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**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHT DIVISION**  
**PETITION NO. 234 OF 2016**

08 JUN 2016

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER  
ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2, 10, 27,  
28, 29, 31, 43 AND 50 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE UNITED NATIONS UNIVERSAL DECLARATION OF  
HUMAN RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT ON CIVIL AND  
POLITICAL RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT FOR ECONOMIC,  
SOCIAL AND CULTURAL RIGHTS

AND

IN THE MATTER OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES  
RIGHTS.

AND

IN THE MATTER OF SECTIONS 162 AND 165 OF THE PENAL CODE

BETWEEN

JOHN MATHENGE.....	1 <sup>ST</sup> PETITIONER
MAUREEN OCHIENG.....	2 <sup>ND</sup> PETITIONER
MARY AKOTH OCHIENG.....	3 <sup>RD</sup> PETITIONER
YVONE POWERS.....	4 <sup>TH</sup> PETITIONER
MARK ODHIAMBO.....	5 <sup>TH</sup> PETITIONER
GAY AND LESBIAN COALITION OF KENYA.....	6 <sup>TH</sup> PETITIONER
NYANZA WESTERN AND RIFT VALLEY NETWORK.....	7 <sup>TH</sup> PETITIONER
KENYA HUMAN RIGHTS COMMISSION.....	8 <sup>TH</sup> PETITIONER

-VERSUS-

ATTORNEY GENERAL..... RESPONDENT

PETITION

TO:

The High Court of Kenya;  
Nairobi.

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The humble Petition of the John Mathenge, Maureen Akoth, Mary Akoth Ochieng, Kenyan Human Rights Commission, Yvone Powers, Maureen Ochieng, Mary Akoth Ochieng, Yvone Powers, Mark Odhiambo, The Gay and Lesbian Coalition, the Nyanza, Western, Rift Valley Network and the Kenya Human Rights Commission, whose address of service for this purposes of this Petition shall be **C/O Otieno Ogola & Company Advocates, 3<sup>rd</sup> Floor, Studio House, P.O. Box 22671-00100 Nairobi.**

**I) Parties**

1. The 1<sup>st</sup> Petitioner is an adult male of sound mind. The Petitioner has been subjected to attacks, rape and discriminatory acts on the basis of his perceived or actual sexual orientation. The Petitioner's family have also been subjected to attacks and discrimination purely on the basis of the Petitioner's perceived or actual sexual orientation.
2. The 2<sup>nd</sup> Petitioner is an adult male of sound mind and has been subjected to public attacks, arbitrary arrests by the police, discriminated against purely on the basis of his perceived or actual imputed sexual orientation. The 2<sup>nd</sup> Petitioner has been attacked and gang raped based on his perceived or actual imputed sexual orientation.
3. The 3<sup>rd</sup> Petitioner is an adult female of sound mind and the mother to the 2<sup>nd</sup> Petitioner. The 3<sup>rd</sup> Petitioner has witnessed discriminatory acts against the 2<sup>nd</sup> Petitioner, has had to severally go to police stations to secure the release of the 2<sup>nd</sup> Petitioner when detained because of his perceived or actual imputed sexual orientation. The 3<sup>rd</sup> Petitioner has also been exposed to public ridicule and attack as a result.
4. The 4<sup>th</sup> Petitioner is an adult woman of sound mind and has been subjected several violations of her rights to privacy, human dignity and security of the person as a result of her imputed sexual orientation. The 4<sup>th</sup> Petitioner has undergone public attacks, arbitrary detention, eviction from her residence, attacks on her business purely because of her perceived or actual imputed sexual orientation.

5. The 5<sup>th</sup> Petitioner is an adult male of sound mind and a priest based in Kisumu County. The Petitioner has witnessed discriminatory acts and attacks against members of the lesbians, gay, bisexual and transgender in his interactions in the community.
6. The 6<sup>th</sup> Petitioner is a civil society organization working on the human rights and welfare of persons of minority sexual orientation and gender identities in Kenya.
7. The 7<sup>th</sup> Petitioner is an organization that champions for the respect of the human rights and welfare of persons of minority sexual orientation and gender identities in the Nyanza, Western and Rift Valley regions of Kenya.
8. The 8<sup>th</sup> Petitioner is a registered Non-Governmental Organization working on and supporting human rights in Kenya and the region.
9. The Respondent is the Attorney General of the Republic of Kenya and is sued in his capacity as the principal legal advisor of the government of the Republic of Kenya as provided under 6 C Article 156 of the Constitution.
10. The Petitioners bring this petition on their own behalf and in the public interest and are seeking orders which aim to actualize the human rights provisions of the Constitution of Kenya 2010 and to protect the fundamental rights and freedoms of persons of minority sexual orientation and gender identities in the Republic of Kenya.

## **II Background**

11. The Penal Code in Section 162 (a) (c) and 165 penalizes consensual private sexual acts of two adult persons for particular consensual sexual act and conduct and these provisions have been the basis of attacks, incarceration and discrimination of the Petitioners in the community.
12. The 1<sup>st</sup> to 5<sup>th</sup> Petitioners' rights and freedoms have been infringed as a result of the criminalization of consensual sexual conduct in the Penal Code which has informed attacks against persons of

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particular sexual orientation and gender identities including some of the Petitioners, their stigmatization in the community, incarceration, attacks and general violation of their rights.

13. Persons of particular sexual orientation, sexual conduct, gender identities have severally been denied access to quality health care services in the country purely on the basis of their perceived or imputed sexual orientation and in furtherance of the provisions of Sections 162 (a) (c) and 165 of the Penal Code.

### III) Jurisdiction

14. The Petitioners bring this suit under Article 165 (2) (d) of the Constitution which grants this Honorable Court the jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of – (i) the question whether any law is inconsistent with or in contravention of the Constitution; and (ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution;
15. The Petitioners further brings this suit as a matter of Public Interest under Article 258 (2) (c) of the Constitution of Kenya and thus this Honorable Court has jurisdiction over this matter
16. The Petitioners bring this Petition seeking declaratory orders that Sections 162 (a) (c) and 165 of the Penal Code are contrary to the provisions of Articles 27 (4), 32 and 36 of the Constitution of Kenya 2010 and are therefore null and void to the extent that they are in conflict with the above stated provisions of the Constitution.
17. The Petitioners bring this suit in the interest of the public and to secure and protect the rights and freedoms of persons engaging in consensual sexual conduct, minority sexual orientation and gender identities who have been subjected to severe violations of their fundamental rights and freedoms as a result of the application of these sections of the Penal Code.



