discrimination. African values and morality have often been the common grounds for limiting application of bill of rights to the lesbians and the gays. However, this would not outweigh the effects of discrimination, police brutality and imprisonment and even murder as perpetrated by the penal code. It is unconstitutional that the bill of rights can't protect the LGBT community and that anti-homosexuality laws are justified by African culture and morality. The justifications are used to circumvent the constitution so as to legitimise violation of social minorities in this case the LGBT community. The irony of it is that we have a constitution that is supposed to protect all human from violation but which cannot protect a certain class of human beings just because of their unpopular sexual orientation. In this regard therefore, the question this study sought to answer is, at what point does one's rights to protection end as a result of their sexual orientation? Secondly, are the members of the LGBT community, lesser beings deserving exemption from constitutional human rights protection?

#### **2.4: United Nations fight against discrimination based on sexual orientation**

In December 10, 1948, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR). It was widely viewed as the pillar of international human rights law since it set forth economic, cultural, social and political rights. Even though UDHR is not legally binding, it has opened ways for legally binding treaties such as the international covenant on civil and political right and the International Covenant on Economic, Social and Cultural Rights. Whereas UDHR does not explicitly list sexual orientation or gender identity its other statues inclusion protects the LGBT individuals (Finerty, 2013).

The United Nations has been working gradually towards enjoyment of human rights for all and protection from discrimination on the grounds of sexual orientation. In 17<sup>th</sup> June 2011 the United Nations passed the rights of the gay, lesbian and transgender people for the first time. This endorsement irked some African and the Muslim countries. The US hailed the move as historic. This endorsement was an outcome of the concerns about discrimination and abuse of individuals across the world, on the grounds of their sexual orientation and gender identity. With respect to the LGBT community's agitation for recognition in Kenya, this could be an indication that social challenges facing the LGBT community might end soon. However, this will be dependent on the rights of the LGBT members being adopted by all the countries (Jordan, 2011)

Various human rights groups and LGBT persons have been agitating for the laws to be amended to accommodate and protect the rights of homosexuals. Such campaigns have often been bashed by a section of the clergy and political groups who held that such sexual orientation is religiously unacceptable. Homosexuality is still perceived to be weird sexual behaviour brought in by Western influence.

There have been attempts by international human rights bodies and the West to convince the Kenya government to reconsider legalizing homosexuality so as to allow the (LGBT persons) to enjoy their rights. Internationally there have been concerns that continued discrimination on persons based on their sexual orientation contravenes fundamental human rights. The UN High Commissioner for Human Rights through a statement to member states enumerated the obligation to prevent discrimination and violence based on sexual orientation.

Ban Ki Moon as the UN Secretary General, wasn't shy to talk about the desire to accommodate and respect the rights of the sexual minorities in our societies. In his visit of Zambia in 2012, Moon equated the then country's struggle for human rights of sexual minorities to the struggle



for liberation in Zambia and by extension South Africa. Ban Ki Moon described the struggle for LGBT rights as just one of the great, neglected human rights challenges of modern times (Ban, 2013).

Ban Ki moon's visit to Zambia, was viewed negatively with some of the anti-homosexual rights persons describing the visit as suspect with hidden agenda. And when he had audience with the former Zambian president Kenneth Kaunda and Foreign affairs Minister Given Lubinda; Moon stressed on dignity of homosexuals. He maintained that LGBT community deserved respect by mankind (Helo Zambia, 2012).

## **2.5: The attitudinal evolution towards LGBT agenda and persons**

There have been attempts to change social attitudes toward LGBT persons. In the United States for instance, an opinion poll done to gauge attitude toward gays and lesbians was conducted in 1965 (Herek, 2002). 70% of the respondents had a negative view. They believed that homosexuality was more "harmful than helpful to American life." Nonetheless between 1973 and 1977 there was an increase in positive attitude towards morality of homosexuality (Herek, 1988).

In the United States, there have been changes in attitude towards lesbians and gays. The change is linked to the entry of younger people in the public arena (Lewis and Gosset, 2008; Brewer, 2008; Loftus, 2001). Increased contact with gays and lesbians has been documented as a key contributor towards more liberal attitude to the LGBT community (Herek, 2003; Lewis, 2011). The trend towards the change of attitudes in spite of the resistance it can provoke has gone on unabated in several unexpected areas; such as Catholic nations like Argentina. This has been viewed as a true global phenomenon (Asal, Sommer and Harwood, 2013; Frank et al, 2010; Kollman, 2007).

In the United States, homosexuality was seen as a form of illness. It was until 1973 that the American Psychiatric Association decided to remove homosexuality from its list of mental disorders without morally judging it as crime or sin. This move granted homosexuality as an alternate lifestyle. This new definitional change accorded homosexuality some respect unlike before when it was seen as a felony (Lehrman, 2005).

The change of American attitude towards homosexuality began with a change of the American medical association's definition of it. The association upheld that whereas homosexuality was seen as morally perverse by the religious groups, it is rather a normal sexual orientation and not a disorder. The attitude of the public has been greatly affected by media which is greatly influenced by the homosexual movement. This confession was made by Richard Berke of the New York Times, then the national political correspondent. He told the National Lesbian and Gay Journalist Association that literally three quarters of the people deciding what appears on the front page are the not-so-closeted homosexuals a far cry from what it used to be few years back (Lehrman, 2005).

In the US popular culture changes were witnessed in the 1990s which caused liberalization of attitudes, particularly among the younger persons (Tropiano, 2002; Gross, 2002).

Attitude towards a minority group doesn't change in a linear way over time. Increased exposure to issues and the call for equal rights through social movements can shape attitudes (Brooks and Manza, 2004); Miceli, 2005). As per social movement theory, injustices committed to a certain group in a society can be fixed if the same are demonstrated (Miceli 2005; Zald, 1996).

The push for equality has been linked to culture. Social movements are capable of persuading the public that what they are doing is valid and acceptable (Miceli, 2005). Through the creation of visibility of gays and lesbians through activism, the gay rights movement has encouraged

individuals to come out to their friends and family with the hope that acceptance will be achieved through visibility (Haider-Merkel and Joslyn, 2008).

The value of international rights law to LGBT person relies in its ability to make claims for recognition and protection. This can be done by locating sexual orientation within sets of rights claims, lesbians and gay men can tie their struggle to a tradition that has transformed panoply of basic human needs into rights that are respected within domestic and international law (Miller, 1996).

Some people are still denied their human rights due to their sexual identities. International human rights do not explicitly mention sexual identity or orientation. There is a need for a broader interpretation of international laws so that LGBT people can enjoy rights to equality, privacy and freedom from discrimination (Goodhart, 2009).

## **2.6: South Africa's journey towards acceptance and recognition of the LGBT community**

South Africa is one of the countries in Africa, where homosexuality has been decriminalised. In South Africa, the legal and apartheid system didn't protect the sexual preferences of the gays, lesbians and transsexuals. It was during the advent of constitutional democracy that the LGBT community mostly comprised of the middle and upper class whites, organised themselves and agitated for constitutional protection, from mid 80s. Gays and Lesbians of the Witwatersrand (GLOW) movement was formed and despite it being a white dominated group, the founder was a black South African called Simon Tseko Nkoli (Ilyayambwa, 2012).

South Africa is one of the few African countries which ratified its constitution to accommodate the LGBT community. Chapter 1 of the Constitution of the Republic of South Africa has the pursuit of equality captured. The founding provisions are:

- a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- b) Non-racialism and non-sexism

South Africa government approved a new constitution in 1996 making it the first in the world to protect the homosexual rights in addition to ending apartheid. Lawmakers wrote sexual orientation into national non-discrimination clause hence the gay rights were enshrined in the supreme law of the land.

Section 9 of the South Africa constitution clearly upholds that discrimination on the grounds of sexual orientation is unconstitutional. It provides that; everyone is equal before the law and has right to equal protection and benefit of the law.

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, religion, conscience, belief, culture, language and birth.

South Africa's Bishop Desmond Tutu prominently voiced his desire to allow the LGBT persons enjoy their human rights. In an opinion piece published by Washington Post in 2010, the article highlighted the struggles LGBT persons go through in Africa and the need to show love, compassion and concern, notwithstanding race, gender, faith and sexual orientation. His call to action was that it was time to stand up against another wrong (Tutu, 2010).

## **2.7: Homophobia and discrimination against LGBT persons**

In Africa heterosexuality is still widely upheld and even perceived as normal and naturally acceptable. In this regard any other sexual orientation that deviates from this is rejected for going against the moral expectations of the African society (Vincent and Howell, 2014). Members of the LGBT group in Kenya have had to live in fear of the backlash they will get, if

they came out clear on their sexual orientation. As a result some have chosen to hide their true sexual orientation as secretly as possible. Most of them have to contend with homophobia which is a range of negative attitudes and feelings towards homosexuality and the homosexuals (Chadee, Nair, Chezelle, Peters, Sankar, and Philip, 2013).

The Bill of Rights in the Kenya 2010 Constitution has Article 27 which protects one from discrimination and mistreatment. It states that individuals within the Kenyan jurisdiction enjoys the following fundamental freedoms and rights: right to life, equality and freedom from discrimination, human dignity, freedom of expression, freedom of association, the highest attainable standards of health, education and access of justice. The constitution also guards against discrimination. It prohibits discrimination on any ground including race, sex, pregnancy, marital status, health status, disability, belief and culture (Kenya Constitution, 2010).

Whereas the constitution does not openly mention sexual orientation as a prohibited ground for discrimination, the rights and fundamental freedoms set in the bill of rights ought to apply to the LGBT individuals in Kenya by the virtue of its “on any ground” catch call provision. The constitution provides that state organs and public officers have the duty to address social needs of the vulnerable. In this context therefore given the social oppression, hostility, abuse and stigmatization meted on the LGBT individuals currently in Kenya, they fit into the minority or marginalised social bracket. In international community LGBT individuals are recognised as marginalized group (Finerty, 2013).

## **2.8: Physical and verbal abuse against LGBT persons**

A study was conducted by the Kenya Human Rights Commission (KHRC), on the human rights violations of LGBT community in 2011. Interviewed members of the community admitted to being harassed and hassled by state officials and the police and at times taken to remand without

the due procedure. This is due to the fact that they are a loathed minority. The abuse they face is fuelled by the legitimacy, granted by the criminalization of homosexual activities (KHRC, 2011).

The decriminalization of homosexuality in Kenya is classified under the Penal Code: Sections 162-165. This Penal Code provides long jail sentences to those convicted of engaging in homosexual acts. A convicted offender can serve up to 14 years in jail. This criminalization of homosexuality has led to some LGBT persons being subjected to assault or torture in the name of teaching them a lesson for defying 'normal sexuality'.

Apart from abuse triggered by homophobia towards the LGBT individuals, some of them fall victim to unscrupulous police officers who extort money from them, by threatening them with arrest. Unfortunately, such cases are rarely looked in to by the police who are often unwilling to probe their own. Homosexuals in the coast have borne the brunt of social hostility (KHRC, 2011).

Unfair treatment in high schools, colleges and universities, is a major challenge which LGBT person face when they are outed. This is an indication of a serious case of continued intolerance towards LGBT community in educational institutions. In extreme cases young men and women have even been disowned by their families for exhibiting embarrassing and 'unwanted' sexual orientation. Blackmailing is yet another major challenge. In order to be at peace with their families or safeguard their jobs from possible firing as a result of being outed; gay men have often been forced to part with some money to their sexual partners or male sex workers.

A number of organizations, including the Gay and Lesbian Coalition of Kenya (GALCK), the Kenyan Human Rights Commission and National gay and Lesbian Human Rights Commission (NGLHRC) have condemned homophobia and urged the Kenyan Government and the general

public to support LGBT rights, recommending the removal of certain sections in the Penal Code and enacting a comprehensive equality and non-discriminative legislation (SIDA, 2015).

Unlike in other socially liberal countries such as US that legalised homosexuality, Kenya is yet to yield to the international community pressure, to decriminalize homosexuality. In Kenya majority of the population believe homosexuality is unacceptable and ought to be punished and corrected. So dire is the state of intolerance to homosexuals in Kenya such that even corrective rape is being meted out by violent groups on LGBT members found or suspected to be engaging in homosexual activity. A lesbian interviewed by KHRC admitted to have been gang-raped alongside her female partner (KHRC, 2011). She however opted not to report the incident to the police because of the previous experience, where she was ridiculed and shamed, and even threatened with sexual violation. Such violation of privacy and one's dignity, as a researcher is a serious case of socially sanctioned discrimination and blatant justification for human mistreatment.

