Facts

This judgment concerns two consolidated petitions challenging the constitutionality of sections 162(a) (c) and 165 of the Penal Code, proscribing “carnal knowledge of any person against the order of nature” and “gross indecency” even in private settings, respectively. The petitioner in the first petition is a lawyer who identifies himself as gay man, who has been subjected to stigma and discrimination due to these provisions, and who seeks to bring the petition on behalf of the LGBTIQ community. The first petitioner in the second petition is a male adult who, as well his family, has faced discrimination and attacks due to his perceived or actual sexual orientation. The other petitioners in the second petition are individuals who have either been subjected to or have witnessed attacks and discriminatory behaviour based on sexual orientation, and civil society and human rights organisations. The petition also has ten interested parties comprising advocates of LGBTIQ rights, a senator representing diversity of Kenyan cultures (in rejection of homosexuality), registered trustees, the Kenyan Christian Professional Forum, and the Kenya Legal & Ethical Issues Network on HIV & AIDS. Additionally, there are two amicus curiae, an NGO and the Kenya National Commission on Human Rights.

The petitioners challenge the aforementioned provisions on various grounds including vagueness, right to dignity, right to privacy, right to freedom and security, right to equality, and right to health.

The first petition was certified on 9th June 2016 and the second on 2nd November 2016. The bench in this case was constituted on 1st February 2017 and the petitions were consolidated on 18th January 2018.

Decision Overview

The High Court of Kenya delivered a per curiam opinion in this case.

The underlying issue was whether Sections 162 and 165 of the Penal Code of Kenya were ultra vires the Constitution.

The arguments in favour of unconstitutionality of Sections 162 and 165 of the Penal Code, raised by the petitioners and the interested parties, revolve around the fact that these provisions in effect, “criminalize private consensual sexual conduct between adult persons of the same sex”.[para. 163] It was argued that they violate the rights provided under Articles 27, 28, 29, 31, and 43 of the Constitution, that concerning the right to equality and freedom from discrimination, right to human dignity, right to freedom and security of the person, right to privacy, and economic and social rights- specifically health, respectively. This is because criminalisation of consensual sexual intimacy of only a particular sexual orientation is discriminatory as well as jeopardises access to health services. On the aspect of dignity, it was argued that since these provisions declare that their sexual conduct as “unnatural or grossly indecent and criminalize it”, [para. 62] it degrades the inherent dignity of the concerned individual. Sexual intimacy in private being a “fundamental part of the experience of humanity”, [para. 62] its criminalisation amounts to a degrading treatment violating the other rights including privacy as mentioned above.

It was also argued that due to the vague drafting of these provisions, they violate the constitutional principle of rule of law, the common law principle of legal certainty, and the right to fair hearing. Further, it has been argued that the impugned provisions stand in violation of Kenya’s obligations under international law which have been “incorporated as part of domestic law by virtue of Article 2 of the Constitution”. [para. 59] Under various instruments of international law such as the ACHPR, the ICCPR, the ICESCR, and the UDHR, various rights such as dignity, privacy, and equality are guaranteed that were violated by these provisions as mentioned above. One of the petitioners also highlighted that since LGBTIQ community is a marginalised group or community, “the court owes them a special protective duty under Article 21(1) and 21(3)” [para.111] of the Constitution. It was also highlighted that through amendments to the Sexual Offences Act, the term ‘indecency’ had been defined to require the acts to be unlawful which in turn required the acts to be carried out without proper consent. The petitioners further emphasised on the sexual orientation to be normal and relied on the decriminalisation of the LGBTIQ conduct across the globe, with a particular emphasis on the Yogyakarta Principles. The two amicus curiae also supported this position deeming the impugned provisions to be unconstitutional.

It must be noted that in both petitions it was explicitly mentioned that a favourable outcome in this decision would not have the effect of mandating Kenya to recognised same sex marriages, but merely to legalise consensual homosexual conduct.

In response, the Respondents and some interested parties contested the provisions to be constitutional. It was argued that marriage has been defined as the “union of two consenting adults, male and female” [para. 66] and if the given petition is ordered in favour of the petitioners it would tantamount to the judiciary exercising the role of the legislature by amending the same. Further, they argued that it “would have a drastic impact on the cultural, religious, social policy and legislative functions in Kenya”. [para. 67] A major thrust of the opposition argument was that permitting homosexuality would harm the social fabric and morality of the Kenyan society which is conservative in nature. This was supported by harping on the fact that at the time of adoption of the constitution the Committee of Experts on Constitutional Review deliberately did not legalise homosexual conduct and excluded ‘sexual orientation’ as one of the grounds on which discrimination is impermissible.

On the argument on vagueness it was argued that it is amply clear what the scope of the provisions is. On discrimination, it was submitted that the equal applicability of these provisions on heterosexuals as well indicates absence of any discrimination. As far as the other rights are concerned it was argued that these provisions act as reasonable restrictions on such rights as they are in furtherance of “common good and public policy”. [para. 76] Another strain of argumentation was to argue that there exists insufficient evidence on issues such as denial of services based on sexual orientation. Similarly, expert evidence was adduced to show that homosexuality is not something that people are born with but they indulge in the same “by choice”. [para. 184] Finally, it highlighted the presence of penal sanctions on homosexuality in around 35 African countries indicating the possibility of a regional custom regarding the same.

First of all, on the question of vagueness and uncertainty, the court held that since the concerned terms have been “clearly defined in law dictionaries and in a catena of judicial pronouncements” [para. 278] the claim does not stand.

Next, the court turned to the argument on discrimination. It held that the use of the term ‘any person’ in the penal code clearly indicates that there is no discrimination. They incorrectly understood the petitioners’ contention to mean that “the impugned provisions do not apply against heterosexuals” [para. 295] to arrive at this conclusion. Additionally, it ruled that there does not exist any evidence of the cited discriminatory experiences. Similarly, the arguments on right to health, the right to fair trial, the right to freedom of conscience, religion, belief, and opinion, and the right to freedom and security of the person were dismissed on the ground of lack of evidence regarding the same.

The court finally addressed the arguments on the rights to dignity and privacy. It contextualised the issue by turning to the values and principles laid down in the constitution reflecting the “historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya”, [para. 386] and holding culture to be the foundation of the nation. With this backdrop the court noted that the issue of same sex marriage was raised during the constitution making process and deliberately outlawed. In this light it held that the provisions do not violate the aforementioned rights as permitting homosexual relationships would go against the “spirit, purpose and intention of Article 45(2)” [para. 395] which recognises only heterosexual marriages. This is because it will lead to permitting same sex couples to live together, thereby indirectly going against the spirit of Article 45(2). Additionally, it also held that there is unanimous opinion of the experts that there is no conclusive proof that the LBTIQ people are born that way.

Consequently, the court dismissed the petitions, and held the impugned provisions to be constitutionally valid.

Summary and Outcome

The petitioners challenged the constitutionality of the provisions of the penal code (Sections 162 and 165) criminalising same sex sexual intercourse. They challenged its vires on various grounds including vagueness, right to dignity, right to privacy, right to freedom and security, right to equality, and right to health.

The court dismissed the petitions and upheld the aforementioned provisions as unconstitutional. In doing so it majorly relied on insufficient evidence led on the part of the petitioners to prove their case and the effect of its upholding on the cultural fabric of the nation that purposely chose to outlaw same sex marriages during the time of constitution making.