#### IV) Constitutional Foundation of the Petition

18. The Preamble to the Constitution of Kenya recognizes the aspirations of all Kenyans for a government based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law and the exercise by the people of Kenya of their sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of the Constitution.
19. Article 1 (1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.
20. Article 2(1) of the Constitution of Kenya pronounces the supremacy of the Constitution and provides that the Constitution binds "all persons and all State Organs at both levels of government".
21. Article 2(5) of the Constitution provides among other things, that any act or omission in contravention of the Constitution is invalid.
22. Article 2 (5) of the Constitution of the Republic of Kenya provides that the general rules of international law shall form part of the law of Kenya.
23. Article 2 (6) of the Constitution of the Republic of Kenya provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.
24. Article 3 of the Constitution of the Republic of Kenya obligates every person to respect, uphold and defend the Constitution.
25. Article 10 of the Constitution of the Republic of Kenya sets out the National Values and Principles of governance that bind all state officers, state organs, public officers and all persons whenever they apply or interpret the Constitution, enact, apply or interpret any law, make or implement

public policy decisions. The national values and principles of governance include the rule of law, equity, inclusiveness, equality, human rights, non-discrimination, good governance, transparency, accountability, democracy and participation of the people.

26. Article 22 (1), read together with Article 258 (1) gives every person the right to institute court proceedings claiming a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Article 22 (2) and Article 258 (2) provides that in addition to a person acting in their own interest, court proceedings under clause 1 may be instituted by: a. a person acting on behalf of another person who cannot acting their own name; b) a person acting as a member of, or in the interest of, a group or class of persons; c) a person acting in the public interest; ord. an association acting in the interest of one or more of its members.
27. Article 27 (1) of the Constitution which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.
28. Article 27 (4) which provides that 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, color, age, disability, religion, conscience, belief, culture, dress, language, or birth.
29. Article 28 which provides that every person has inherent dignity and the right to have that dignity respected and protected.
30. Article 29 which provides that every person has the right to freedom and security of the person which includes the right not to be- deprived of freedom arbitrarily or without just cause; detained without trial, except during a state of emergency, in which case the detention is subject to Article 58; subjected to any form of violence from either public or private sources; subjected to torture in any manner, whether physical or psychological; subjected to corporal punishment; or treated or punished in a cruel, inhuman or degrading manner.
31. Article 31 which provides that every person has the right to privacy which includes the right not

to have – their person, home, or property searched; their possessions seized; information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed.

32. Article 32 of the Constitution which provides that every person has the right to freedom of conscience, religion, thought, belief and opinion.
33. Article 43 of the Constitution which provides that every person has the right to the highest attainable standard of health, which includes health care services, including reproductive health care.
34. Article 50 which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.
35. Article 50 (5) which provide that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.
36. Article 258 of the Constitution which gives every person the right to institute court proceedings, claiming that this constitution has been contravened, or is threatened with contravention.
37. Article 259 of the Constitution of the Republic of Kenya provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms

#### **V) Other Legal foundations of the Petition**

38. Article 1 of the Universal Declaration of Human Rights which provides that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
39. Article 2 of the Universal Declaration of Human Rights which provides that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
40. Article 3 of the Universal Declaration of Human Rights which provides that everyone has the right to life, liberty and security of person.
41. Article 7 of the Universal Declaration of Human Rights which provides that all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
42. Article 9 of the Universal Declaration of Human Rights which provides that no one shall be subjected to arbitrary arrest, detention or exile.
43. Article 12 of the Universal Declaration of Human Rights which provides that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
44. Article 28 of the Universal Declaration of Human Rights which provides that everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

45. Article 2. 1. of the International Covenant on Civil and Political Rights (ICCPR) provides that each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;
46. Article 17. 1. of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation;
47. Article 6. 1 of the ICCPR provides that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
48. Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.
49. Article 9. 1 of the ICCPR provides that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
50. Article 16 of the ICCPR provides that everyone shall have the right to recognition everywhere as a person before the law.
51. Article 17. 1 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation; It further provides that everyone has the right to the protection of the law against such interference.
52. Article 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination

on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

53. Article 2.2 of the International Covenant on Economic, Social and Cultural Rights provides that the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;
54. Article 12.1 of the Covenant for Economic, Social and Cultural Rights provides that the States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
55. Article 2 of the African Charter on Peoples and Human Rights which provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.
56. Article 3 of the African Charter on Peoples and Human Rights which provides that every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law.
57. Article 4 of the African Charter on Peoples and Human Rights which provides that Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.
58. Article 6 of the African Charter on Peoples and Human Rights which provides that every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

59. Article 10 of the African Charter on Peoples and Human Rights which provides that every individual shall have the right to free association provided that he abides by the law. Subject to the obligations of solidarity provided for in Article 29 no one may be compelled to join an association.
60. Article 19 of the African Charter on Peoples and Human Rights which provides that all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.
61. Article 28 of the African Charter on Peoples and Human Rights which provides that every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.
62. Resolution 275 of the African Charter on Peoples and Human Rights which provides protection against violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity.

## VI Contravention of the Constitution

63. Section 162 of the Penal Code provides that (a) any person who has carnal knowledge of any person against the order of nature; 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.

This provision of the Penal Code is unconstitutional to the extent that it violates Articles 27 (4), of the Constitution which requires the State not to discriminate against any person on any ground **including** race, sex, religion, conscience, belief and others. This provision is discriminatory of persons whose sexual orientation, sexual conduct, practices, belief and conscience is not heterosexually aligned.

The provision violates Article 28 of the Constitution to the extent that it seeks to infringe on the dignity of the individual by criminalizing consensual sexual conduct, and expression of a person.

The provision violates the Article 29 of the Constitution to the extent that it arbitrarily seeks to criminalize adult, consensual, and private conduct between members of the same-sex

The provision further offends Article 31 of the Constitution to the extent that it violates the privacy of individual consenting adults for acts which the law should not concern itself. The Constitution grants every person the right to privacy.

64. Section 165 of the Penal Code provides that "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.

This provision of the Penal Code is unconstitutional to the extent that it violates Articles 27 (4), of the Constitution which requires the State not to discriminate against any person on any ground **including** race, sex, religion, conscience, belief and others. This provision is discriminatory of persons whose sexual orientation, practices, belief and conscience is not aligned to heterosexuality.