## **2.9: Health care and social challenges facing LGBT persons**

One of the greatest challenges facing the LGBT community is access to health care, thanks to the homophobia. In February 2010 in Mtwapa, there was a crackdown on sympathisers of the LGBT community. Peer educators from the Kenya Medical Research Institute (KEMRI) who were providing health services to LGBT individuals, were subjected to violence and threats.

In recent times there have been obstacles preventing LGBT individuals from accessing services from government institutions. Audrey Mbugua, a transgender woman had to sue the Kenya National Examinations Council (KNEC) for refusing to issue her school certificate in female name and gender. The court ruled that KNEC violated Audrey's dignity according to Article 28 of the constitution.

The constitutional supremacy reigns even at the point where there are unpopular views towards it. Controversial lawyer Prof Makau Mutua wrote that the constitutions aren't meant to just protect the interest of the majority, but instead protect particularly the unpopular that are ideally more vulnerable and prone to the tyranny of the masses (Mutua, 2012).

The clamour for legal reforms that brought about anti-discrimination laws doesn't necessarily impact on lived experiences of equity for the minority groups. Educational research shows that despite promises of inclusion and non-discrimination brought by human rights law, educational institutions are in continuation of heterosexist patterns (Francis and Msibi, 2011).

There have been calls and arguments in favour of sexual minorities' equality and sexuality rights; these have brought about legal reforms in some countries. Closer home, South Africa, (SA Constitution, 1996) enshrined the rights to dignity, bodily integrity, equality of all including the sexual minorities. Although teachers in schools can challenge negative cultures while promoting equity, most of them avoid or ignore issues of sexual diversity when educating on sexual health (Francis, 2012). More often than not, conversations about sexuality are avoided with the imagination that learners are child-like and innocent rather than seeing them as active sexual subjects (Allen, 2007; Francis, 2011).

The construction of sexual objects on the ground of assumed heteronormative model is still an impediment towards sexual equity. Heteronormativity in this sense is understood as existing structures of understanding, institutions and practical orientation that make heterosexuality the norm/normal and privileged (Ryle, 2012; Francis and Msibi, 2011; Berlant and Warner, 1998). The problem such a culture presents is that, it affords privilege and benefits to the perceived heterosexuals, while oppressing those perceived unusual or abnormal (Francis and Msibi, 2011; De Vos, 2008).



Sexual oppression can be viewed as a matter of domination and exclusion of the other. Against the background of heteronormativity, oppression and inequality on the grounds of sexual difference, the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) tried to heal the division of the past and build a society that is based on social justice, fundamental human rights and democratic values; by affording the equal rights to the sexual minorities (De Vos, 2008).

Sexual minorities face social problems and their rights, which are protected by the constitution, are normally violated. When they are arrested, they end up being held in detention beyond the legally recommended period before being taken to court. Some also end up facing trumped up charges (KHRC, 2011).

Since same-sex relationship is still a taboo and quite loathed here in Kenya, LGBT persons have to contend with stigma and exclusion by family and society (KHRC, 2011). Expulsion from learning institutions is another challenge that LGBT students face. There have been reports of girls being sent away from schools on the suspicion of engaging in lesbian conduct (KHRC, 2011).

The illegality of homosexual relationships and the way society reacts toward the LGBT community creates some sort of uncertainty and fear, whenever such persons intend to seek health care services in a health services facility (Kodero et al, 2011).

Lesbians in societies are often underexposed as a result of censorship and patriarchal control (Berman, 1993). Women organizations formed over the years concentrate on political and economic issue and don't do much to address the issues of sexuality. As a result the lesbians lack support in their pursuit to seek recognition (Cock, 2003; Gevisser, 1994). Unlike their male counterparts who enjoy the privileged status of masculinity, lesbians more often opt to remain closeted on their sexuality out of fear of social bashing (Gevisser, 1994). Because of

the way the society has conditioned gender roles, women are pressured to marry and sire kids. Differently, a gay bachelor has some space in the society (Gevisser, 1994).

Gay men can enjoy gay subculture because of the fact that they are not confined to domestic sphere, which women are subjected to. Women are often expected to exhibit values and good appearance and hence lesbians, are deprived of the social-political support and have to get used to social-cultural confines imposed on them (Lewis and Loots, 1994).

Homosexuality study in Kenya revealed that some Bantu societies provided for marriage between two women. Kamba, Kisii and some Kalenjin sub-tribes practised this since ancient times. In these cultures, the same-sex marriage between two women was not viewed as homosexual, but rather viewed as means in which families without sons undertook as a remedy, to have sons to inherit and propagate family lineage (Murray and Roscoe, 1998).

Challenges faced by LGBT persons are shaped by a range of structural, behavioural and social factors. LGBT persons do have specific unique health needs that are more likely not to be met by existing health structures and systems. Lack of professional knowhow to handle LGBT persons, or even negative influence by socialisation and bad attitudes towards LGBT individuals disadvantages such persons. Past discriminative experiences or perceived homophobia can force them to either delay, or desist altogether from seeking health services (Rabatin et al, 2006).

It's ironical that despite Kenya having a constitution with extensive provision of human rights, Kenya still cannot fulfil its obligation of promoting individual rights due to the harsh penal codes which are discriminatory to the sexual minorities. The researcher is left wondering how long it will take to ratify penal codes to be in congruence with the constitution. There has been a failure also to ratify Kenyan laws to be in coherence with the international human rights law.

One of the reasons that has been fronted and which objects repealing of decriminalization of homosexuality is that it contradicts Kenyan belief (Finerty, 2013).

Former Chief Justice and President of Supreme Court of Kenya, Dr Willy Mutunga was on record as a supporter of LGBT rights. In one of his statements he said, “Gay rights are human rights.” He went ahead to say that human rights principles do not allow the demand of selective human rights. His tenure at the judiciary was seen to be the best time to file a case in the Supreme Court challenging the constitutionality of laws decriminalization homosexuality. The irony in this scenario is that Dr Willy Mutunga was not vocal on relooking anti-homosexuality laws in Kenya, as the head of judiciary only for him to be more articulate on gay rights after exiting office.

### **2.10: LGBT persons socially discriminated**

Social stigma is defined as a social mark which signifies an individual’s membership of a particular group or a set of presumed characteristics which is socially devalued (Goffman, 1963).

LGBT persons not only suffer stigma and discrimination from society, they also suffer the same from health care providers (Chandra, 2006). Discrimination can be in form of isolation, invasive enquiries, and denial of treatment and even forced treatment on the assumption that such people have a mental problem (Chandra et al, 2006).

LGBT individuals are often harassed, denied treatment and equal opportunity as compared to heterosexual persons. Mental torture and violence are meted out on sexual minority individuals when they visit health centres to seek health services.

### **2.11: Kenya religious stance on homosexuality**

Religion influence attitude towards the practices existing in a society and homosexuality is one of them. Homosexuals end up feeling harassed, victimised and excluded from religious angle (Horn, 2006, Reddy, 2002, Reid, 2010). Religion has indirectly contributed to the marginalisation of minority groups in the society. Members of the clergy from Islam and Christian religions have authenticated and pegged African identity on the two religions in a manner that locks out LGBT individuals (AsHorn, 2006).

Getting a fulfilling and spiritual religious life can be herculean for homosexual people taking part in traditional Christian organizations. The difficulty might often start at adolescence; since this is the age most religious traditions do nurture emerging sexuality within their religious beliefs (Buchan, Dzelme, Harris and Hecker, 2001). On the downside young homosexual people may not get support and nurturing that embraces their sexuality, within their faith communities. Such can lead to distress and self-hate (Barret and Barzan, 1996; Barret and Logan, 2002).

Interpersonal conflict between Christianity and homosexuality is not an unusual phenomenon. Most Christians view homosexuality as morally wrong. Mainstream denominations such Orthodox, Catholic have taken up the position. According to Western religious views on homosexuality, the conflict between homosexuality and Christianity can be well understood if the two main themes of nature and scripture are addressed. In recent times some Christian organizations have propagated more liberal interpretations of scriptures. One such organization called Integrity is a non-profit outfit that caters for the LGBT persons (Integrity USA, 2008).

Homosexuals born in a family with conservative religious beliefs, find themselves in a quite uneasy situation compared to those growing up in more liberal religious families (Newman and Muzzonigro, 1993; Subhi, 2006).

Deep personal meaning is found in religious faith, but it is unfortunate when leaders in a religion promote rejection of certain persons in the society, by inculcating hate and negative attitude towards them. The saddest part is when the rest of the society sees this discriminative stance as a legitimate way of expressing their faith (Mohamed and Wieringa, 2005). A research done by (Amnesty International, 2013) shows that strongly religious communities, tend to give their leaders some absolute power to exhibit homophobic tendencies against LGBT people. As a result of this, LGBT persons who may be even more religious will opt to keep a low profile. This is to avoid being ejected, humiliated or worse their secret being made public and even risk ending up in the hands of law enforcers (Amnesty International, 2013).

In Kenya almost all religious leaders were informed that in Kenya homosexuality is criminalized. In that respect they all believe legalizing homosexuality will go against the religion. Religious leaders who thought homosexuality as an inherent or inborn tended to have more favourable attitude towards LGBT persons unlike those who perceived homosexuality as a result of personal choice or upbringing (Haider-Merkel and Joslyn, 2008; Sakalli, 2002).

The churches in Kenya have faced opposition from a section of liberal thinkers and civil rights activists demanding for accommodation of gays in the society. There have been attempts to ban sex education because of the fear that it will erode morals and promote sexual immorality. Prof Henry Indangasi objected what he termed as churches' moral posturing which was deliberately refusing to accept sexual realities in the Kenyan society. In his argument Prof Indangasi maintained that the society was comprised of men and women with sexual morals contrary to the ones preached by the church. The conservative nature of the Kenyan church,

has deprived boys and girls the opportunity of getting necessary skills and knowledge to fight sexual temptation (Indangasi, 2003).

In an attempt to reconcile the clash between homosexuality and religion, some LGBT persons born into a family with conservative religious beliefs, might end up attempting to alter their sexual orientation by undergoing conversion therapy (Haldman, 2004). This is to avoid extreme consequences of being rejected or expunged. However, the success of such therapies is still debatable (Herek, 2003: Worthington, 2004). Those who fail conversion therapy might be forced to make the difficult decision of challenging, changing or altogether abandon their religion to meet their inner self needs. In extreme cases some homosexuals out of pressure and stress contemplate or even attempt suicide. There exists evidence linking homosexuality and suicide as well as homosexuals reporting depression (Kourany, 1987).

### **2.12: The Vatican and Pope Francis's rejection of same-sex unions**

In July 2013, Pope Francis told journalists aboard a Rome-bound plane that, "Who am I to judge gay people?" This declaration ignited a debate around religious position on the LGBT agenda particularly the Catholic Church. Seven years later, the pontiff revisited the subject where he reiterated that homosexual people have every right to be in a family, and that no one deserved to be subjected to misery over it. However the Pope has come under sharp scrutiny over what has been seen to be double speak on the matter. Whereas he has publicly endorsed same same-sex unions, he has neither acknowledged same sex marriages nor gay men being members of the clergy. To an extent this can be viewed as a partial acceptance of the LGBT community within the Catholic's religious space. Pope Francis's strong opposition of priests being gays, was manifested when he sacked a Polish gay priest in October 2015.

Pope Francis's endorsement of same-sex unions hasn't been taken well by the Catholic faithful in Asia and Africa which have significant Catholic population. Theo Hipp, a German-based

priest perceives the Pope's latest move as an attempt to reignite the difficult conversation regarding homosexuality in the Catholic Church. Despite the sharp division that Pope's statement on homosexuality has elicited in the catholic community. Hipp upholds the importance of continued debate on the issue of homosexuality, in light of the opposition of dogmatist tendencies in the Vatican (Prange, 2020)

On Monday 14<sup>th</sup> March 2021, The Vatican made a surprising U-turn on same sex unions. Through a statement, it declared that the Vatican will not bless same-sex unions. This was a combative statement approved by Pope Francis and widely expected to have serious implications on Catholic members of the LGBT community. This came as a surprise considering that Pope Francis has been praised for his accommodative stance towards the LGBT community both in and outside the church. The decision is a huge setback for Catholics who were hopeful that the institution was going to modernize its homosexuality approach (CNN, 2021)

The statement described same-sex unions as a "choice" seen as sinful and which cannot be recognised as "objectively ordered" to God's plans. It remains to be seen whether this new stance, will affect the millions of gays and lesbians. Congregation for the Doctrine of Faith, the Vatican's top office, stated that the blessing of homosexual unions cannot be considered licit. According to the Vatican, blessing same-sex unions will pass across the message that the Catholic Church approves and encourages a choice and way of life that is not ordained by God.

