



THE ISSUE IS VIOLENCE

Attacks on LGBT People on Kenya's Coast

HUMAN
RIGHTS
WATCH





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PEMA Kenya is a community organization in Mombasa, Kenya, that provides support to gender and sexual minorities on human rights, health, HIV/AIDS, and economic well-being.



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Glossary

Terms Related to Sex, Gender, Sexual Orientation, and Gender Identity

Bisexual: Sexual orientation of a person who is sexually and romantically attracted to both women and men.

Commercial Sexual Exploitation of Children: Sexual abuse by an adult or adults with respect to a child or an adolescent – female or male – under 18 years old, accompanied by a payment in money or in kind to the child or adolescent or to one or more third parties. Commercial sexual exploitation of children includes the use, offer, procurement, or provision of a child under 18 years old for sex work, sex trafficking, or pornography.

Gay: Synonym in many parts of the world for homosexual; used here to refer to the sexual orientation of a man whose primary sexual and romantic attraction is towards other men.

Gender: Social and cultural codes (as opposed to biological sex) used to distinguish between what a society considers "masculine" and "feminine" conduct.

Gender Identity: Person's internal, deeply felt sense of being female or male, both, or something other than female and male. It does not necessarily correspond to the biological sex assigned at birth.

Gender Non-Conforming: Behaving and appearing in ways that do not fully conform to social expectations based on one's assigned sex.

Homophobia: Fear of, contempt of, or discrimination against homosexuals or homosexuality.

Homosexual: Sexual orientation of a person whose primary sexual and romantic attractions are toward people of the same sex.

Intersex: A person born with reproductive or sexual anatomy that does not seem to fit the typical definitions of "female" or "male."

Key Populations/ Key Populations at Higher Risk of HIV Exposure: Those most likely to be exposed to HIV or to transmit it. In most settings, those at high risk of HIV exposure include men who have sex with men, transgender people, people who inject drugs, sex workers and their clients, and serodiscordant couples (couples in which one partner is HIV positive and one is HIV negative).

LGBT: Lesbian, gay, bisexual, and transgender; an inclusive term for groups and identities sometimes associated together as “sexual and gender minorities.”

LGBTI: Lesbian, gay, bisexual, transgender, and intersex.

Lesbian: Sexual orientation of a woman whose primary sexual and romantic attraction is toward other women.

Men Who Have Sex With Men (MSM): Men who have sexual relations with persons of the same sex, but may or may not identify themselves as gay or bisexual. MSM may or may not also have sexual relationships with women.

Sexual and Gender Minorities: Inclusive term that includes all persons with non-conforming sexualities and gender identities, including lesbians, gay men, bisexuals, transgender people, gender non-conforming people, men who have sex with men, and women who have sex with women.

Sexual Orientation: The way a person’s sexual and romantic desires are directed. The term describes whether a person is attracted primarily to people of the same sex, the opposite sex, both or neither.

Sex Work: The commercial exchange of sexual services between consenting adults.

Transgender (also, “trans”): The gender identity of people whose birth gender (which they were declared to have upon birth) does not conform to their lived gender (the gender that they are most comfortable with expressing or would express given a choice). A transgender person usually adopts, or would prefer to adopt, a gender expression in consonance with their preferred gender, but may or may not desire to permanently alter their bodily characteristics in order to conform to their preferred gender.

Transphobia: Fear and contempt of transgender persons, usually based on negative stereotypes.

Kiswahili Terms

Kanjoo (pl. Makanjoo): A slang term for county law enforcement officials.

Shoga: A slang term for “gay,” usually derogatory, but occasionally used by men who have sex with men to self-identify.

A Note on Terminology

Selecting appropriate, accurate, and inclusive terminology to describe and classify individuals and groups on the basis of their gender identity, gender expression, sex characteristics or sexual orientation is challenging. Some Kenyan organizations restrict themselves to a discourse around lesbian, gay, and bisexual (LGB) rights, acknowledging transgender activists’ arguments that it is inappropriate to use the term “LGBT” when one’s focus is on sexual orientation and does not include specific work around gender identity. Some organizations use the term “LGBTI,” to include intersex people, but intersex activists challenge the use of the term “LGBTI” when they find that those using the term are simply tokenizing intersex people but are not addressing their specific needs.

Due to the absence of intersex interview subjects in this research, we limit ourselves to the acronym “LGBT” (lesbian, gay, bisexual, and transgender”) in describing our findings, while keeping in mind that intersex people on the coast and elsewhere in Kenya may experience similar violations. When citing the findings of other organizations that have documented abuses against intersex people, we adopt their use of the acronym “LGBTI.”