The provision violates Article 28 of the Constitution to the extent that it seeks to infringe on the dignity of the individual by criminalizing consensual adult sexual conduct.

The provision violates the Article 29 of the Constitution to the extent that it arbitrarily seeks to criminalize consensual sexual conduct of two consenting adults that does not offend anyone and that may not be in the public domain;

The provision further offends Article 31 of the Constitution to the extent that it violates the privacy of individual consenting adults for acts which the law should not concern itself. The Constitution grants every person the right to privacy.

65. Sections 162 (a) and (c) and Section 165 of the Penal Code undermine fundamental human rights that are guaranteed by Articles 1,2,3,7,9,12,and 28 of the United Nations Universal Declaration



of Human Rights and Articles 2,3,4,6,10,19 and 28 of the African Charter on Human and Peoples Rights.

66. The Kenyan State through its officers in seeking to enforce these provisions of the Penal Code have subjected sexual and gender minorities to the most inhumane treatment that offends their right to human dignity and security of the person.

This Petition seeks to have the Honorable Court give meaning to the provisions of the Constitution which are offended by the application of the provisions of Sections 162 (a) (c) and 165 of the Penal Code sought to be declared null and void.

67. The Sections 162 (a) (c) and 165 of the Penal Code further have the effect, and are in practice applied so as to criminalize private and consensual sexual conduct between adult persons of the same sex Furthermore, these provisions, by virtue of their vagueness and uncertainty, breach the principles of legality and the rule of law, and so infringe the rights of all Kenyan citizens.

68. By violating the rights of persons guaranteed under the Universal Declaration of Human Rights and the African Charter on Human and Peoples rights, the above stated provisions of the Penal Code, further violate the provisions of the Constitution which require that the state recognizes international law as part and parcel of Kenyan Law.

69. This Petition recognizes that there is a limit to the extent to which the State can legislate within the parameters allowed by the Constitution and in so doing the privacy realm and intimate acts done in private by consenting persons are not within the province of what the State should legislate on and criminalize.

70. The Petition further recognizes that in legislating, the State should not discriminate against any particular group of persons and that the criminal law should apply universally to all persons and not just to a select group because of their private consensual sexual conduct based on sexual orientation.

71. The Petition further advances the point that a law whose application by its nature and design violates the fundamental rights and freedoms of the person including right to privacy, non-discrimination, right to dignity, freedom of conscience, does not adhere to the principles and provisions of the Constitution and should be declared null and void.
72. The Petition further avers that a law which requires the violation of the fundamental rights and freedoms of the person in order to investigate or determine its application is by its design and import unconstitutional and contrary to the provisions of Article 50 of the Constitution.
73. The Petition further avers that a law whose application and supervision requires arbitrariness by the enforcer is by its design and import contrary to Article 29 of the Constitution which provides that persons should not be deprived of their freedom arbitrarily.
74. The Petition is concerned with the constitutional legitimacy of the State seeking to regulate the most intimate and private sphere of conduct of all Kenyans, regardless of their sexual orientation.
75. Article 24 of the Constitution recognizes limitation of fundamental rights and freedoms and the same can only be limited only if; the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account amongst others- the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.
76. The Sections 162 (a) (c) and 165 to the extent that they limit the rights and fundamental freedoms of persons to engage in consensual adult sexual acts in private does not meet the requirements of Article 24 of the Constitution permitting limitation of rights and freedoms. The provisions offends human dignity of the persons, equality and freedoms thus falling foul of the provisions of Article 24 (1).
77. The Sections 162 (a) (c) and 165 to the extent that they penalize consensual private sexual adult conduct and orientation and identities of a minority and marginalized group does not meet the requirements of Article 24 of the Constitution permitting limitation of rights and freedoms. These

provisions of the Penal Code offend the human dignity of persons, right to equal treatment, it entrenches discrimination and thus fall foul of the provisions of Article 24 of the Constitution.

**YOUR PETITIONERS** therefore **HUMBLY PRAYS** for the following **ORDERS:-**

- a. A declaratory Order that Sections 162 (a) and (c) of the Penal Code are contrary to the provisions of Articles 27 (4), 28, 29, 31, 43 and 50 of the Constitution and are therefore null and void;
- b. A declaratory Order that Section 165 of the Penal Code is contrary to the provisions of Articles 27 (4), 28, 29, 31, 32, 43 and 50 of the Constitution and is therefore null and void.
- c. A declaratory Order that sexual and gender minorities are entitled to the right to the highest attainable standard of health including the right to health care services as guaranteed in Article 43 of the Constitution.
- d. An Order directing the State to develop policies and adopt practices prohibiting discrimination on grounds of sexual orientation and gender identity or expression in the health sector.
- e. Each Party to bear their own costs.
- f. Any further Relief or Orders that this Honorable Court may deem just and fit to grant.

DATED at Nairobi this... 7 ... day of... June ... 2016

**OTIENO OGOLA & COMPANY ADVOCATES**  
**ADVOCATES FOR THE PETITIONERS**

**DRAWN & FILED BY:**

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**TO BE SERVED UPON:**

The Attorney General

State Law Office, Harambee Avenue,

**NAIROBI.**

# **SUPPORTING AFFIDAVITS**

RECEIVED

REPUBLIC OF KENYA

08 JUN 2016

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 NYANZA WESTERN AND RIFT VALLEY NETWORK.....8<sup>TH</sup> PETITIONER

-VERSUS-

ATTORNEY GENERAL..... RESPONDENT

**SUPPORTING AFFIDAVIT**

I, **JOHN MATHENGE** of **POST OFFICE BOX NUMBER 16885 - 00200, NAIROBI** and a resident of Nairobi City County in the Republic of Kenya do hereby make oath and state as FOLLOWS;

1. **THAT** I am an adult aged 38 years, of sound mind and disposition and the 1<sup>st</sup> Petitioner herein and hence competent to make and swear this affidavit.
2. **THAT** I swear this Affidavit in Support of the Petition herein which has been brought by myself and seven other persons.
3. **THAT** I have read the contents of the Petition herein, the same have been further explained to me by our counsel on record and I affirm that the same are correct and in support thereof I swear this Affidavit.
4. **THAT** I am a Director of an organization dealing with LGBTI persons and also identify myself as a gay man living with HIV /AIDS.
5. **THAT** I always knew I was gay since I was a young man which subjected me to discrimination from my family to the extent that my father even refused to pay for my secondary education .
6. **THAT** my sexuality has brought me into great scrutiny, discrimination and stigma.
7. **THAT** I later ran away from home and gained employment as a house boy where I worked for 6 years. During that time managed to train as a hairdresser.
8. **THAT** I later found work at Sarit Centre in Nairobi, but was fired because of my sexual orientation.
9. **THAT** I decided to move to Mombasa where I worked as a houseboy under very harsh conditions because I was gay.