Pope Francis had been widely perceived as reformist, open to leading the way towards a progressive Catholic leadership. This statement is total contradiction to what he said in 2020. When asked about the church's position on homosexuality and same-sex marriages, he responded to the affirmative. "Homosexual people have a right to be in a family. They are children of God and have a right to a family," he said.

Whether denouncing of same-sex unions by the Vatican will have major implications across the religious divide particularly the Catholic Church, is a matter that remains to be seen in the coming days.

What could have influenced the change of mind on same-sex unions is still a question begging an answer. Unfortunately this decision could trigger rejection and even discrimination of LGBT members in the Catholic Church. Sadly, as a researcher, this change of heart by the Vatican might awaken homophobia perpetuated by the members of clergy. Whereas they are supposed to preach love for all as per the Holy Book, they are appearing to be shunning the LGBT community exposing them to possible ‘religiously sanitised’ rejection and stigma.

### **2.13: Homosexuality in Kenya high schools**

A study conducted in Kenya about high school students’ attitude and perception towards homosexuality revealed that most students perceive that homosexuality exist in schools in Kenya. The study proved that students are less informed about homosexuality (Mucherah, Owino and McCoy, 2016). Majority of the students supported suspension of those found engaging in gay or lesbian relationship. A majority of them didn’t support the idea of expulsion from school, of these students found engaging in homosexual relationship. The study also found out that students believe that teachers and parents didn’t know that homosexuality is practised in schools. This could be attributed to the possibility that a few parents and teachers discussed about homosexuality with their children or students. The students end up assuming that their parents or teachers aren’t aware of homosexual practice in school.

More females than males revealed that homosexuality was being practiced in their schools. Unlike the boys who believed that homosexuality is predominantly practised in all boys’ schools, the females admitted the practise happen in all types of schools (Mucherah, Owino and McCoy, 2016).



LGBT persons in Kenya are yet to enjoy their freedoms of rights in Kenya. Provisions in the Bill of Rights enshrine the right to privacy, equality, non-discrimination, and freedom of expression. Ironically the Penal Code of Kenya considers homosexuality “against the order of nature.” Sections 162, 163 and 165 criminalize same sex relationship with jail terms ranging from 5 to 21 years subject to determination whether the relations were consensual (Karanja, 2016).

Human rights discourse on issues relating to the LGBT persons is quite imbalanced to date. Negative attitudes towards LGBT lifestyles are scrutinized through the lenses of religious practices, legal instrument, market places, educational and media outlets. The office of the Attorney General has been reluctant to register LGBT organizations. This has only been facilitated by the intervention of the judiciary that granted them the leeway to be registered as non-profit organizations used for fundraising.

#### **2.14: KFCB’s sustained opposition to homosexual content**

The Kenya Film and Classification Board (KFCB) which licenses filmmaking in Kenya has lately been discriminating against LGBT projects while citing morality reasons. This has led to misinformation about homosexuality which spreads faster than positive information about LGBT rights. Sadly, a trend in which media stories are usually preceded by violence against the LGBT individuals occurs often. This animosity towards the LGBT community needs to be changed. This is necessary so as to allow LGBT persons to freely tell their stories with freedom similar to those of mainstream storytellers without any threat to their right of expression (Human Right Watch, Kenya, 2016).

KFCB’s bullish manner of handling censorship of films and TV content, as a researcher has gone overboard. Some of the reasons given by KFCB are often unconvincing and come off as

just too conservative. KFCB banning apparently go against the right of freedom of expression which is provided for by the constitution.

AIK (Atheists in Kenya) expressed its intention of backing constitutional amendments of Article 45 (2) to allow marriage of two consenting adults irrespective of their sexual orientation. The group also demanded a review and subsequent removal of sections 162-165 of the penal code which criminalizes homosexual behaviour (Mutuko, 2018). The ban of Rafiki film was viewed by AIK as an act of promoting homophobia, stigma and discrimination against LGBT community. Daisy Siongok the AIK Vice President blamed Dr Mutua of being driven by religious biases when addressing social issues.

The atheists in Kenya have also had to contend with rejection instigated by the religious society which doesn't accept people who have no faith in deity. Whereas the constitution guarantees freedom of worship those who don't fall to either of the religions face social isolation. The atheists and the LGBT community face similar predicament which is lack of recognition and acknowledgment in a liberal society.

### **2.15: Social media and internet as an avenue for LGBT persons' communication**

Internet has provided an avenue for the LGBT community to freely express themselves and interact with others across the globe. In 2015, Facebook enabled users to customise their profile pictures with a rainbow sign. This was in celebration of the landmark ruling by the US Supreme Court that legalized same-sex marriage. This kick-started a widespread public discourse on LGBT issues in Kenya.

The late Binyavanga Wainaina, a celebrated author was the first Kenyan to openly come out about his gay sexuality. He used his blog to communicate about homosexuality while focusing in Africa. He was clear that had he used traditional media which are much controlled, they would have probably rejected publishing his homosexual content (Wainaina, 2014).

Whereas LGBT persons have access to social media platforms such as Facebook, some of them are often insulted about their sexuality. Harassment is also common when mainstream news does articles on LGBT issues; this is according to Anthony Oluoch, the legal and human rights officer at GALCK. Gay men who are in heterosexual marriages are often threatened with exposure regarding their gay sexuality. This tends to inflame homophobic sentiments; nonetheless local LGBT activists admit that online use has been helpful to the LGBT persons despite the challenges that come with it. Eric Gitari, the Executive Director of the National Gay and Lesbian Human Rights Commission (NGLHRC) says that they thrive on using Google (Gitari, 2016).

### **2.16: Kenya high court ruling on anti-gay law**

On 22<sup>nd</sup>, February 2019, Kenya High Court postponed the much-anticipated ruling on whether to scrap the colonial laws which have decriminalised gay sex. A battery of journalists was present in the court room. The media presence in the court room as a researcher, pointed to some salience that this LGBT ruling had for them media and the general public. Hopeful members of the LGBT community who had packed the court room were dismayed by the postponement of the ruling for a case filed three years before. Chacha Mwita, one of the judges hearing the case cited absence of one of their colleagues in their three-judge bench; as the reason for the postponement of the ruling. The ruling was set for May 24 (Ratner, 2019).

And on 24<sup>th</sup> May the High Court eventually upheld the penal code 162-165, stating that same sex relationships and marriage is illegal in Kenya. The court based its ruling on Article 45 (2) which states that marriage is between two consenting adults of opposite gender. The pro-LGBT activists vowed to seek an appeal at the Court of Appeal led by lawyer Paul Muite.

## **2.17: Gradual transformation in cinema and media representation of homosexuality**

Cinema is an entertainment product which has the ability to reflect thoughts and even shape feelings (Dyer, 1984). Therefore, deliberate alteration of film representations can impact powerfully in breaking down societal structures such as marginalization and discrimination.

There has been a gradual emergence in recent days of African films that have attempted to portray homosexuality. *Rag Tag* is a Nigerian film with a gay theme which was shot partly in UK and Nigeria. The film premiered at the 2006 San Francisco International Film festival. More often representation in cinema has neither been seen as outside reality nor dignified of reality itself. However, cinema has been fronted more as a discursive force that has the power of constituting what can be perceived as the reality itself (Lim, 2006).

The media as a primary information source has a powerful influence on an individual's belief, attitudes and behaviour. Social context moderate how audience receive media effects (Rimal, Chung and Dhungana, 2015).

Media can provide reinforcement effect in which the interest of people, motivate that which they have interest in watching television or viewing in the media. Should a television viewer develop an interest in the lives of LGBT couples, such interest is more likely to provoke them to watch LGBT related content, and hence reinforcing that initial interest that was existent (Gehrau, Bruggermann & Handrupp, 2016).

Minority groups such as the members of the LGBT community have suffered historic underrepresentation and stereotypic on television shows and films. Traditional homosexual actors have been fronted in negative roles purposely for audience humour (Gonta, Hansen, Fagin and Fong, 2017). Through the years of growth in the media as a social media platform, there is a significant progression in representation and attention to homosexuality.

In recent times homosexual-rights issues have come in. Homosexual liberation movements in 1960s, experienced media coverage which only reinforced present anti-homosexual stereotypes (Bennet, 1998). The New York Times ran an article that described homosexuals as deviant and promiscuous in their first ever front page on homosexuals. The AIDS epidemic of the 1980s and homosexual rights movements led to the implementation of changes in mainstream American media (Alwood, 1996).

Previous research has shown media can influence audience members' attitudes and beliefs on homosexuality. In the absence of any personal relationships or homosexual acquaintances, heterosexual television viewers can endorse homosexuality courtesy of their media interactions with them (Bond and Compton, 2015). Viewer attitudes towards homosexuality have risen over time as a result of acceptance of homosexuality in the media. The degree at which socialization occurs is the result of media and our predisposed variables, which is well described in communication theory of behaviour. Attitudes towards homosexuality are socialised and not really inborn (Calzo and Ward, 2009).

Media failure has been captured in the way they portray homosexuals. It didn't portray homosexuals as well functioning individuals in anything besides conflict or health related stories. Entertainment media content on homosexuality was more likely to contribute towards yielding positive attitudes by the more consistent positive correlation on the acceptability and willingness scale (Gibson, 2003).

The media has been highlighting issues related to LGBT agenda and persons since 1990s. There has been an insinuation that the increasing visibility of gays and lesbians in this era can be perceived as a battle won. However, despite LGBT people appearing on TV shows and movies, discrimination against them has not been eliminated. Violence meted out on LGBT persons

has often been seen as a reaction to visibility of LGBT agenda. Such resistance is seen as a reactionary move against the LGBT community (Ayoub, 2014).

Media plays a role in influencing attitude. Young LGBT persons can learn more from the media. Media can help them get educated about their sexuality and sexual behaviour (Hetsroni, 2007).

The Kenyan media has negatively covered matters to do with homosexuality. This is caused by the general belief that homosexuality is ungodly and sinful. This has immensely contributed to the media's negative coverage of homosexuality (BBC Focus on Africa Magazine, 2010).

### **2.18: Findings of previous study on media representation of homosexuality and its implications**

Media portrayal of homosexuality as normal, by having open discussions about homosexuality has influenced perception. The youth for instance are getting used to seeing homosexuality as a normal thing. Gayism to the youth is now being equated to modernization such that those who still have negative attitude towards the LGBT community are deemed to be primitive and lacking modernism (Nabwire, 2014).

They gay community in Kenya feels that the media representation over time has contributed to a change of attitudes and beliefs. This is a testament to the fact that when a media subject is repeated continuously or given salience it becomes normal, in the mind of the consumers of media content. Whereas the media has been blamed for "normalised" representation of homosexuality, it is still commended for reporting the happenings in the society as they are. A section of church leaders were not pleased with the media representation of homosexuality. In that regard they wanted the media to be regulated more in terms of the content they churn out to the public; seeing that such information was contributing to moral decay in the society.

The religious community attributes the moral decay particularly on the part of the youths, to the media's representation of homosexuality. Youths exhibiting homosexual tendencies are perceived to have been influenced by the media's normalization of homosexuality (Nabwire, 2014). Whereas majority of Kenyan are heterosexuals, they aren't blind to the fact that in this modern era, homosexuality and LGBT persons exist.

The Kenyan media's open discussion on homosexuality and the LGBT agenda has immensely changed perception to a more positive one. Media representing homosexuality more openly has immensely led to a change of attitude and varying stereotypes. The strict religious conservative persons still hold that homosexuality is not acceptable. In recent times more religious leaders have soften their stance on homosexuality, by welcoming LGBT members into their places of worship. In addition those who subscribe to Post modernism see homosexuality beyond morality aspect; as such they perceive morality to be subjective (Nabwire, 2014). Cultural dynamism and post-modernism can be attributed to the global gradual acceptances of homosexuality, as witnessed by decriminalization of same-sex relationships in a number of powerful nations such as US.

From the findings it's evident that the Kenya media has over time carried open and constructive conversation on the LGBT in Kenya. The constant and repeated coverage of LGBT affairs has led to a gradual decline in the hard stance that LGBT talks were accorded in the earlier years. This softening stance and the willingness by the Kenya media to even engage the members of LGBT community can be interpreted as part of concerted efforts to demystify LGBT discourse and give room for considerate conversation.

