

Are Transgender and Gay People Criminalized in Kenya?

Much has been written and discussed on laws of Kenya and their implications on transgender people. However, these discourse is dominated by ignorance and misconceptions about transgender people. In this article, I will highlight some of these misinformations and hope that relevant stakeholders will get a better grasp of the legal ecosystem that sexual and gender minorities live in and fine-tune their work to be more responsive and responsible. But before doing so, it is important I get to clear the air about who transgender people are and are not.

Transgender people are individuals whose self awareness as either male or female does not correspond with the sex they were assigned at birth. For example, some individuals born male are not comfortable with this sex and feel this is an incomplete and inaccurate description of who they are. They identify as women or female and seek medical procedures to change their sex to female. Alternatively, some individuals are born female and raised up as female. But, they feel comfortable, identify and live as male and eventually change their sex to male. These individuals and their gender identity(preference) problems have nothing to do with homosexuality or sexual orientation i.e. they are not gay or lesbian. Some may be attracted to female and others male persons. In a nutshell, their sexual orientation is heterosexual (straight).

There is this acronym i.e. LGBT normally used by some media personalities, NGOs, civil society organizations (CSOs), activists, haters and other stakeholders. This acronym stands for lesbians (L), gay (G), bisexual (B) and transgender/transsexual (T). A large majority of people who use this term (LGBT), including homosexual activists, do not understand what that T stands for or what the issues of transgender people are. Amongst them, LGBT is a catchy and modern term for representing gay and lesbian communities i.e. homosexuals. They do not realize that transgender is not related to gay orientation or that transgender is not a sexual orientation. Here is a simple break-down of that: Gay men are men who are attracted to other men; they are not attracted to women or to transgender women. Lesbians are women who are attracted to other women; they are not attracted to men or to transgender men. Additionally, gay men are not men who want to change into women and

lesbians are not women who want to become men. Gays and lesbians are happy with the sex they were assigned at birth and raised as - they are just attracted to individuals of their gender i.e. gay people are not transgender. However, due to ignorance in our communities and even among liberals, they confuse transgender as a subunit of gay orientation.

Misconception #1

LGBT people are criminalized by Kenya's Penal Code and the Constitution.

Fact: This is not true. Most people rely on sections 162 (a), 163 and 165 of the Penal Code to promote the propaganda that transgender people or LGB (lesbians, gay and bisexual) people are criminalized in Kenya.

Provisions of 162(a):

162. Unnatural offences

Any person who—

(a) has carnal knowledge of any person against the order of nature; or

(b) has carnal knowledge of an animal; or

(c) permits a male person to have carnal knowledge of him or her against the order of nature,

is guilty of a felony and is liable to imprisonment for fourteen years:

Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—

(i) the offence was committed without the consent of the person who was carnally known; or

(ii) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.

163. Attempt to commit unnatural offences

Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years.

165. Indecent practices between males

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any

male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years.

Readers should note that the above 3 sections do not single out transgender or gay people. The penal code (section 162) criminalizes certain sexual acts irrespective of the sex of the offenders. Section 162 criminalizes sexual acts known as "***carnal knowledge of any person against the order of nature***" between male and female persons as well as male and male persons. It does not matter if any or all the parties involved in the act identify as transgender, heterosexual, homosexual, bisexual, lesbian, cisgender (non-transgender people), communists, socialists, kikuyus, kambas, luos, cushites, christians, muslims, mormons etc.

Constitution of Kenya

Section 45(2):

Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.

This means that anyone irrespective of their labels or identities i.e. heterosexual (straight), transgender, cisgender (non-transgender people), homosexual (gay or lesbian), atheists, christians, muslims, bantus, nilotes, cushites etc are free to marry anyone as long as the other party is from the opposite sex. They are heterosexual (straight) men who are married to women (some are happy while others aren't). There are gay men who are married to women (some are happy while others aren't so happy). Additionally, there are straight and lesbian women married to men (some are happy while others aren't). These provisions of law apply to everyone. They do not single out transgender people or the so call LGBT community.

There is a difference between being a transgender person and engaging in criminalized sexual activities. The fact that one is transgender or LGBT does not mean they engage in above criminalized acts. Most Kenyans have seen transgender activists and even gay activists in TV interviews. No police officers ever waiting for these activists at the doors of TV stations to arrest them.

So, are transgender and gay people criminalized in Kenya? The answer is a simple NO.

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