10. **THAT** in the year 2000 I found myself homeless and in the streets where I was raped by 4 men without any of them using protection.
11. **THAT** because of the fear of stigmatization I was not able to report the issue to the police or to seek medical assistance.
12. **THAT** while there I was subjected to a lot of hardship and harsh conditions only until I met a certain individual who together we formed the LGBTI movement in Mombasa where I was able to train as a peer educator.
13. **THAT** In 2008 I came back to Nairobi and opened a salon business that I had to close once the Landlord who was a pastor found out I was gay.
14. **THAT** during that time we could not report to the police because there was a lot of discrimination.
15. **THAT** in 2009 I came out as a gay man living with HIV/AIDS through a public documentary and gained a lot of publicity as a result.
16. **THAT** when my landlord found out about the documentary, I was evicted from my house and members of the community discriminated against me until I was thrown out of the church.
17. **THAT** due to the negative publicity I received on account of appearing in the documentary, my social media accounts were hacked and as a result, I received threats from messages to calls from persons not known to me.
18. **THAT** my family was also negatively affected: my parents were thrown out of the church where they had served for many years.
19. **THAT** later that year together formed a group that would offer medical assistance to LGBTI persons.
20. **THAT** in 2013, the clinic that our group ran had to be closed for 10 days because threats from the Angamiza Ushoga campaign against homosexuality in Kenya.



21. **THAT** in 2013 while the Angamiza Ushoga movement was ongoing, I was falsely accused of raping a man in my office which led to my arrest.
22. **THAT** on account of being an openly gay human rights activist, I have been stigmatized discriminated upon and my life placed at risk. I cannot access social places and go about my everyday business because of the fear I have.
23. **THAT** Section 162 of the Penal Code provides that (a) any person who has carnal knowledge of any person against the order of nature; 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.
24. **THAT** this provision of the Penal Code is unconstitutional to the extent that it violates Articles 27 (4), of the Constitution which requires the State not to discriminate against any person on any ground including race, sex, religion, conscience, belief and others. This provision is discriminatory of persons whose sexual orientation, practices, belief and conscience is aligned to homosexual practices.
25. **THAT** the provision violates Article 28 of the Constitution to the extent that it seeks to infringe on the dignity of the individual by criminalizing sexual orientation and gender identity and expression of a person.
26. **THAT** the provision violates the Article 29 of the Constitution to the extent that it arbitrarily seeks to criminalize adult, consensual, and private conduct between members of the same-sex
27. **THAT** the provision further offends Article 31 of the Constitution to the extent that it violates the privacy of individual consenting adults for acts which the law should not concern itself. The Constitution grants every person the right to privacy.
28. **THAT** section 165 of the Penal Code provides that "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.

29. **THAT** this provision of the Penal Code is unconstitutional to the extent that it violates Articles 27 (4), of the Constitution which requires the State not to discriminate against any person on any ground including race, sex, religion, conscience, belief and others. This provision is discriminatory of persons whose sexual orientation, practices, belief and conscience is aligned to homosexual practices.
30. **THAT** the provision violates Article 28 of the Constitution to the extent that it seeks to infringe on the dignity of the individual by criminalizing sexual orientation of the person
31. **THAT** the provision violates the Article 29 of the Constitution to the extent that it arbitrarily seeks to criminalize sexual orientation of two consenting adults that does not offend anyone and that may not be in the public domain;
32. **THAT** the provision further offends Article 31 of the Constitution to the extent that it violates the privacy of individual consenting adults for acts which the law should not concern itself. The Constitution grants every person the right to privacy.
33. **THAT** sections 162 (a) and (c) and Section 165 of the Penal Code undermine fundamental human rights that are guaranteed by Articles 1,2,3,7,9,12,and 28 of the United Nations Universal Declaration of Human Rights and Articles 2,3,4,6,10,19 and 28 of the African Charter on Human and Peoples Rights.
34. **THAT** the Kenyan State through its officers in seeking to enforce these provisions of the Penal Code have subjected homosexual, lesbian, bisexual and transgender persons to the most inhumane treatment that offends their right to human dignity and security of the person.
35. **THAT** we file this petition to seek to have the Honorable Court give meaning to the provisions of the Constitution which are offended by the application of the provisions of Sections 162 (a) (c) and 165 of the Penal Code sought to be declared null and void.
36. **THAT** sections 162 (a) (c) and 165 of the Penal Code further have the effect, and are in practice applied so as to criminalize private and consensual sexual conduct between adult persons of the same sex Furthermore, these provisions, by virtue of their vagueness and uncertainty, breach the principles of legality and the rule of law, and so infringe the rights of all Kenyan citizens.

37. **THAT** sections 162 (a) (c ) and 165 are contrary to several international instruments and conventions which Kenya is a party to including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights.
38. **THAT** Kenya as a State Party to these international instruments has an obligation to honour its international commitments and obligations as set out in the treaties in which she is a party to.
39. **THAT** consequently, it is only just and in the interest of justice that the Sections 162 (a) (c) and Section 165 of the penal code be declared unconstitutional as far as they contradict Articles 27(4), 32 and 36(1) of the Constitution.
40. **THAT** what is deponed herein is true to the best of my knowledge, information and belief save wherein the source of my information is expressly stated.

SWORN at NAIROBI  
by the said **JOHN MATHENGE**

This 7<sup>th</sup> day of June, 2016

BEFORE ME

**COMMISSIONER FOR OATHS**

GAD OTIENO AWUONDA  
ADVOCATE &  
COMMISSIONER FOR OATHS  
P.O. Box 70728 - 00400, NAIROBI

*[Signature]*  
**DEPONENT**

**DRAWN & FILED BY:**

Otieno Ogola & Company Advocates  
3<sup>rd</sup> Floor, Studio House  
Marcus Garvey Road, Kilimani  
P.O. Box 22871-00100,  
**NAIROBI**

08 JUN 2016

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MILIMANI NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHT DIVISION  
PETITION NO 234 OF 2016

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER  
 ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2, 10, 27,  
 28, 29, 31, 43 AND 50 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE UNITED NATIONS UNIVERSAL DECLARATION OF  
 HUMAN RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT ON CIVIL AND  
 POLITICAL RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT FOR ECONOMIC,  
 SOCIAL AND CULTURAL RIGHTS

AND

IN THE MATTER OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES  
 RIGHTS.