In this vein this study assessed the role Kenya media has played in according the LGBT a safe space to exist. Therefore it was imperative to assess the role Kenya media has played in terms

of reporting and presenting an impartial position. These questions were critical in holistically ascertaining the role and the implications of Kenya media in the LGBT discourse.

### **2.19: Kenya media's place and role in the LGBT agenda**

As a researcher, by NTV agreeing to have George Barasa alias Joji Baro to have a place in the panel, and give his views as a LGBT member, speaks volumes about Kenya Media's position on the subject. Could this have been triggered by a "let's give him a chance and hear what he has to say" sort of editorial approval? And when a battery of journalists jammed the High Court room awaiting the ruling on 24<sup>th</sup> May, 2019, on which the High Court upheld the penal code (sections 162-165)- was this a testament that LGBT matter was weighty in the media agenda? As stated earlier in this chapter media has gradually soften their hitherto tough stance on LGBT agenda. When Richard Quest visited Kenya and even gave his own case scenario where CNN had respected his sexual orientation, his message was that it was a high time discrimination based on sexual orientation came to an end.

Building on this, this study sought to find out whether in any way the Kenya media has played any role in promoting the LGBT agenda for a good cause. From the findings, Kenya media has played a great role in facilitating, debunking and demystification of the LGBT community and their agenda; as well as enabling the consumers of media a chance to get informed accordingly.

### **2.20: Self-confessed gay gets asylum in Canada after fleeing Kenya due to life threats**

George Barasa, a self-confessed Kenyan gay sought asylum in South Africa following death threats in Kenya. In 2017 George cited persecution due to his sexual orientation as a reason to why he was seeking asylum. His application was rejected over 'baseless' claims that he was 'fraudulently' purporting to be a gay yet he was an internationally recognised LGBT activist. Despite his appeal to seek dignity, respect and humanity even garnering 11,000 signatures in his appeal, it didn't help him. After two years of humiliation at Home Affairs offices in South



Africa coupled with homophobic and xenophobic abuse from officials he had to leave (DeBarros, 2019).

His relieve came when Canada agreed to his asylum application in August 2019, as a person facing persecution in both his country of origin and that of asylum. Despite South Africa having legalised homosexuality it cannot protect foreign members of LGBT community which was a shocking irony. While reflecting on his harsh treatment in South Africa, George Baro said it was an embarrassment that a non-African country had to take him in after a fellow African country rejected him. He pointed out the reality of Africans divided.

George Baro came to the limelight in Kenya in 2016 after he released a gay music video titled *Same Love* which was banned by KFCB. He was also threatened with arrest as well as homophobic threats, which informed his decision to seek asylum elsewhere (DeBarros, 2019).

### **2.21: Global media's support for LGBT rights and agenda**

Richard Quest the celebrated CNN journalist visited Kenya on 22<sup>nd</sup> October, 2018. In a morning interview at Capital FM hosted by radio presenter Maqbul Mohammed, he confirmed that he was indeed a gay. He reiterated that he wasn't apologetic about his sexual orientation while calling for homosexuality to be decriminalized in Kenya. Criminalization of homosexuality according to him, leads to the best talents shying away. He mentioned that he lived in London and New York because the two cities have accepted LGBT persons. Whereas he admitted to respecting those who have contrary views on homosexuality, he asserted that for Kenya to be a vibrant economy there was a great need to look at homosexuality differently (Ureport, 2018).

In October 2018, British Broadcasting Corporation (BBC) announced that it was going to add gay characters in their shows, in their bid to combat heteronormative culture as part of its

diversity reforms. As a way of embracing sexual diversity, LGBT staff were encouraged to “bring their whole self to work” and be open with their sexuality (Singh, 2018).

Concerns were raised that gay men in the company were more visible, but then inter sectionality of race and background in the LGBT community wasn’t well reflected and more visibility was required on LGBT leaders. James Purnell the director of radio and education maintained that they aimed at creating as open and inclusive culture as possible. LGBT staff makes 115 of the BBC workforce. The BBC bosses acted to ensure that they attract and retain best LGBT talent as employers as well as appealing to the younger audience as a broadcaster (Singh, 2018).

## **2.22: Wanuri Kahiu’s contribution towards acknowledgement of LGBT persons**

Wanuri Kahiu the director of Rafiki film admitted that prior to the making of the film she was aware of its social implications. She mentioned that our Kenyan society is still conservative, but the youth are becoming more open-minded and receptive to not only the sexual minorities but also to the members of different tribes (Vourlias, 2018).

Kahiu observes that in East Africa there has been a saddening development in the manner in which the LGBT persons were being handled coupled with an anti-homosexual climate. As a result of tough opposition to LGBT content, film and TV shows were being banned. Rafiki film according to Wanuri was supposed to open up a bold conversation about LGBT rights as well as expanding the narrowed space of freedom of speech. According to her, the film was meant to be seen as a voice to the voiceless. It was also an opportunity to extend love and chart a good cause for the trampled upon LGBT persons who are often forced to choose between love and their safety (Kahiu, 2017).

One of the challenges that the cast and crew of Rafiki had to overcome was the long-standing cynicism around same-sex relationship. Wanuri adds that they extended this to friends, relatives and the society at large. Rafiki brought forth a conversation about love, freedom and

choice. The freedom was not only to love but to also tell a story. Rafiki film was to initiate a conversation that we are all entitled to love and any denial of that right through violence, condemnation and punitive laws, violates the most fundamental right to choose who to love.

### **2.23: Diplomatic intervention: Canada’s support for Rafiki film and call for recognition of homosexual rights**

Canadian High Commissioner to Kenya Ms Sara Hradecky managed to screen the film at her official residence on 28<sup>th</sup> September, 2018. In her welcoming speech prior to the screening, she lauded Wanuri Kahiu for going out of her way and telling a bold story, she emphasized that the film was the beginning of a conversation towards recognition of LGBT rights in the country.

By the virtue of the fact that Canada, her home country had long legalised same-sex relationships, she expressed her hope that Kenya was going to repeal its laws to allow LGBT community to enjoy their human rights. She asserted that it was wrong to deny anybody a chance to love whoever they wanted to no matter their gender.

She also supported Wanuri Kahiu’s court battle, aimed at seeking their right of expression, which was being curtailed by KFCB banning her film. She mobilised her guests to help raise the legal fees (about Ksh 7.5 million) which was needed to facilitate the litigation process. She called on the Kenyan society to join other countries that have amended their laws to accommodate the LGBT individuals.

### **2.24: United States reiterates its resolve to embracing LGBT community in its social equality agenda**

In a hard-hitting opinion article titled “Reality check on homosexuality” published by Sunday Nation on 14<sup>th</sup> March 2021, Prof Makau Mutua lauded a historic move in the United States. On February 3, 2021 former South Bend, Indiana Mayor Pete Buttigieg became the first openly gay person to be appointed to the cabinet. After being sworn in, he was embraced and kissed

by his husband Chasten Buttigieg. According to Prof Mutua this was manifestation of the Joe Biden's administration to recognise the LGBT community and allow their participation in governance. This is despite the fact that US still has cases of prejudice and discrimination against members of the LGBT community even though it is legal for gays and lesbians to marry. The controversial law professor posed the question, can this happen in Kenya?

Religions have played a role in perpetuating virulent hatred for homosexuality. Such religiously-sanctioned hatred is often un-interrogated and reactionary, and instigated by religion, that forbids one from thinking and reasoning. He avers that homosexuality is as African as heterosexuality since it isn't rigid or fixed and hence it exists in a spectrum such as: heterosexual, pansexual, gay and lesbian (Mutua, 2012).

In his academic findings, Mutua observes that homophobia is perpetuated by dangerous and stupid beliefs and myths around homosexuality. He goes on to say that one doesn't have to be necessarily a gay, lesbian or a woman, in order for them to stand for women, gay or human rights in general. In his assessment homophobia is acquired as it is ingrained into one's DNA through religion or at family level. As such one is likely to be homophobic until they apply the mind at a very basic level (Mutua, 2021).

Antony Blinker, who was appointed by Joe Biden to lead the State Department, announced plans to appoint an LGBT envoy and allow embassies fly pride flag. During Trump's administration multiple embassies had been denied permission to fly the rainbow flag in commemoration of the LGBT Pride Month. This move signalled a departure from Donald Trump's administration. Joe Biden's administration was keen to enhance LGBT protection in a new era of equality. The position of special envoy for the human rights of the LGBT persons had been left vacant under the Trump's administration. Blinker's announcement came at the back drop of increased cases of violence directed against the LGBT persons around the world,

as well as murders of transgender people, particularly women of colour. “United States is playing the role that it should be playing of defending the rights of the LGBT community,” Blinken told the Senate Foreign Relations Committee (News 18, 2021).

Donald Trump’s era rolled back the gains achieved by Barack Obama, by either reversing dropping, removing or withdrawing established LGBT protection and being hostile to the transgender Americans. A major concern was the flouting of existing regulation that prohibited discrimination in the health care against patients who are transgender.

### **2.25: Uproar around Rafiki film and the conversation on legalizing homosexuality as a human rights**

Rafiki film (2018) is a Kenyan film that had a lesbian theme. The film is about two girls whose parents are political rivals. They started off as friends after which they developed a sexual relationship. Their sexual feelings lead them to believe they were meant for each other. Their secret sexual affair leaks out when they are busted by an angry crowd which descends on them with slaps and kicks. They are then frogmarched to the police station. They are later bailed out by their respective fathers.

Rafiki film caused public uproar after it being banned by the Kenya Film and Classification Board (KFCB) for glorifying lesbianism. The ban was however lifted for a week; to allow public screening to enable it get nomination for the Oscars.

From the literature review, it is clear that the Kenya society is still a hostile environment to the LGBT persons. However, the LGBT persons and pro-homosexuality human rights activists have been struggling and are still pushing to seek acceptance and acknowledgement of same-sex relationships. Rafiki film in Kenya attempted to initiate a conversation around this taboo subject. Whereas homosexual subject might be seen as an uncomfortable topic to talk about in a conservative environment, it is a sexual phenomenon that can’t be swept under the carpet. In

our social discourses it was a high time this issue was extensively interrogated. In recent years, there has been continued clamour for decriminalization of homosexuality at the time when it is being viewed from a human rights lens. There was also the question of contradiction between the country's supreme law and the sections of the penal code. Media has been documented in recent years of giving LGBT community and agenda more focus and salience.

## **2.26: Theoretical framework**

### **2.26.1: Intergroup contact theory**

Intergroup contact theory was proposed by Gordon Allport in 1954. In this theory Allport proposed that positive effects of intergroup contact can be achieved by situations characterised by: equal status, intergroup cooperation, common goals, and support by social and institutional authorities. Contact has a real and tangible effect on reducing prejudice. This was ultimately documented into intergroup theory (Hewstone and Swart, 2011). However, achieving reduced prejudice on social groups cannot be achieved by intergroup contact only. There are processes of change that are necessary and which are: change of behaviour, coming up with affective ties, learning more about the out-group and in-group reappraisal (Pettigrew, 1998).

This theory avers that long standing prejudices against a negatively stereotyped group can gently improve for the better, through personal contact and association with such members. Intergroup contact theory was applied across a variety of social groups setting and societies. The resultant effect of intergroup contact had been tested through study on social groups that differ on the ground of: race, ethnicity, age, sexual orientation and political preference. A 2006 meta-analysis found major reductions in prejudices in samples that optimized Allport's condition of contact.

This theory was tested in this study by examining whether close interaction and social association between members of the LGBT community and the respondents, could have

influenced a change of mind set or perception towards them. By extension cooperation with LGBT members in workplace can help in lessening harsh stereotypes against them, by their straight colleagues.

This theory's applicability and suitability in modern settings was interrogated in this study. The findings shows that it has positive effects. When members of LGBT community and the straight persons work together either in academic engagements, social activities or within professional circles, with time that interpersonal conversations and cooperation lessens existing prejudice on the LGBT community. This is because with time one is bound to look beyond sexuality upon realization that LGBT persons are just normal people in other aspects of their life. The study findings approves the application of this theory in combating homophobia and discriminations of LGBT persons.

### **2.26.2: Cultural Imperialism Theory**

Cultural imperialism is spread by media imperialism. Homosexuality in Kenya is often perceived to be a foreign subject brought in through foreign media influence either by film or international news channels; that have normalised it and therefore are trying to spread across its "normalization" agenda. Cultural imperialism theory postulates that Western nations dominate media across the world and have a powerful effect on the third world cultures. This has led to imposing on them Western values and as a result causes destruction of native cultures and values (Schiller, 1973).