We also use the term “men who have sex with men” (MSM), a term used by public health practitioners in recognition of the fact that some men engaged in same-sex relations may not identify as gay or bisexual. The term MSM is an inclusive term which may include both those who identify as gay or bisexual and those who do not.

Finally, we found that gender identity was fluid or in flux for some of our interview subjects. Several individuals, whose sex had been assigned as male at birth but who partially or

fully identified as female and who were sexually attracted to men, simultaneously described themselves as “gay” and as “transgender.” In one case, an individual described himself as a gay man when we interviewed him in 2014, but as a trans woman when we re-interviewed her in 2015.

Given the lack of awareness of transgender identities among many people in Kenya, the perpetrators of human rights abuses against gender non-conforming individuals are likely to perceive their targets as “gay.” Thus, at times we use the term “homophobia” while recognizing that transgender people, as well as lesbian, gay, and bisexual people, may be victims of homophobic discourse and conduct.

Summary

“Being a lesbian or a gay man is a non-issue. Being harmed because of who we are is a huge issue.”

—Lorna Dias, Executive Coordinator of the Gay and Lesbian Coalition of Kenya, Nairobi, July 2015

On February 18, 2015, police arrested two men in Kenya’s coastal Kwale County and charged them with “unnatural offenses” and trafficking in “obscene material.” Community residents had pressured the police to carry out the arrests following the publication on social media of photos depicting men from the community engaged in sexual conduct. The police threatened the two men with violence to try to extract confessions, and doctors conducted forced anal examinations with the purported aim of proving whether the men had engaged in homosexual conduct. At the time of writing, the case against them was ongoing.

The public uproar surrounding the allegations of homosexuality and pornography led dozens of gay men and transgender women, fearing violence, to flee their homes. Residents in the Kwale towns of Ukunda and Diani physically attacked at least two suspected gay men, who did not seek police assistance because they feared it would expose them to the risk of arrest.

The Kwale incident is one of only a few known cases in which Kenyan prosecutors have charged anyone with consensual same-sex conduct. But while the case may be atypical in its judicial trajectory, it is nonetheless emblematic of the ways in which discrimination, violence, and persecution permeate the lives of Kenyans who are gender non-conforming or are perceived to be involved in same-sex relationships.

This report documents rights abuses against lesbian, gay, bisexual and transgender (LGBT) people in the coast region, including violence, incitement to violence, and inadequate protection, and identifies ways in which the Kenyan authorities could better address these abuses and uphold their responsibility to protect all Kenyans. It is based on research conducted between January 2014 and August 2015 by Human Rights Watch, with the assistance of Persons Marginalized and Aggrieved (PEMA Kenya), a Mombasa-based community organization that provides support to gender and sexual minorities on human

rights, health, HIV/AIDS, and economic well-being. Human Rights Watch interviewed 65 gay and bisexual men, lesbians, and transgender women, and more than 20 clergy, county government officials, police officers, lawyers, health workers, and community activists.

While this report focuses largely on the situation facing LGBT people on the coast, which has been a flashpoint for periodic eruptions of anti-LGBT violence, it also assesses dynamics at the national level that have impacted or have the potential to impact LGBT people throughout the country.

Kenya's Penal Code, a colonial-era relic, criminalizes "carnal knowledge against the order of nature," widely understood to refer to anal intercourse between men. Government agencies have denied some organizations representing LGBT Kenyans the right to register and operate legally, on the grounds that they allegedly promote illegal behavior, although recent court victories have compelled the authorities to register two such organizations. Politicians and extremist religious leaders seek to bolster their relevance by proposing homophobic legislation and preaching hatred against gay Kenyans. Media houses engage in sensational reporting on "scandals," sometimes entirely fabricated, involving LGBT people. Although many LGBT people draw on support from friends and family and carve out spaces in which they can live in relative safety, the risk of violence remains present.

In at least six incidents between 2008 and 2015, groups of LGBT people in the coastal counties of Kilifi, Kwale, and Mombasa have been threatened or attacked in incidents of mob violence. Rhetoric vilifying LGBT people, much of it by religious leaders, is particularly pronounced on the coast, and shapes public perceptions.

Police play an ambiguous role. In some cases, they have protected LGBT people from mob violence—a role that is recognized and appreciated by LGBT activists on the coast—but they have not brought the perpetrators of violence to book. In other cases, they have outright failed in their responsibility to protect: refusing assistance to victims because of their presumed gender identity or sexual orientation, conducting arbitrary arrests, or even perpetrating violence themselves.