AND

IN THE MATTER OF SECTIONS 162 AND 165 OF THE PENAL CODE

BETWEEN

JOHN MATHENGE.....	1 <sup>ST</sup> PETITIONER
MAUREEN OCHIENG.....	2 <sup>ND</sup> PETITIONER
MARY AKOTH OCHIENG.....	3 <sup>RD</sup> PETITIONER
YVONE POWERS.....	4 <sup>TH</sup> PETITIONER
MARK ODHIAMBO.....	5 <sup>TH</sup> PETITIONER
KENYA HUMAN RIGHTS COMMISSION.....	6 <sup>TH</sup> PETITIONER
GAY AND LESBIAN COALITION OF KENYA.....	7 <sup>TH</sup> PETITIONER
NYANZA WESTERN AND RIFT VALLEY NETWORK.....	8 <sup>TH</sup> PETITIONER

-VERSUS-

ATTORNEY GENERAL..... RESPONDENT

SUPPORTING AFFIDAVIT

I, MAUREEN OCHIENG of POST OFFICE BOX NUMBER Box 2897 - 40100, Kisumu in  
 the Republic of Kenya and a resident of Kisumu do hereby make oath and state as FOLLOWS;

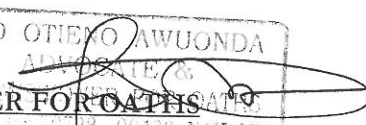
1. **THAT** I am an adult aged 25 years, of sound mind and disposition hence competent to make and swear this affidavit.
2. **THAT** I am the 2<sup>nd</sup> Petitioner herein and swear this Affidavit in support of our Petition.
3. **THAT** I identify as a transgender man and a member of the LGBTI community working at NYARWEK in charge of security of the LGBTI community in Kisumu.
4. **THAT** I am well conversant with the facts of this case as they appear with the records hence competent to swear this Affidavit.
5. **THAT** I came out clearly as a transgender man while in high school where I faced a lot of challenges especially because I was in an Islamic school.
6. **THAT** I was not allowed to fully interact with other students as I was considered a curse.
7. **THAT** the teachers in my school forced me to only interact with girls in a bid to change my behavior.
8. **THAT** I have been disowned by some of my family members due to the fact that my gender identity does not conform to the sex I was assigned at birth.
9. **THAT** members of my community have a problem accepting me and I continue to face a lot of discrimination as a result of the stigma associated with transgender persons.
10. **THAT** around the year 2007 while going to fetch water, I was attacked by 4 men from my village who repeatedly raped me in order to try and correct my gender identity.
11. **THAT** because of fear of being outed I was not able to report the incident to the police and as result the rape continued and during that time I conceived.
12. **THAT** it was not until later when I joined NYARWEK and learned about my rights that I was able to report the incidences to the police.

- 13. **THAT** I have been unlawfully arrested on several occasions on account of my gender identity.
- 14. **THAT** in 2013 while walking home I was arrested and charged with loitering with ill intention which was not the case.
- 15. **THAT** I tried to ask the police to explain the charge to me and they were unable to do so.
- 16. **THAT** I was detained and beaten until my mother had to plead with the police who released me only after extorting my mother.
- 17. **THAT** I face substantial difficulties when accessing health care facilities on account of my gender identity. Most doctors do not understand what I go through and instead ridicule me, instead of offering medical assistance.
- 18. **THAT** it is my belief that most of the challenges that I and LGBTI persons face results from the provisions in the Penal Code that police authorities and members of the public are using in order to discriminate against us.
- 19. **THAT** consequently, it is only just and in the interest of justice that the Sections 162 (a) (c) and Section 165 of the penal code be declared unconstitutional as far as they contradict Articles 27(4), 32 and 36(1) of the Constitution.
- 20. **THAT** what is deponed herein is true to the best of my knowledge, information and belief save wherein the source of my information is expressly stated.

SWORN at NAIROBI  
by the said MAUREEN OCHIENG

This 07 day of 06, 2016

BEFORE ME

  
AD OTIENO AWUONDA  
COMMISSIONER FOR OATHS  
P.O. BOX 13-00000 NAIROBI

  
DEPONENT

DRAWN & FILED BY:

Otieno Ogola & Company Advocates

3<sup>rd</sup> Floor, Studio House

Marcus Garvey Road, Kilimani

P.O. Box 22871-00100,

**NAIROBI**

08 JUN 2016

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MILIMANI NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHT DIVISION  
PETITION NO. 234 OF 2016

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER  
 ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2, 10, 27,  
 28, 29, 31, 43 AND 50 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE UNITED NATIONS UNIVERSAL DECLARATION OF  
 HUMAN RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT ON CIVIL AND  
 POLITICAL RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT FOR ECONOMIC,  
 SOCIAL AND CULTURAL RIGHTS

AND

IN THE MATTER OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES  
 RIGHTS.

AND

IN THE MATTER OF SECTIONS 162 AND 165 OF THE PENAL CODE

BETWEEN

JOHN MATHENGE.....	1 <sup>ST</sup> PETITIONER
MAUREEN OCHIENG.....	2 <sup>ND</sup> PETITIONER
MARY AKOTH OCHIENG.....	3 <sup>RD</sup> PETITIONER
YVONE POWERS.....	4 <sup>TH</sup> PETITIONER
MARK ODHIAMBO.....	5 <sup>TH</sup> PETITIONER
KENYA HUMAN RIGHTS COMMISSION.....	6 <sup>TH</sup> PETITIONER
GAY AND LESBIAN COALITION OF KENYA.....	7 <sup>TH</sup> PETITIONER
NYANZA WESTERN AND RIFT VALLEY NETWORK.....	8 <sup>TH</sup> PETITIONER

-VERSUS-

ATTORNEY GENERAL..... RESPONDENT

SUPPORTING AFFIDAVIT

I, MARY AKOTH OCHIENG of POST OFFICE BOX NUMBER BOX 2897 - 40100,  
 KISUMU in the Republic of Kenya and a resident of Kisumu do hereby make oath and state as  
 follows;