In this ambit media imperialism has been defined as the process whereby a media ownership, structure, distribution and its content are singly or together subject to external pressures from media interests of any other country or countries that have no reciprocation of influence by the country affected (Boyd-Barrett, 1998). Cultural imperialism is even informed by capitalistic manipulation and this was evident when President Barack Obama promised to deny aid to

countries that still hold onto anti-homosexual laws (Montopoli, 2011). In this context, this threat was seen as a move aimed at forcefully imposing a foreign social-cultural uptake, on economically vulnerable countries.

Here in Kenya, *Rafiki* as a medium of communication was seen as an extension of Western cultural imperialism. And by the virtue of the fact that *Rafiki* was applauded at the Cannes Festival and appreciated by pro-homosexuality countries, locally it was viewed as a continuation of Western agenda of disrupting the normal African sexuality.

This assertion got some credence by the fact that a big chunk of the film's crew members were foreigners and also the film got foreign funding and support in its making. The film was lauded abroad but rejected locally. This was a pointer to a cultural clash of sorts. *Rafiki* film was perceived as a communication medium attempting to legitimise an otherwise unacceptable sexual orientation (homosexuality). By the West standing in solidarity with Wanuri Kahiu and condemning the ban of her film, this move was locally seen as an extension of cultural imperialism and an attempt to change Kenya's conservative culture and its sexual morality. Dr Mutua upheld that *Rafiki* Film was banned for glorifying lesbianism, however from a Western view, glorification is just but a way of LGBT community acknowledging and bravely owning up to their sexuality, in the face of resistance; a message which was well passed across in the film.

This theory was tested by assessing whether the notion that Western media and their cultural influence has contributed towards reenergised clamour for homosexuality to be accepted in Kenya. The researcher was interested to find out whether homosexuality is a Western concept which is influenced by cultural imperialism.

The findings of the study does not find homosexuality or current agitation for its legalisation in Kenya, as a result of cultural imperialism. From the literature review homosexuality existed



in Kenya and Africa at large, hence it cannot be termed as foreign or Western concept. Therefore the clamour for legalization of same-sex relationships in Kenya cannot be solely attributed to cultural imperialism, though there is the foreign media influence. The foreign media has only and to a larger extent highlighted it repeatedly.

### **2.26.3: Queer Theory**

Queer theory offers an intensive examination of the manner in which power works to legitimise and institutionalize certain forms and expressions of sexuality and gender, while at the same time stigmatizing others. Queer theory problematizes and challenges the rigid categories around norms of sexuality and gender and the oppression and violence that such hegemonic norms justify. Queer theory offers multiple, unfettered interpretations of cultural phenomena. Queer theory challenges the notion and belief that sexuality and gender identity are determined by biology and can be judged empirically on fixed standards of morality and truth (Calafell and Nakayama, 2016).

Queer theory starts from the notion that identities are not a destiny, instead it avers that destinies are shaped, constituted and constructed with the intention of meeting certain goals. In this vein, Queer theorists put emphasis on what is considered normative, as well as how and why people sometimes resist normativity. Queer theory also looks beyond the binary manner of classifying sexualities into heterosexuality or homosexuality- in favour of capturing the diversity that lies in sexualities. Such diversities comprises of intersex, transgender, intersex, bisexual, and cross-dressing. Queer theory takes the anti-essentialist path, by embracing whatever is non-normative. As such it doesn't categorize any essential or underlying characters into any of the existing categories of sexual identity.

Queer theory looks at sexuality as a complex array of social codes and forces, forms of individual activity and institutional power, which interacts to shape the ideas of what is

normative and what is deviant at a particular time (Harris, 2005). In the long run this operates under what is deemed as “natural,” “essential,” “biological” or “God-given.”

This theory was tested by evaluating the extent to which social power, laws and those in leadership positions have stamped their authority, in as far as sexuality is concerned. There are evidence of this theory in effect .A case in point is the decision by KFCB to ban the Rafiki film, because of what it perceived as the film’s glorification of homosexuality. KFCB assumed the role of a ‘moral police’ through its actions of using its power to determining what is permissible and impermissible content in the Kenyan society as a way of upholding that homosexuality has no place in the Kenyan social space

Banning the film in my view as a researcher, exposed the ugly underbelly of the Kenya leadership that has continued resisting modern day sexual dynamics, diversities and realities. When the political and religious leadership make a blanket condemnation on homosexuality, the plight of the members of the LGBT cannot be addressed well

The church, KFCB and the laws of Kenya have collectively shaped and influenced the policies against the LGBT persons’ human rights and freedom of expressions. These forces and power work towards institutionalizing certain forms of sexual and gender expressions while stigmatizing others. In this context same-sex relationships and LGBT themed content are unlawful in Kenya, to that effect queer theory informs the continuation of the existing policies and laws against homosexuality in Kenya.

## **CHAPTER THREE: RESEARCH METHODOLOGY**

### **3.1: Introduction**

This chapter focuses on the following; Study Design, Study approach, Study Area, Sampling Procedures, Data collection instruments and procedures, and data analysis.

### **3.2: Study design**

This study is descriptive in the sense that it interrogated a phenomenon based on attitudes, perceptions and values (Orodho, 2013). This design was appropriate since this study examined existing policies on homosexuality, legal gaps and the role of Kenya media in the LGBT discourse; and their implications on the LGBT community. Descriptive design suited this study because it entailed data collection which described and analysed a larger population.

### **3.3: Study approach**

This study was purely qualitative research. Desk study was used to collect and piece together the secondary data. Key Informant Interviews were used to collect primary data from specific persons who were purposively selected, and who have the experience, expertise and knowledge on areas that this study was interrogating.

The approach was suitable for this study because it enabled the researcher to get a deeper understanding of the subject of study by reading through the available literature and building up an argument with that. The key Informant interviews supplemented the study with input from the experts and policy makers' perspective.

### **3.4: Study Location**

This study was conducted within Nairobi County, Kenya.

This location was conveniently picked for the study because most of the stakeholders relevant for this study are based here. Latest policies and judicial pronouncements around LGBT community and homosexuality have been made by relevant institutions based in the city.

### **3.5: Target population and sampling**

This study focussed on the general society in the sense that it interrogated legal gaps, media role in LGBT discourse, the church's position and existing policies on homosexuality.

### **3.6: Sample size determination**

There are no limiting rules when it comes to sample size in a qualitative study. Sample size is often informed by the purpose of the study, what can be done at a particular time with particular resources. Sampling for a qualitative research often takes the general term purposeful sampling. In this respect the researcher utilized a non-probability approach, whereby decisions were made depending on the expertise, knowhow and relevance of the individuals included in the sample. In this study the individuals who were picked were representatives from relevant policy makers, clergy members and legal experts who are directly involved on issues directly or indirectly related to homosexuality, human rights and LGBT rights.

### **3.7: Validity and Reliability**

Validity for this study was achieved by the researcher, through the appropriateness of the study in respect to the research design, methodology, sampling, data collection, analysis and interpretation. For a qualitative research of this nature extended field engagement, keen observation, evidence weighing, checking for the representativeness, respondents' validation and researcher effects were well managed.

This study incorporated desk study which entailed a rigorous analysis and keen examination of Kenya media role in LGBT discourse, existing policies on homosexuality, legal contradictions, church's position on LGBT discourse and their ramifications on the LGBT community. There was extended interaction with documents, journals, video content, essays and articles. Newspapers articles, dissertations and theses from universities locally and abroad were used to strengthen up the study. This diverse information sources were necessary in this study.

### **3.8: Data collection instrument and technique**

Data collection involves getting data in an orderly and procedural manner in order to meet and answer the study's objectives and questions. The primary data was generated by the use of key informant interviews. The informants were policy makers on laws, policies, and social matters relating to homosexuality. The respondents in the key informant interviews were comprised of: Pastor Fredrick Waithunguri, youth pastor ACK St Mark, Westlands, Sheila Lulu, Program Assistant (Legal Aid and Advocacy), National Gay and Lesbian Human Rights Commission (NGLHRC) and Faith Masafu, Program Officer (NGLHRC). The secondary data was conducted through extensive and rigorous desk study using available informants' sources such as refereed journals, essays, articles, university repository journals and thesis of previous researchers' studies done around the subject of homosexuality and the LGBT community both local and internationally.

A voice recorder was used to capture the audio of the discussions for playback purpose during analysis. The audio files were transcribed, analysed along research themes and presented in prose form.

### **3.9: Data analysis and presentation**

Data analysis can be defined as the breaking or separating research materials into elements or units into a manageable piece (Siedel 1988). The data for this study, audio files of the key informant interviews were collected, transcribed through a process of analysis. The data was corroborated with field notes. There were instances where the need for further clarification arose and the researcher carried out follow up phone interviews. The decision making at this stage was based on what is important for the study and what is less important from the data, in respect to the study's objectives. Data gotten from the desk study was analysed alongside the data gotten from the key informant interviews. Triangulation was utilised to check a number of issues regarding role of the Kenya media in LGBT discourse and its implications, legal gaps, human rights question on LGBT and policies surrounding homosexuality in Kenya, as well as their ramifications on the welfare of the LGBT community.

### **3.10: Ethical consideration**

In research it is important to be aware of the ethical matters surrounding gathering data from human beings. It is vital to maintain justice, utmost respect for persons and beneficence. They are crucial when it comes to assessing and evaluating processes that entail gathering data from people through focus group discussions, surveys and interviews. The researcher at all times respected people's autonomy in regard to them making independent decisions and acting on them.

This study was quite sensitive due to its controversial nature. However, to overcome this problem the researcher took time to explain and clarify that this study was solely for academic purposes. There were informed consent forms which respondents signed in order to participate in the study. The key informants were notified that the interviews were to be audio recorded for playback purposes during the data analysis process.

## **CHAPTER FOUR: DATA PRESENTATION, ANALYSIS AND INTERPRETATION**

### **4.1: Introduction**

This chapter presents analysed data generated from a combination of findings from desk study and key informant interviewees. The analyses was based on study objectives and research questions. The study being a qualitative one, the data presentation was done using prose form and by narration and summary of themes.

### **4.2: Role played by the Kenya media in the LGBT discourse and its implications**

The Kenya media has played a vital role in giving visibility to the LGBT community, thanks to their impartial coverage of the LGBT stories and giving voice to the LGBT community to articulate their issues. The LGBT discourse has gathered momentum to a point where it can no longer be ignored or dismissed as a non-issue socially.

The media has reliably highlighted LGBT community adversely and as such it has enhanced their presence. This is through ways such as foreign LGBT themed movies being accessed in Kenya and some even being produced. A number of public figures have come out regarding their sexual orientations and the media has been running LGBT related stories.

There are numerous instances where Kenya media houses have demonstrated their commitment to have bold conversations around the LGBT community, their issues and agenda. The case of George Barasa alias Joji Baro getting invitation to a prime evening show to speak on the challenges he is facing as a gay in Kenya, speaks volumes about the media's desire to have a peek into world of the LGBT community and get a side of their story.

George Barasa alias Joji Baro, a self-confessed gay and gospel artiste has been passionate about protection of LGBT rights as well as the freedom of expression by the LGBT community. As

a teenager, he was disowned by his parents and had to fend for himself. In an interview with a local TV station he admitted to being stigmatised by family due to his sexual orientation.

The apparent normalization and demystification of the LGBT community and their agenda in the Kenyan media came to the fore on 16<sup>th</sup> October 2016, when Joji Baro was invited as a panellist on NTV's Friday night show; The Trend then hosted Larry Madowo. The subject of discussion was the controversial amendment of Film and Stage Play Act, Cap 222. The amendment had set a raft of unfriendly and bureaucratic measures aimed at regulating film making as well as censorship.

Joji Baro was sitting in as a representative of the LGBT community. Dr Ezekiel Mutua the former KFCB boss was part of the show albeit through a live link from a different location. In his submission Joji Baro blamed Dr Mutua for his highhandedness and ill treatment of the LGBT community. He even cited his personal experience where his music video was banned despite it not having any lewd visuals. In his defence, the CEO justified the ban citing the song's lyrics which he termed as immoral, much to the chagrin of Joji.

In a spirited rant, Joji accused Dr Mutua of trying to set social morality parameters a function which he described as unwarranted and far-fetched. He also blamed Dr Mutua and KFCB of discriminating on LGBT persons by failing to consult them during decision making. In many instances, Dr Ezekiel Mutua has come under constant attack for using his position to impose personal religious beliefs discriminately.