The criminalization of same-sex conduct renders LGBT people vulnerable to violence at the hands of ordinary citizens as well as law enforcement officials. Those who engage in sex work are even more vulnerable: they suffer rape and other abuses at the hands of clients,

police, and county government law enforcement officials. Many LGBT victims of violence believe they have no recourse, and that the police are just as likely to persecute them as to protect them. LGBT individuals told us that the incidents in Kwale—where gay men and trans women at risk of violence felt unable to seek assistance from the police after the police arbitrarily arrested two alleged gay men—further diminished the little trust LGBT Kenyans on the coast have in the Kenyan authorities.

Criminalization, discrimination, and violence also inhibit access to HIV prevention and treatment. Men who have sex with men (MSM) are many times more likely to be infected with HIV than the general population in Kenya and have been identified by health agencies as a key population in addressing the HIV epidemic. Mombasa, the largest city on the coast, also has higher HIV rates than the overall Kenyan rate. Success in addressing HIV in Mombasa, with its large and mobile population, is important in addressing HIV nationally.

But HIV services for MSM in the Mombasa area are under threat. Homophobic mobs attacked or threatened to attack clinics and HIV workshops for MSM on the coast in 2008, 2010, and 2012. Proposals in February 2014 to tighten anti-gay legislation provoked fear of attacks, leading to a decrease in the number of people seeking HIV services and causing health workers to temporarily close a few clinics providing HIV services to MSM. During the February 2015 anti-gay witch hunts in Kwale, several gay men who were HIV-positive did not leave their homes for days. Their friends collected their antiretroviral treatment to deliver to them at home—commendable evidence of the strength of community, but not a sustainable approach to ensuring the right to the highest attainable standard of health.

Kenya's progressive new constitution, promulgated in 2010, guarantees all Kenyans the rights to privacy, equality, dignity, and non-discrimination. It articulates a set of national values that include "human rights, non-discrimination and protection of the marginalized." Further, the constitution integrates international law—including treaties ratified by Kenya that prohibit discrimination on the grounds of sexual orientation—into Kenyan law. These provisions provide Kenyan authorities with an opportunity to eliminate discriminatory laws and practices.

During the Universal Periodic Review (UPR) process at the UN Human Rights Council in January 2015, Kenya rejected recommendations to decriminalize same-sex conduct between consenting adults, but accepted a recommendation to "adopt a comprehensive

anti-discrimination law affording protection to all individuals, irrespective of their sexual orientation or gender identity.” Kenyan activists are pushing for the government to uphold this commitment as well as to decriminalize same-sex conduct.

Kenya’s approach to addressing the clear vulnerability of LGBT people to violence and instability should be guided by a landmark resolution passed by the African Commission on Human and People’s Rights in 2013, which called on member states to “end all acts of violence and abuse, whether committed by State or non-state actors” against individuals on the basis of their real or perceived sexual orientation or gender identity.

The African Commission resolution specifically urges States to address violence by:

- enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities,
- ensuring proper investigation and diligent prosecution of perpetrators, and
- establishing judicial procedures responsive to the needs of victims.

Kenya, as a member state, is required to uphold this resolution by taking steps to prevent abuses against LGBT people, provide necessary protection, and prosecute perpetrators. In order to do so, the Kenyan authorities at a national level and particularly in Mombasa, Kwale, and Kilifi counties should send an unambiguous message to law enforcement officials as well as ordinary citizens that all Kenyans, regardless of their gender identity or sexual orientation, deserve the same respect, protection, and realization of their rights.

Law enforcement officials should stop all forms of abuse and discrimination against LGBT people (including by dropping charges against the men arrested in Kwale), and should ensure that LGBT people are free to file complaints against both law enforcement officials and ordinary citizens without fear of retribution. The Kenyan Parliament and county legislative assemblies should repeal laws that discriminate on the basis of sexual orientation, gender identity, or sex worker status. They should adopt comprehensive anti-discrimination laws that explicitly protect people of all sexual orientations and gender identities. It is the Kenyan government’s responsibility to ensure the safety of all citizens, including by more effectively addressing the violence and insecurity that lesbian, gay, bisexual, and transgender people face.

Key Recommendations

To the President and the Deputy President of the Republic of Kenya and the County Governors of Mombasa, Kilifi, and Kwale

- Publicly condemn any major incidents of homophobic and transphobic violence that occur in Kenya or in their counties, including mob attacks on individuals or organizations.
- Refrain from making any public comments that denigrate lesbian, gay, bisexual, or transgender people.