1. **THAT** I am an adult aged 50 years, mother to the 2<sup>nd</sup> Petitioner, of sound mind and disposition hence competent to make and swear this affidavit.
2. **THAT** I am the 3<sup>rd</sup> Petitioner herein and I swear this Affidavit in support of our Petition.
3. **THAT** I found out that the 2<sup>nd</sup> Petitioner was different when in Primary School as he used to love relating with women more than men.
4. **THAT** because she felt different, she was discriminated against in school and as a result always spent time alone.
5. **THAT** at one point I heard his brothers insulting her.
6. **THAT** I also witnessed our neighbors harassing her and calling her a curse.
7. **THAT** as a parent, all I could do was to talk to her in order to calm him down.
8. **THAT** as a parent to a transgender person, I have faced a lot of discrimination including the church where most sermons condemn the 3<sup>rd</sup> Petitioner and I.
9. **THAT** as a parent I have been severally extorted by police officers to pay them money to secure the release the 3<sup>rd</sup> Petitioner in order to secure his release.
10. **THAT** I have personally accepted him for who he is and cannot in any circumstance discriminate him on grounds of gender identity.
11. **THAT** just like any other person he is to be treated as a human being and not as an outcast in the society.
12. **THAT** the Constitution of Kenya guarantees every person certain fundamental rights and I do believe that it is just and proper that all human beings are treated equally regardless of their sexual orientation of gender identities
13. **THAT** it is my belief that most of the challenges that I face as a parent with an transgender child is as a result of the provisions in the Penal Code that the police authorities and members of the society are using in order to discriminate against sexual and gender minorities.

14. **THAT** consequently, it is only just and in the interest of justice that the Sections 162 (a) (c) and Section 165 of the penal code be declared unconstitutional as far as they contradict Articles 27(4), 32 and 36(1) of the Constitution.
15. **THAT** what is deponed herein is true to the best of my knowledge, information and belief save wherein the source of my information is expressly stated.

SWORN at NAIROBI  
by the said MARY AKOTH OCHIENG

This 7<sup>th</sup> day of June, 2016

BEFORE ME

  
**COMMISSIONER FOR OATHS**  
DAVID OTIENO AWUONDA  
ATTORNEY AT LAW  
COMMISSIONER FOR OATHS  
NAIROBI

  
DEPONENT

**DRAWN & FILED BY:**

Otieno Ogola & Company Advocates  
3<sup>rd</sup> Floor, Studio House  
Marcus Garvey Road, Kilimani  
P.O. Box 22871-00100,

**NAIROBI**

**CERTIFICATE OF ATTESTATION**

I CERTIFY THAT THE 3<sup>RD</sup> PETITIONER APPEARED BEFORE ME ON THE 7<sup>th</sup>  
DAY OF *June* 2016 AND THE CONTENTS OF THE PROCEEDINGS WERE  
READ AND EXPLAINED TO HER AND SHE UNDERSTOOD THEM TO BE TRUE

GAD OTIENO AWUONDA  
ADVOCATE &  
COMMISSIONER FOR OATHS  
P.O. Box 78728, 00400, NAIROBI

---

SIGNATURE AND DESIGNATION OF WITNESS

08 JUN 2016

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MILIMANI NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHT DIVISION  
PETITION NO. 234 OF 2016

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER  
ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2, 10, 27,  
28, 29, 31, 43 AND 50 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE UNITED NATIONS UNIVERSAL DECLARATION OF  
HUMAN RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT ON CIVIL AND  
POLITICAL RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT FOR ECONOMIC,  
SOCIAL AND CULTURAL RIGHTS

AND

IN THE MATTER OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES  
RIGHTS.

AND

IN THE MATTER OF SECTIONS 162 AND 165 OF THE PENAL CODE

BETWEEN

JOHN MATHENGE.....	1 <sup>ST</sup> PETITIONER
MAUREEN OCHIENG.....	2 <sup>ND</sup> PETITIONER
MARY AKOTH OCHIENG.....	3 <sup>RD</sup> PETITIONER
YVONE POWERS.....	4 <sup>TH</sup> PETITIONER
MARK ODHIAMBO.....	5 <sup>TH</sup> PETITIONER
KENYA HUMAN RIGHTS COMMISSION.....	6 <sup>TH</sup> PETITIONER
GAY AND LESBIAN COALITION OF KENYA.....	7 <sup>TH</sup> PETITIONER
NYANZA WESTERN AND RIFT VALLEY NETWORK.....	8 <sup>TH</sup> PETITIONER

-VERSUS-

ATTORNEY GENERAL..... RESPONDENT

SUPPORTING AFFIDAVIT

I, YVONNE POWERS of POST OFFICE BOX NUMBER Box 41562 - 80100, Mombasa in  
the Republic of Kenya and a resident of Mombasa do hereby make oath and state as FOLLOWS;

1. THAT I am an adult aged 36 years, of sound mind and disposition hence competent to  
make and swear this affidavit.

2. **THAT** I swear this affidavit in support of our Petition herein.
3. **THAT** I identify as a transgender woman and a member of the LGBTI community working as a business person in Mombasa, and former peer educator at Kenya Medical Research Institute in Mombasa.
4. **THAT** I am well conversant with the facts of this case as they appear in the records hence competent to swear this Affidavit.
5. **THAT** ever since I came out as a transgender woman I have faced major challenges in societal integration through various human right violations. My right to privacy and freedom of association as enshrined in the Constitution has been interfered with.
6. **THAT** In February 2010 I was attacked at my place of work accusing me of recruiting people of the gay community.
7. **THAT** thereafter I was taken to a police station by the group where I was detained the whole day, brutally assaulted, and no charges were levied against me.
8. **THAT** this incident exposed my gender identity to my neighbourhood, putting my life at risk.
9. **THAT** as a result I moved to Nairobi for a few months in order to protect my life.
10. **THAT** upon return to Mombasa, I was attacked and robbed by a crowd at the ferry.
11. **THAT** I was rescued by a police officer on patrol. It is my belief that the crowd intended to execute me on account of my gender identity.
12. **THAT** later around 2013, my business premises was demolished and my goods stolen because I associated with members of the gay community.
13. **THAT** the same group that attacked my business premises came to my house with the intention to attack me but I was not in the house.
14. **THAT** as a result of this attempted attack, my then landlord evicted me from the house without notice saying I was placing the people in the neighborhood in danger.

15. **THAT** I currently cannot associate freely and conduct my business because of the stigma that I face from the society and the fear of death that I face every day on account of my gender identity.
16. **THAT** consequently, it is just and in the interest of justice that the Sections 162 (a) (c) and Section 165 of the penal code be declared unconstitutional as far as they contradict Articles 27(4), 32 and 36(1) of the Constitution.
17. **THAT** what is deponed herein is true to the best of my knowledge, information and belief save wherein the source of my information is expressly stated.