In a high court ruling on 24<sup>th</sup> May 2019, which upheld the penal code section 162 -165, the court room was packed with a battery of journalists all eager to capture the historic event. The ruling was anticipated with a bated breath as it was going to have far reaching implications on the LGBT community in Kenya and their pursuit for legal acknowledgement and safe spaces. Sadly and much to the chagrin of the LGBT community and the Pro-LGBT human rights bodies



and lobby groups; the court dismissed the case citing that the constitution allows for heterosexual marriage hence quashing any hope of same-sex relationships having a place in Kenya.

From a communications angle, it was evident the court case had a great salience within the media circles. Over the years the LGBT agenda and discourse were often dismissed as an un-African sexual concept which was being peddled by a section of Western media. A case in point was the July, 2015 when the then United States President Barack Obama paid an official visit to Kenya. While addressing the media from the State House in Nairobi, President Obama asked Uhuru Kenyatta to reconsider dropping discriminative laws in the spirit of Kenya's progressive constitution. President Obama affirmed that he believed in treating people equally before the law. He reiterated that the State should not be discriminating its people based on sexual orientation. Whereas he acknowledged that there could be differences in cultural and religious beliefs, President Obama stressed that the government has the obligation to operate relative to the people. While making reference to the historical happenings in the US, President Obama decried that the moment a State begins to treat its people differently because they are different, it creates room for freedoms to erode paving way for bad things to happen. Obama compared LGBT rights violations to slavery and segregation in the United States which was perpetrated by government system structures. President Obama's remarks on gays and lesbians rights sparked intense debate and elicited mixed reactions on both social-religious and legal fronts.

Whereas Obama's position on gay and lesbian rights was dismissed by those opposed to the LGBT rights in Kenya, it opened a window for deep introspection at a personal level, bolder conversations and reflections on the LGBT discourse and agenda in Kenya. In his speech, President Obama posed the question, "why do we have to criminalize someone because of who they choose to love?"

On 17<sup>th</sup> May 2013 KTN ran a news headline dubbed the Gay, Lesbians Match, where members of the LGBT community converged at Uhuru Park in readiness to stage demonstration along the streets of Nairobi, to agitate for their rights. The demonstration was led by Eric Gitari, who was then the Executive Director of National Gays and Lesbians Human Rights Commission (NGLHRC). The group admitted they were considering writing to the Attorney General to seek their rights to be protected under human rights. The demonstration was thwarted by police.

KTN in its Morning Express show on 21 Jan 2014, hosted by Sophia Wanuna and titled Homosexuality in Africa; Eric Gitari the then Executive Director of National Gays and Lesbians Human Rights Commission, alongside Anthony Oluoch a representative of Gay Kenya Trust were hosted to shed more light on LGBT discourse in Kenya and the misunderstanding surrounding it.

The two LGBT rights crusaders explained the struggles members of the LGBT community go through in the conservative Kenya society and the stigma that those who have come out have to contend with from both family, society and even from religious quarters. While marking reference to their own experiences, they appreciated their friends and families for accepting them eventually despite some of them expressing shock and disbelief regarding their sexual orientation.

The two maintained that lack of information, religious incitement and the government failure to drop the colonial laws in the Penal Code Sections 162-165, were flaming sanctioned discrimination and homophobia in Kenya. They called on the Kenyans to respect personal decisions like whoever one chooses to express love to.

On 6<sup>th</sup> July 2015 in its Power Breakfast show hosted by Willis Raburu, Citizen TV had a topic discussion called Gay Debate Voices. The debate brought together a legal mind; Mr Irungu Kang'ata, Bishop Mark Kariuki, a member of the clergy and Eric Gitari then Executive

Director of National Gays and Lesbians Human Rights Commission (NGLHRC). Eric Gitari highlighted cases of discrimination on LGBT persons even in their own families where they face threats of disownment. Gitari clarified that in their LGBT rights advocacy they were fighting for social justice as opposed to the same-sex marriages as it had been misconstrued by the anti-LGBT critics.

The discussion happened ahead of President Barack Obama's visit to Kenya. The debate was triggered by a national buzz created by information intimating that in his official visit, President Obama was going to address the gay and lesbian rights, after Kenya was mentioned as a hostile, intolerant and discriminative country to the rights of the LGBT community. This can be interpreted as Kenya media's active participation in the national LGBT discourse. In other words, the media was playing a role of facilitating candid conversations on a social subject that was hitherto deemed taboo, unnecessary or satanic. By having such a show involving a lawyer, member of clergy and a representative from the LGBT rights organization, it demonstrated the media's intention of having an all-rounded conversation towards debunking the mystery around LGBT rights, persons and the clamour for safe space and social justice.

Bishop Mark Kariuki was put to task to explain why he was urging the religious community to shun the LGBT community, contrary to the biblical dictates of compassion, kindness, care and love for all. In his defence the Bishop clarified that he did not generally hate the community but hated the resultant sin from homosexual behaviour. He was adamant that a sin is a sin no matter the justification brought forth at least in a Christian religious setting.

Irungu Kangáta had organized a rally to condemn LGBT community in Kenya and even incited the public to arrest and hand over to the police anyone they suspected to be a homosexual. This move was criticized by Eric Gitari as a perpetuation of violence and discrimination against a social minority that was not posing any social threat to warrant such hateful stance. According

to Eric, rallying people against a social minority was just but a reckless move aimed at gaining political capital at the expense of the safety of a minority group.

Eric Gitari also debunked the fallacy that members of the LGBT community are not religious arguing that most of them are active church goers who even have religious leaders who they go to for spiritual counsel from time to time. His message to the religious leadership in Kenya, was more of a clarion call to the churches to open their arms to the members of the LGBT community without being judgemental.

The visit to Kenya by renowned CNN presenter Richard Quest in October 2018, proved to be another voice of reason and call on the need for the media houses to also liberalize the newsrooms to accommodate media personalities who could be members of the LGBT community. He made reference to the BBC media house strategy that is not discriminative to their LGBT staff but instead has embraced the sexual minorities in the work place. Richard Quest also called on Kenya to amend its laws to allow everyone to live and work freely; so that they can be in a good position to compete with other nations across the world.

#### **4.3: NGLHRC lauds Kenya media's role in LGBT discourse**

National Gay and Lesbian Human Right Commission (NGLHRC) admits that the Kenya media has largely contributed to increase in visibility of the LGBT community and has helped to demystify the prejudices, stereotypes and misinformation on LGBT community. The media has also facilitated the debunking of the mystery around LGBT community and the LGBT discourse. It is through the media that LGBT persons, human rights activists have had a chance to explain their agenda. NLGHRC is satisfied with mainstream media which have over the years invited LGBT representatives and pro LGBT rights legal minds to shed more light on the LGBT community and their clamour for legal protection. This has helped in furnishing the public with the right and correct information.

NGLHRC admits that homophobia, prejudices and discriminative tendencies against the LGBT persons are caused by lack of information, misinformation or spread of malicious propaganda that incites the public against the LGBT community. By the media giving the LGBT rights activists and representatives a chance to speak and shed light on their cause, it has played a role in lessening prejudice, harsh stereotypes and homophobia. However there are a few blogs and tabloids such as TUKO, that are leaning more on sensational reporting by using misleading click baits. As such they end up churning out skewed and negative reporting of LGBT community and the LGBT agenda. Nonetheless the mainstream media has by large impacted positively on the LGBT community.

#### **4.4: Implications of the legal contradiction between Kenya constitution and the penal codes sections 162-165**

The High Court dismissal of a court case seeking dropping of penal code sections 162-165, dealt a huge blow to the National Gays and Lesbians Human Rights Commission (NGLHRC) which had lodged the case. The ruling was also a setback to the LGBT community, which was hoping for the court to rule in their favour in their pursuit for social justice, safe space and legal recognition in Kenya. The ruling dampened the hopes, excitement and anticipation of a historic ruling.

While reacting to the ruling, the dejected representatives of the LGBT human rights organization accepted the ruling but vowed to carry on with the fight. They decried that the penal code had been used as a basis to discriminate, harass, and stigmatize the LGBT community. The Penal Code was an affront to full enjoyment of human rights since it predisposed members of the LGBT community to social ills such as legally-sanctioned police brutality. Cases of suspected members of the LGBT community getting arrested, detained without formal procedure and later coerced to pay bribes to the police officers are documented.

The basis under which the High Court anchored its ruling on, has also come under scrutiny, over what the LGBT community termed as selective interpretation of the constitution. The court based the ruling on Article 45 of the constitution which states that marriage can only happen between two consenting adults of opposite gender. The LGBT community decried that their main concern was not really same-sex marriage being permitted but dropping of the Penal Code Sections which were flaming discrimination, stigma and assault hence depriving the members of the LGBT community human dignity.

The high Court ruling on 24<sup>th</sup> May 2019, upholding the Penal Code Sections 162 to 165 elicited reaction from the United Nations High Commissioner for Human Rights Ms Michelle Bachelet. Bachelet expressed her disappointment at the decision citing that the Penal Code was breaching human rights obligation, resultantly contributing to discrimination and violence against the members of the LGBT community.

Criminalization of acts targeting individuals based on who they love is seen as inherently discriminatory. The downside of this is that it communicates a message to the society that encourages hostility and even violence targeting LGBT individuals. The ripple effect of criminalizing same sex relationships is denial of rights to education, healthcare, housing and even gainful employment.

Kenya has come under scrutiny for holding on to draconian laws that are not only discriminative but in conflict with the spirit of the Kenya constitution. The High Court ruling cited that the Penal Code Sections 162-165 are not discriminative per se while implying that it does not apply exclusively to LGBT members alone. However the court did not take into consideration the legally-sanctioned injustices that LGBT community are exposed to; occasioned by laws failing to protect them.

In that regard whereas the same-sex relationships are unlawful in Kenya, the same laws failed to consider that members of the LGBT community are human beings who are entitled to equal enjoyment and protection under constitution of the country. There is an existing disconnect between the constitution and the laws of Kenya. There is need to conduct further legal interpretation so as to arrive at a middle ground where sexual minorities are not exposed to harm merely on the grounds of sexual orientation. Despite the pressure from the West and the United Nations Human Rights Council, Kenya has stood its ground. There are grave concerns surrounding the safety and the welfare of the members of the LGBT community, unfortunately the State has failed to reconsider the human rights and the human dignity questions informing the LGBT community's struggle for social justice and safe space.

The LGBT community and the Pro-LGBT human rights organizations have vowed to carry on with the fight despite the legal setback occasioned by the High Court upholding the Penal Code Sections 162-165.

#### **4.5: Implications of existing homosexuality policies on the LGBT community**

Kenya Film Classification Board has been quite in the news headlines for its tough stance on homosexual content in films produced in Kenya. On 23th September 2021, KFCB acting Chief Executive Officer Christopher Wambua banned a gay-themed film titled 'I am Samuel'. He accused the producer of the documentary film of attempting to promote same-sex marriage agenda as an acceptable way of life. The film revolved around two men who were in a romantic relationship. The two expressed their love for each other and their wish for their relationship to be embraced as a way of life. The documentary ends with the two men exchanging vows. The film producer dedicated the film to the gay community.

The KFCB premised the ban on Penal Code Section 165 that outlaws homosexuality as well as the provision in Films and Stage Plays Act Cap 222 of the laws of Kenya. The commission

further stated that the film was an affront to Article 45 of the Kenya Constitution which recognizes a family as a basic unit of a society; and which is made up of two persons of the opposite gender. The CEO elaborated that the Kenyan laws, society's belief and culture is in sacrosanct of family.

KFCB also took an issue with the documentary film over what it termed as its demeaning of Christianity by the two men purporting to conduct a religious marriage through exchange of vows while invoking the name of the Father, Son and the Holy Spirit.

Whereas Mr Wambua admitted that the adults have a right to choose what to consume within the parameters of the law, the commission expressed concerns about the possibility of the vulnerable groups being corrupted by such inappropriate content.

In light of this ban of yet another LGBT-themed film it is evident that policies in place in Kenya are still intolerant to the freedom of expression by the members of the LGBT community. The commission has also demonstrated its reluctance to explore the contemporary sexual diversities and the creative expressions thereof. KFCB has also blatantly opposed setting up avenues aimed at having an amicable resolution to this standoff between it and the content creators telling LGBT-themed stories.

Members of LGBT community have decried the ban as an affront to their right of creative expression which infringes on their freedom of expression as enshrined in the constitution. As such these punitive policies targeting both the creative members of the LGBT community and the pro-LGBT content creators; exacerbates suppression and undue condemnation against members of the LGBT community.

Whereas as the children have a right to be protected from exposure to unsuitable content, there is a way adult-rated content can be made exclusively accessible to target adult consumers. The



anti LGBT policies as demonstrated by KFCB are rigid and unresponsive to the existing sexual realities in this modern age.

From the legal and policy angles, Penal Code Sections 162-165 are often reinforced by the mentioning of Kenyan culture, traditions and religions. However this is a faulty notion, in the sense that it does not give a room to interrogate, analyse deeply and reflect on other existing sexual realities such as the LGBT community and their rights.

Whereas the constitution is not really explicit about LGBT persons, there is the need to seriously consider their human rights enjoyment which they are entitled to in the first place. Ideally before one can be classified as male or female, they are first human beings and therefore eligible for constitutional protection under the Bill of Rights.

The existing policies in Kenya are discriminative even to the creative expressions of the members of the LGBT community. Wanuri Kahiu the director of Rafiki film had to seek a court injunction to obtain a week-long lifting of the ban of her film for screening, in order to meet the criteria for nomination. It was a sold-out screening.

Wanuri Kahiu acknowledged that the ban of Rafiki, was an infringement on her freedom of expression, and this informed her decision to move to court to challenge the ban on that ground. In her own admission Wanuri Kahiu appreciates that the ban of the film triggered a national buzz in Kenya. It paved way for a candid discussion around the oppressive laws and possible options that can be pursued to ratify them to be in congruence with the provisions of the constitution.

NGLHRC observes that anti-LGBT policies are informed and enforced through the penal code section 162-165 in Kenya, and as such repelling the penal code sections in question, will pave way for restructuring the existing anti-LGBT structures and policies. Children adoption polices

in place cannot allow LGBT persons to adopt children, which is quite discriminate to those who intend to raise adopted children. Alternatively LGBT persons who are in a romantic relationship are not eligible to adopt children.

The LGBT community under the NGLHRC is hoping the Court of Appeal will eventually drop the discriminative penal section 162 which promotes homophobia. The High Court based its ruling on article 45 which provides for heterosexual marriage between adults of opposite gender. The NGLHRC disputes this saying that the main priority for the LGBT community now is to be guaranteed safety, access to quality health care and full enjoyment of human rights. And this can only be achieved when the Penal Codes Sections 162-165 are repelled.

#### **4.6: The Church's position on LGBT discourse in Kenya**

The respondent accepts that the existence of members of LGBT community in our society, and some are even faith based. Whereas the church does not disagree with them coming and fellowshiping in church, the respondent admits that the church should be the last place to push away people based on sexual orientation. The respondent says members of LGBT community are just like any other person seeking spiritual nourishment in church.

The respondent has not experienced any case of homophobia or discrimination of any nature within their church precincts. In reference to some prominent personalities who have come out regarding their sexual orientation, the respondent applauds those who have taken the step because confession is a demonstration of acceptance. As such the church is at hand to assist self-confessed members of the LGBT community both spiritually and in any other ways necessary towards their wellbeing. However this should not in any way cause discomfort or become a baggage to the church, members of clergy and even members of the congregation.

According to the church representative, the LGBT community has earned indirect acknowledgement in Kenya over the years, now that there are registered organizations

championing for their rights and safe social spaces for the members of the LGBT community. The church is trying to provide a conducive environment so that LGBT community is able to seek spiritual help and necessary support. The church is aware that besides the issue of sexual orientation, there are other persons having personal struggles such as porn addiction, alcoholism and as such the emphasis is more on the church providing assurance through all possible ways without really being judgemental of their choices. Nonetheless the respondent says any behaviour or action that is in sharp contradiction to biblical teachings and Godly ways will not be accepted. “We expect everyone who comes to church to behave in a manner that is acceptable to church and society in general.”

The question of whether homosexuality is inherent or acquired, the respondent obliges that there is no scientific proof that one is born a gay or lesbian but such orientation can be nurtured through environment, socialization, sexual trauma at young age and peer influence.

Everyone is deserving love and God is the only one who will judge. However, the respondent upholds that the bible is clear on what God expects. The LGBT community should turn to God and his teaching in order to have a clear indication on the path they can align themselves through spiritual intervention.

From the findings the church in Kenya is aware of the LGBT community and their cause. However whereas it is not discriminating on them, it is evident the church has set conditions which the members of the LGBT community must adhere to. The church perceives homosexuality as an acquired behaviour that can be reversed or changed over time through spiritual intervention, counselling and rehabilitation. As such the members of LGBT community in Kenya are seen by church as persons who require spiritual salvation and deliverance.

There has been a sharp divide within the Church of England in regard to same-sex marriage. Conservatives within the church have voiced their concerns and instead sought to stick to the traditional teachings that a marriage is a union between a man and a woman.

Paul Bayes, a Senior Bishop in the Church of England delivered a hard-hitting statement calling on the church to recognise marriage between people of the same sex. This was expected to bring to an end the traditional Christian teaching of heterosexual marriage. Bishop Bayes advocated for “gender-neutral marriage canon”. He decried that their hard stance on same-sex relationship had been oppressive, offensive and hypocritical to the “world beyond church.”

Bishop Bayes has increasingly been vocal on the LGBT rights and in the recent years, he admitted that as he grows older and nearing the end of his ministry, his pro-LGBT agenda has been inspired by his vision of having a Christian community that does not stink of oppression or hypocrisy to the world.

Most LGBT members have opted to hide away from church for the fear of being exposed and subjected to conversion therapy or being forbidden from preaching in churches.

Church of England has witnessed equality campaigns being carried out, over what was described as LGBT Christians being made to feel unwelcome. Some of the ‘outed’ members underwent conversion practices, including payers to “deliver” them from the unwanted sexuality. This was seen to have adverse consequences such as breakdowns and suicidal feelings

At the moment the Church of England does not recognise same-sex marriages, and therefore discourages clergy from blessing same-sex.

The Kenyan church is reluctant to endorse same-sex relationship and marriages. The ACK church which falls under the Church of England, has had to defy some decisions being made by senior church leaders in the West.

On 20<sup>th</sup> June 2019 Archbishop Jackson Ole Sapit the ACK Kenya head flagged by Justin Welby from Church of England admitted that they believed in the biblical definition of marriage and relationship. He however observed that the modern world calls for Christians to respect each other's differences in order to preach the word of God. (The Standard, 2019)

In what was a demonstration of rejection of same-sex marriage, Archbishop Sapit maintained that no Kenyan bishop will attend 2020 Lambeth Conference at Lambeth Palace, England unless a gay bishop was struck off from the list of invitees. The invitation was open to even bishops who had announced their gay sexual orientation. This was in response to Bishop Kevin Robert from Canada who married his partner Mr Mohan Sharma in December 2018. The conference was through the invitation of Justin Welby who invited all active bishops alongside their spouses.

From Justin Welby and Jackson Sapit's statements it is evident that the Kenya church is still sticking to its biblical teaching of heterosexual marriage and the church is yet to recognize same-sex relationships. The members of the LGBT community are still perceived by the church as "sinners seeking salvation." Jackson Sapit made reference to Romans 3:23 which reads that 'all have sinned and fallen short of God's glory.'

The church in Kenya disapproves same-sex relationship. In as much as the LGBT members in Kenya are allowed to worship, they are treated as social misfits such as thieves or adulterers, who need spiritual intervention so as to change their behaviours for the better. In that the regard same-sex relationship is still perceived by the church as a sinful act which defies the order of God.

#### **4.7: The human rights question on homosexuality in Kenya; and the positives drawn from the legal pursuits for LGBT rights to be consolidated as part of human rights**

In Kenya there is still a raging debate on gay and lesbian rights being recognized as part of human rights. In his speech in July 2015 President Uhuru Kenyatta was dismissive when he was put on the spot by the then Reuters Correspondent for White House Jeff Mason; regarding Kenya's reluctance and evident disregard for the protection of gay and lesbian rights.

President Kenyatta affirmed that gay and lesbian rights were not a priority in Kenya, and that there were more pressing issues such as enhancing access to quality healthcare, women empowerment among others. He also mentioned that the values, religious stance, cultures and traditions of the Kenyan society were not ready to accommodate homosexual rights. Whereas he acknowledged that some countries had decriminalized same-sex relationship, he admitted that Kenya was not ready to give gay and lesbian rights any consideration because it was a non-issue.

President Kenyatta's position was a blow to the LGBT community. It was a confirmation that the State was not willing to give LGBT agenda and LGBT rights any space in Kenya. The established and influential Western countries such as the US, UK as well as the UN Human Rights Council have been calling out Kenya for failing to amend its punitive and draconian laws that have continued to be discriminative to the sexual minorities.

The fight for LGBT rights in Kenya has achieved quite commendable milestones according to the National Gay and Lesbian Human Rights Commission (NGLHRC). However, there is hope of better days ahead. A Court of Appeal in Mombasa ruled on March 22, 2018 that; conducting forced anal examinations on persons accused of engaging in same-sex sexual intercourse was unconstitutional. This was regarded as a win for the LGBT persons who decried that the

examination was unlawful and deprived them of human dignity. The petition by NLGHRC described the anal testing as cruel, inhuman and degrading.

The acceptance of the third gender intersex in Kenya was also seen as an historic moment in Kenya and it set a precedence for intersex rights in Kenya and around the globe. In the 2019 national census intersex persons were counted and the third sex was formally accepted in Kenya.

NGLHRC appealed the May 19 ruling in the Court of Appeal. The NGLHRC respondent avers that the ruling violated the rights of the LGBT community and deprived them an opportunity to enjoy their human rights as enshrined in the constitution. The existence of the penal code also subjected the LGBT members to partial enjoyment of human rights as second class citizens. Penal code section 162-165 predisposes LGBT community to risk of being thrown out from places of residence. Cases of arbitrary arrest of persons suspected of engaging in same-sex sexual conduct have been persecuted by the state officials thanks to the penal code section 162-165 being in place. The penal code section 162 according to the respondent, violates human privacy.

With the Penal Code sections 162-165 being in effect, it means it will take years before the LGBT community can enjoy their rights. Failure to drop the aforementioned laws will continue to predispose the LGBT community to discrimination, stigma and violation of their human rights. The members of the LGBT community who have come out regarding their sexual orientation have to contend with life threats, discrimination and social reprimand meted out against them.

## **CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS**

### **5.1: Introduction**

This chapter presents a summary of the findings of the study around the legality debate, human rights question, church's position and the media role in LGBT discourse. The conclusions arrived at from the study as well as recommendations are presented.

### **5.2: Britain's gradual repeal of its anti-LGBT laws in comparison to Kenya's reluctance to embrace LGBT rights**

The United Kingdom has come a long way in its journey towards sexual liberation. In the early years, The Buggery Act 1533 was passed by Parliament during the reign of Henry VIII which made homosexuality among the male prosecutable and possible convictions punishable by death. It was until 1861 that death penalty was abolished after the passing of the Offences against the Person Act. Acts of sodomy convictions were punished by a minimum of 10 years imprisonment.

With the significant rise in arrests and prosecutions record after the world war two, coupled with increasing prosecutions; the legal system was relooked with the aim of addressing and dealing with homosexual acts. This led to formation of report of the Committee on homosexual offences and Prostitution. The committee in respond to findings of a research conducted on homosexuality, decreed that the state needed to focus on protecting the public, rather than scrutinizing the private lives of the people.

The fight for sexual liberation bore fruits in 2004 after the passing of the Civil Partnership Act 2004 allowed same-sex couples to enter into legally binding agreements just like marriage. In 2013 Marriage Act 2013 permitted same-sex couples in England and Wales to marry. Scotland did the same.



The transgender also got legal recognition, and were even allowed to acquire new certificates even though gender options were limited to male and female. This was preceded by the coming into effect of the Gender Recognition Act in 2005. The Equality Act 2010 gave LGBT employees protections from discrimination, harassment and victimization at work places. This legislation consolidated existing legislations and added extended protection to the transgender workers hence solidifying rights granted by the Gender Recognition Act (Dryden, 2018).

Britain, which Kenya was a colony to has witnessed gradual amendments of its LGBT laws which were meant to eradicate discrimination and protect the rights of the LGBT community. The irony in reference to Kenya is that, Kenya's former colonial master that introduced the Penal Code Sections 162-165, has since ratified its laws to be LGBT accommodative. The dropping of the laws that criminalized same-sex relationships were premised on the need to accord all humans dignity, and the freedom to express their love freely.