SWORN at **NAIROBI**  
by the said **YVONNE POWERS**

This 7<sup>th</sup> day of June, 2016

BEFORE ME

  
**COMMISSIONER FOR OATHS**  
OTIENO AWUONDA  
COMMISSIONER FOR OATHS  
Nairobi



DEPONENT

**DRAWN & FILED BY:**

Otieno Ogola & Company Advocates

3<sup>rd</sup> Floor, Studio House

Marcus Garvey Road, Kilimani

P.O. Box 22871-00100,

**NAIROBI**

RECEIVED

REPUBLIC OF KENYA 08 JUN 2016  
IN THE HIGH COURT OF KENYA AT MILIMANI NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHT DIVISION  
PETITION NO. 239 OF 2016

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER  
ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2, 10, 27,  
28, 29, 31, 43 AND 50 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE UNITED NATIONS UNIVERSAL DECLARATION OF  
HUMAN RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT ON CIVIL AND  
POLITICAL RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT FOR ECONOMIC,  
SOCIAL AND CULTURAL RIGHTS

AND

IN THE MATTER OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES  
RIGHTS.

AND

IN THE MATTER OF SECTIONS 162 AND 165 OF THE PENAL CODE

BETWEEN

- JOHN MATHENGE.....1<sup>ST</sup> PETITIONER
- MAUREEN OCHIENG.....2<sup>ND</sup> PETITIONER
- MARY AKOTHOCHIENG.....3<sup>RD</sup> PETITIONER
- YVONE POWERS.....4<sup>TH</sup> PETITIONER
- MARK ODHIAMBO.....5<sup>TH</sup> PETITIONER
- KENYA HUMAN RIGHTS COMMISSION.....6<sup>TH</sup> PETITIONER
- GAY AND LESBIAN COALITION OF KENYA.....7<sup>TH</sup> PETITIONER
- NYANZA WESTERN AND RIFT VALLEY NETWORK.....8<sup>TH</sup> PETITIONER

-VERSUS-

ATTORNEY GENERAL..... RESPONDENT

**SUPPORTING AFFIDAVIT**

I, **MARK ODHIAMBO** of **POST OFFICE BOX NUMBER\_BOX 1393 - 40100, KISUMU** in the Republic of Kenya and a resident of Kisumu do hereby make oath and state as FOLLOWS;

1. **THAT** I am an adult aged 41 years, of sound mind and disposition hence competent to make and swear this affidavit.
2. **THAT** I am the 5th Petitioner herein and I swear this Affidavit in support of our Petition herein.
3. **THAT** I am a priest based in Kisumu who works with LGBTI persons and their families in informal settlements. I am also working in partnership with the police in the area on issues surrounding LGBTI persons.
4. **THAT**, on account of life in informal settlements in Kisumu, the sexual orientation and gender identity of LGBTI persons is easily discovered.
5. **THAT** in my line of work, I have seen that many of the persons in the LGBTI community are molested and taken advantage of.
6. **THAT** in my line of work, LGBTI persons face a lot of discrimination and that members of the church do not want to associate with them.
7. **THAT** if one is associated with LGBTI persons, they are not allowed to express themselves and have no right to privacy.
8. **THAT** as a religious leader I have faced a lot of stigma for holding certain views in favour of the LGBTI community who according to the society are to be marginalized and no one should associate with them.
9. **THAT** in my theological interpretation of the image of God and Man, the act of Homosexuality is not attacked in the Bible.
10. **THAT** I truly believe that people love differently and the constitution protects all individuals including those in the LGBTI community.



11. **THAT** being part of the LGBTI community does not make anyone unique and therefore persons should not be stigmatized based on their sexual orientation as it is not our identity.
12. **THAT** it is my belief that most of the challenges that the persons of the LGBTI community face is as a result of the provisions in the penal code that the police authorities and members of the society are using in order to discriminate against them.
13. **THAT** consequently, it is only just and in the interest of justice that the Sections 162 (a) (c) and Section 165 of the penal code be declared unconstitutional as far as they contradict certain Articles of the Constitution of Kenya as identified in the Petition.
14. **THAT** what is deponed herein is true to the best of my knowledge, information and belief save wherein the source of my information is expressly stated.

SWORN at **NAIROBI**  
by the said **MARK ODHIAMBO**

This 7<sup>th</sup> day of June, 2016

BEFORE ME

GAD OTIENO AWUONDA  
ADVOCATE &  
COMMISSIONER FOR OATHS  
P.O. Box 70728 - 00100 NAIROBI  
**COMMISSIONER FOR OATHS**

  
**DEPONENT**

**DRAWN & FILED BY:**

Otieno Ogola & Company Advocates

3<sup>rd</sup> Floor, Studio House

Marcus Garvey Road, Kilimani

P.O. Box 22871-00100,

**NAIROBI**

RECEIVED

08 JUN 2016

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MILIMANI NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHT DIVISION  
PETITION NO. 234 OF 2016

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER  
ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2, 10, 27,  
28, 29, 31, 43 AND 50 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE UNITED NATIONS UNIVERSAL DECLARATION OF  
HUMAN RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT ON CIVIL AND  
POLITICAL RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT FOR ECONOMIC,  
SOCIAL AND CULTURAL RIGHTS

AND

IN THE MATTER OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES  
RIGHTS.

AND

IN THE MATTER OF SECTIONS 162 AND 165 OF THE PENAL CODE

BETWEEN

JOHN MATHENGE.....	1 <sup>ST</sup> PETITIONER
MAUREEN OCHIENG.....	2 <sup>ND</sup> PETITIONER
MARY AKOTH OCHIENG.....	3 <sup>RD</sup> PETITIONER
YVONE POWERS.....	4 <sup>TH</sup> PETITIONER
MARK ODHIAMBO.....	5 <sup>TH</sup> PETITIONER
GAY AND LESBIAN COALITION OF KENYA.....	6 <sup>TH</sup> PETITIONER
NYANZA WESTERN AND RIFT VALLEY NETWORK.....	7 <sup>TH</sup> PETITIONER
KENYA HUMAN RIGHTS COMMISSION.....	8 <sup>TH</sup> PETITIONER

-VERSUS-

ATTORNEY GENERAL..... RESPONDENT

SUPPORTING AFFIDAVIT

I, LORNA DIAS of POST OFFICE BOX NUMBER Box 13005 - 00100, Nairobi in the  
Republic of Kenya and a resident of Nairobi do hereby make oath and state as FOLLOWS;

1. THAT I am the Director of the 6<sup>th</sup> Petitioner herein and well conversant with the facts of  
this case as they appear in the records and thus competent to swear and depone to this  
affidavit.