Despite the pressure from the West and the United Nations Human Rights Council, Kenya has stood its ground. There are grave concerns surrounding the safety and the welfare of the members of the LGBT community, unfortunately the State has failed to reconsider the human rights and the human dignity question informing the LGBT community's struggle for social justice and safe space.

Kenya has come under scrutiny for holding on to draconian laws passed down from the colonial government. They are not only discriminative but in conflict with the spirit of the Kenya constitution. The High Court ruling cited that the Penal Code Sections 162-165 are not discriminative per se while implying that it does not apply exclusively to LGBT members alone. However the court did not take into consideration the legally sanctioned injustices that LGBT community are exposed to; occasioned by laws failing to protect them.

In that regard whereas the same-sex relationships are unlawful in Kenya, the same laws failed to consider that members of the LGBT community are human beings who are entitled to equal enjoyment and protection in the country. There is an existing disconnect between the constitution and the anti-homosexuality laws of Kenya.

### **5.3: Recommendations**

There is need to explore further legal and judicial interpretations so as to arrive at a middle ground where sexual minorities are not exposed to harm merely on the grounds of their sexual orientation. Even though the laws as captured in the Penal Code Sections 162-165 remain in effect, there is a need to safeguard the welfare of the LGBT community in terms of their: safety, access to healthcare and protection from extra judicial suffering in the hands of security officials. Cases of suspected gays or lesbians being physically and sexuality assaulted while in police custody or being coerced to part with bribes have been reported. Subjecting members of LGBT community to human rights violations on the basis of their sexual orientation, goes against the human rights dictates in the constitution.

There is a need to redress the anti-LGBT laws in Kenya to fix the loopholes that are encouraging discrimination and social-institutional brutality against the LGBT community. It is only through the repelling of Penal Code Sections 162-165, that the discriminatory policies can be amended to achieve the following: Freedom of expression, access to quality health care that is not discriminative but responsive to LGBT persons, freedom to live anywhere and coexist freely without the fear of being stigmatized, subjected to arbitrary arrests, sexual assaults or harassment on the grounds of sexual orientation. Repelling of anti-homosexuality laws will only accord the members of LGBT a fair chance at self-development and attainment of self-potential.

The Kenya media has played a critical role in the LGBT discourse in Kenya. The media has clearly demonstrated this by: telling stories about LGBT activities such as court cases, inviting members of the LGBT for interviews and also according airtime to pro LGBT legal and human rights activists. The outcome of this is that the consumers of media have had a chance to get information, insights and interrogate LGBT issues accordingly. Prejudices and homophobia against a certain social group is often attributed to lack of information, knowledge and propaganda.

To an extent the media has contributed towards rewriting the story around LGBT community and agenda in Kenya, in a way where information is presented based on facts and in reference to human rights and freedom of expression.

The media in Kenya need to do more to in championing for equal and fair treatment of humanity. This can be done through exposing objectively human rights violations and acts of discrimination meted out on the members of the LGBT community. This will go a long way in underpinning the fact that a person's sexual orientation should not be used as a justification to persecute, discriminate, and stigmatize them; and subsequently deny them their human rights as enshrined in the Bill of Rights Chapter of the Kenya Constitution 2010.

The church on the other hand, needs to desist from ill treatment of the LGBT community in Kenya. The church and clergy play integral and influential role in LGBT discourse and their pronouncements have greater ramifications. The church and the clergy have to equip themselves with more information and understanding around LGBT issues, so that they don't get to a point where they expose LGBT persons to religiously-sanctioned harm. It is also humiliating to classify LGBT persons as sinners who need spiritual help and guidance, so as to be rescued from the 'Satan's' bondage.

Whereas the biblical teachings might be in contradiction with the sexual and romantic ways of the members of LGBT community, there is a need to exercise caution and due diligence. Just like the straight people, members of the LGBT community were also created by God. At the moment there is still debate and ideological differences among Western and African churches in regard to same-sex relationships. The churches might not really approve same-sex marriages unanimously, but they can create a free and safe environment for the LGBT community to seek spiritual nourishment, assistance and guidance their sexual orientation notwithstanding.

#### **5.4: Suggestions for further studies**

Pursuant to Penal Code Sections 162-165, homosexuality is unlawful in Kenya. This study focused on interrogation of the legality debate, human rights question on homosexuality and role played by the Kenya media in the LGBT discourse. There are other areas that need to be researched on as follows:

1. There is a need to conduct a research on perceptions, knowledge and understanding of homosexuality in rural areas of Kenya. Most of the LGBT organizations and activists are stationed in Nairobi.
2. There is a need to conduct a research on coping mechanisms employed by the LGBT members who have either come out or exposed regarding their sexual orientation.
3. There is presence of various organizations championing for the rights of LGBT community in Kenya such as: NGLHRC, GLAK, Gay Trust Kenya, GALCK, and IGLA. There is a need to conduct a research to ascertain whether these organizations have impacted in any way, on the welfare of the LGBT community.

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## **APPENDIXES**

### **APPENDIX 1: INFORMED CONSENT**

Good morning/Good afternoon. My name is Martin Mutai. I am a Post-Graduate student at University of Nairobi pursuing a Master's degree in Communication Studies. I am conducting a study titled: **INTERROGATION OF LEGALITY DEBATE AND THE HUMAN RIGHTS QUESTION ON HOMOSEXUALITY IN KENYA**

**Risks and Discomfort:** questions asked are not embarrassing. I therefore don't foresee risks or discomfort from your participation in the research. You may refuse to answer these questions if you choose.

**Voluntary participation:** Your participation in the study is completely voluntary and you may refuse to answer any question or choose to stop participating for any reason at any time.

**Reward:** You will not be rewarded for participation. You will not be asked to pay any amount to participate in the survey.

**Confidentiality:** All information you provide during the research will be held in confidence and your name will not be recorded on the questionnaire and focus group discussion. Questionnaires and Focus Group Discussion recordings will be kept in a secure location for safe keeping.

**Contact Information:** If you have any question regarding this survey, you may contact the following persons.

1. Prof George Nyabuga: Email-[gnyabuga@uonbi.ac.ke](mailto:gnyabuga@uonbi.ac.ke)
2. University of Nairobi Ethical Review Committee Secretariat.

**Participant statement**

I have understood the nature of this study. I have been provided with the opportunity to ask questions and I am satisfied by the answers provided and wish to participate. My signature or thumbprint below indicates my consent

.....

.....

**Signature or thumb print**

**Date**

**Investigator statement**

I have explained to the volunteer the nature of this project, risks and benefits involved in a language that s\he understands

**Name of Interviewer.....**

.....

.....

**Signature**

**Date**

## **APPENDIX 2: KEY INFORMANT INTERVIEW**

### **KEY INFORMANT INTERVIEW ONE**

#### **(1) Ms Faith Masafu - Program Officer, National Gay and Lesbian Human Rights Commission (NGLHRC)**

- i. LGBT persons often face threats, stigma and discrimination. As an organization fighting for the rights of these people what are some of the challenges you face?
- ii. Over the years that you have been in operation as a human rights organization, has the Kenyan society accepted your presence and the NGLHRC cause?
- iii. When NGLHRC was formally registered at the NGO registrar?
- iv. Since your registration of NGLHRC have you achieved any gains in as much as the fight for LGBT rights are concerned?
- v. In May 2019 the High Court of Kenya dismissed a case you had filed seeking to decriminalise same-sex relationships. Did the ruling dampen your spirit?
- vi. While registering the National Gay and Lesbian Human Rights Commission (NGLHRC) what was the major driving force or motivation?
- vii. Your pro-LGBT agenda has often been bashed as immoral and unbiblical especially by the clergy, what is your take on this?
- viii. In your opinion are gay rights human rights and why?
- ix. Kenyan society has been intolerant and hesitant to accept homosexuality do you think this will change any time soon and how?
- x. What legal reforms and policies are you seeking in order to improve the welfare and the rights of the LGBT community?
- xi. Has the media in Kenya contributed positively to your cause in any way?
- xii. What is your opinion on media coverage of LGBT discourse and is it aiding your agenda in any way?

- xiii. The fight for LGBT rights has often been touted by some quarters as a Western agenda, which is being popularised in Kenya. How are you working towards countering such narratives?
- xiv. After the High Court ruling in May 2019 which upheld the Penal Code, Sections 162-165, as an organization do you intend to seek further legal redress?
- xv. Does National Gay and Lesbian Human Rights Commission have presence across the country? If not, do you have plans to expand your reach?
- xvi. There has been a continued debate on whether gay rights are human rights, how is your organization hinged to substantively have a legal position in this regard?
- xvii. Over the years that your organization has been in operation what are some of the key highlights, which can be reported in as far as fight for LGBT community rights is concerned?
- xviii. Has the government and other relevant authorities been supportive to your organization in any way?
- xix. Do you have a safe space to commemorate LGBT-related events such a Pride Month in Kenya?
- xx. Rafiki film was banned in Kenya in 2018 by KFCB over what was described as its lesbian theme which was glorifying lesbianism, what is your take on the ban? Was it necessary in your view?

**Thanks for your participation.**

## **KEY INFORMANT INTERVIEW TWO**

### **(2) Ms. Sheila Lulu, Program Assistant - Legal Aid and Innovative Advocacy, National Gay and Lesbian Human Rights Commission (NGLHRC)**

- i. As a legal expert, what is your opinion on the greatest impediment to the legal recognition of the LGBT community in Kenya?
- ii. Did you move to the Court of Appeal to appeal the High Court ruling, after losing the case filed by NGLHRC, and which you represented in court?
- iii. The High Court dismissed the case in May 2019, which was seeking decriminalization of same sex relationships in Kenya. Was this a final blow to the LGBT community's pursuit for social and legal liberation?
- iv. Did the ruling against decriminalization disregard the human right to: chose who to love, who to associate with or have intimate relations with?
- v. What are the future prospects of the LGBT rights and persons in Kenya as a legal expert, in regard to their clamour for legal recognition?
- vi. Do you think human rights and gay rights can be consolidated in Kenya and what are some of the legal hurdles hindering this possibility?
- vii. Why is it hard for our laws to accommodate the LGBT community despite the constitution having a provision protecting all persons against discrimination of any nature be it sex, gender, colour etc.?
- viii. Is our perceived social-religious morality as a country perpetrating continued decriminalization of homosexuality in Kenya against the constitution?
- ix. Is the interpretation of the constitution flawed to the point of upholding the Penal Code, Section 162-165 as witnessed in the High Court ruling against decriminalization of homosexuality?

- x. In your opinion is the criminalization of homosexuality an affront to wellbeing of the LGBT community?
- xi. What could be the hindrance towards reviewing the Penal Code Sections 162-165 to be in coherence with the spirit of the constitution 2010 in Kenya?
- xii. Do you think the media in Kenya covers LGBT-related stories in a way that helps in promoting the welfare, equal rights and safety of the LGBT community?
- xiii. What is your recommendation on other legal alternatives that LGBT community have, in order to achieve legal acknowledgement and safe space in Kenya?
- xiv. The High Court ruling was hinged on Article 45 of the constitution which states that marriage can only occur between a man and a woman. Was this basis satisfactory and if not why?

**Thanks for your participation**

### **KEY INFORMANT INTERVIEW THREE**

#### **(3) Rev. Erick Waithunguri, Youth Pastor, ACK St. Mark, Westlands**

- i. What is the position of your church on matters of homosexuality?
- ii. The church has been documented to be homophobic and discriminative to the LGBT community what do you have to say on that?
- iii. How will you handle a case of a lesbian or gay either 'outed' or self-confessed, being part of your congregation? First are they welcomed to worship in your church?
- iv. As a church leader do you think LGBT community deserves to be acknowledged in Kenya?
- v. Is the church doing anything to protect this LGBT from social rejection, stigma and discrimination?
- vi. Biblically all human beings are equal before God, is the church tolerant to the LGBT community?
- vii. Do you think homosexuality is inherently inborn or acquired behaviour?
- viii. How would you advise on how our society should treat the LGBT community?
- ix. What message do you have for the LGBT community as a member of the clergy?
- x. In recent months, Archbishop Jackson Ole Sapit when hosting the Archbishop of Canterbury, admitted that LGBT community members were welcomed to worship in church do you support that?
- xi. What is your perception about Kenya media coverage of LGBT issues and what is your take on the same?

**Thanks for your participation**