2. **THAT** I have been a Director of the 6th Petitioner from 2013 to date.
3. **THAT** before joining the 6th Petitioner I worked with the National Aids and STI Control Program (NASCOP) Key Populations Program.
4. **THAT** the 6th Petitioner was established in 2006 and its headquarters is in Nairobi.
5. **THAT** its vision is to attain a safe and enabling environment for sexual orientation, gender identity and expression (SOGIE) individuals and organizations in Kenya and its mission is to provide rights based and comprehensive services to its membership through capacity building, positive visibility and stigma reduction.
6. **THAT** the organization strives to achieve its vision through communication and the coordination of initiatives around research, health and human rights advocacy, security, capacity strengthening and networking.
7. **THAT** the organization works with 16 member that undertake various SOGIE rights, health and social welfare issues in Nairobi and its environs, the Rift Valley region and at the Coast of Kenya.
8. **THAT** as the Director of the 6th Petitioner, I have interacted with many SOGIE persons who face a significant fear of violence, actual violence, a multiplicity of human rights violations, stigma and discrimination from the society based on their real or imputed sexual orientation or gender identity and expression.
9. **THAT** it is my belief that the continued existence of Sections 162 (a) and (c), and 165 of the Penal Code are consistently used as a basis upon which to bring gross physical, mental and verbal harm to adult Kenyans based on whom they love and how they love.
10. **THAT** enforcement of the provisions of these sections of the Penal Code by their nature require a violation of the fundamental rights and freedoms of individuals and the same should not continue to exist in the statute books.
11. **THAT** enforcement of these provisions require arbitrariness on the part of the law enforcer and such these provisions should be declared unconstitutional.

12. **THAT** consequently, it is just and in the interest of justice that the Sections 162 (a) (c) and Section 165 of the penal code be declared unconstitutional as far as they contradict Articles 27(4), 28, 31,32, 43, 36 and 50 of the Constitution.
13. **THAT** what is deponed herein is true to the best of my knowledge, information and belief save wherein the source of my information is expressly stated.

**SWORN** at **NAIROBI**  
by the said **LORNA DIAS**

This 7 day of June, 2016

BEFORE ME

GAT

COM.

COMMISSIONER FOR OATHS

GAD OTIENO AWUONDA  
ADVOCATE &  
COMMISSIONER FOR OATHS  
P. O. Box 10728 - 100400, NAIROBI

DEPONENT

DRAWN & FILED BY:

Otieno Ogola & Company Advocates

### 3<sup>rd</sup> Floor, Studio House

Marcus Garvey Road, Kilimani

P.O. Box 22871-00100,

NAIROBI

08 JUN 2016

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MILIMANI NAIROBI  
CONSTITUTIONAL AND HUMAN RIGHT DIVISION  
PETITION NO. 234 OF 2016

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER  
ARTICLE 22(1) OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2, 10, 27,  
28, 29, 31, 43 AND 50 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE UNITED NATIONS UNIVERSAL DECLARATION OF  
HUMAN RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT ON CIVIL AND  
POLITICAL RIGHTS

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT FOR ECONOMIC,  
SOCIAL AND CULTURAL RIGHTS

AND

IN THE MATTER OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES  
RIGHTS.

AND

IN THE MATTER OF SECTIONS 162 AND 165 OF THE PENAL CODE

BETWEEN

JOHN MATHENGE.....	1 <sup>ST</sup> PETITIONER
MAUREEN OCHIENG.....	2 <sup>ND</sup> PETITIONER
MARY AKOTH OCHIENG.....	3 <sup>RD</sup> PETITIONER
YVONE POWERS.....	4 <sup>TH</sup> PETITIONER
MARK ODHIAMBO.....	5 <sup>TH</sup> PETITIONER
KENYA HUMAN RIGHTS COMMISSION.....	6 <sup>TH</sup> PETITIONER
GAY AND LESBIAN COALITION OF KENYA.....	7 <sup>TH</sup> PETITIONER
NYANZA WESTERN AND RIFT VALLEY NETWORK.....	8 <sup>TH</sup> PETITIONER

-VERSUS-

ATTORNEY GENERAL..... RESPONDENT  
SUPPORTING AFFIDAVIT

I, DANIEL PETER ONYANGO of POST OFFICE BOX NUMBER Box 2897 - 40100, Kisumu in the Republic of Kenya and a resident of Kisumu do hereby make oath and state as FOLLOWS;

1. THAT I am the Director of the 8<sup>th</sup> Petitioner herein and thus competent to swear and depone to this affidavit.
2. THAT I am well conversant with the facts of this case as they appear in the records hence competent to swear this Affidavit.

3. **THAT** the 8th Petitioner was established in 2009 and its headquarters is in Kisumu Town, located at Tom Mboya Estate, industrial road off Kakamega road.
4. **THAT** its mission is to attain a society where LGBT persons are respected and their human rights dignified.
5. **THAT** the organization implements its vision through coordination, human rights advocacy, security, health, research and documentation.
6. **THAT** the organization works with about 21 organizations advocating for the rights of LGBT persons in the whole of Western Kenya .
7. **THAT** I have interacted with LGBT persons as the Director of the 8th Petitioner and they face alot of discrimination and stigmatisation from the society.
8. **THAT** LBIT persons should not be discriminated based on their sexual orientation.
9. **THAT** it is my belief that most of the challenges that the persons of the LGBT community face is as a result of the provisions in the penal code that the police authorities and members of the society are using in order to discriminate them.
10. **THAT** consequently, it is just and in the interest of justice that the Sections 162 (a) (c) and Section 165 of the penal code be declared unconstitutional as far as they contradict Articles 27(4), 32 and 36(1) of the Constitution.
11. **THAT** what is deponed herein is true to the best of my knowledge, information and belief save wherein the source of my information is expressly stated.

SWORN at NAIROBI

by the said DANIEL PETER ONYANGO

This 7 day of June, 2016

BEFORE ME

GAD OTIENO AWUONDA  
ADVOCATE &  
COMMISSIONER FOR OATHS  
P.O. BOX 22871-00100, NAIROBI



DEPONENT

**DRAWN & FILED BY:**

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**NAIROBI**