To the County Governments of Mombasa, Kilifi, and Kwale

- Review all county bylaws to ensure that they conform to constitutional guarantees of privacy, non-discrimination, and equal protection of the law.

To the Kenyan Parliament

- Pass comprehensive anti-discrimination legislation that prohibits discrimination on the grounds of gender identity and sexual orientation and includes effective measures to identify and address such discrimination.
- Repeal sections 162, 163, and 165 of the Kenya Penal Code, which criminalize same-sex relations between consenting adults.

To the National Police Service Commission

- Publicly recognize and commend police officers who undertake active efforts to protect LGBT people from violence, in order to reinforce the message that the police force should uphold its obligation to protect all people within Kenya.
- Prohibit police officers from ordering, participating in, or carrying out forensic anal examinations on persons suspected of same-sex conduct.
- Take all appropriate measures to ensure that all police officers respect the rights to non-discrimination, equality, and privacy, and do not discriminate in the exercise of their functions.

To the Office of Director of Public Prosecutions

- Drop charges against the two men in Kwale charged with consensual same-sex conduct.

Methodology

Human Rights Watch, with the assistance of PEMA Kenya, conducted field research in Mombasa, Kilifi, Kwale, and Nairobi counties from January 13-28, 2014, and from March 23-April 2 and August 4-7, 2015. Researchers conducted follow-up interviews by phone throughout 2014 and in early 2015. Four Human Rights Watch researchers interviewed 86 people for this report. These include:

- 57 gay or bisexual men
- 5 lesbians
- 3 transgender women
- 7 religious leaders
- 6 health care providers

Ten of the lesbian, gay or bisexual people we interviewed were activists with civil society organizations. We also spoke with civil society activists who did not identify as LGBT, as well as with lawyers, police officials, and county government officials.

PEMA Kenya identified LGBT interview subjects through its networks and through chain referrals, with the assistance of Tamba Pwani, an organization that serves gay and bisexual men, transgender people, and male sex workers within Kilifi County, and HAPA Kenya, an organization that serves MSM living with HIV/AIDS in Mombasa County. We used a purposive sampling method and specifically sought out individuals who had experienced human rights violations. The findings cannot be generalized to the broader LGBT population.

Human Rights Watch conducted interviews at restaurants, hotels, homes, and the offices of nongovernmental organizations (NGOs). Five people who were unable to meet in person were interviewed by telephone. Interviews were conducted in English and Kiswahili. Interviewees were not paid. Those who travelled to meet with us were reimbursed the cost of public transport and lunch, between 500 and 1,000 Kenya shillings (roughly \$5-10), depending on the distance travelled. All persons interviewed were over 18 and provided verbal consent to be interviewed.

Human Rights Watch and PEMA Kenya reviewed Kenyan national laws and municipal bylaws, court rulings, media reports, and studies by other human rights organizations, including groundbreaking reports published in the last several years by the Kenya Human Rights Commission (an NGO) and the Kenya National Commission on Human Rights (a governmental body).

Although this report addresses human rights violations that may impact all sexual and gender minorities, it focuses on abuses against gay and bisexual men and transgender women. Trans women and gay and bisexual men, especially those who do not conform to gender stereotypes, seem to be particularly vulnerable to violence and discrimination at the hands of both law enforcement officials and civilians, perhaps in part because they are more visible in the coastal region than lesbian and bisexual women.¹ The law prohibiting “carnal knowledge against the order of nature,” while vague, is widely interpreted to criminalize same-sex conduct between men, but not between women.

The decision to focus on trans women and men who have sex with men in this report should not be taken to suggest that serious violence and discrimination against lesbian and bisexual women and trans men do not exist. Research conducted elsewhere in Africa suggests that many lesbian and bisexual women suffer abuses in the “private sphere” of the home, including retaliatory rape, forced marriage, family rejection, and attempted “conversion” at the hands of traditional healers.² Further research focused specifically on human rights abuses against lesbian and bisexual women and transgender men on the coast and elsewhere in Kenya would contribute greatly to a broader understanding of the impacts of homophobia and transphobia.

¹ Social disapproval of homosexual conduct between men is particularly acute. One gay male activist told us: “The punishment for lesbians is lighter. They’re not heckled or stoned. The girls are seen as misbehaving a little, whereas, with boys, it’s a sin, particularly on the coast.” Human Rights Watch interview with Ishmael, Mombasa, January 15, 2014. Jo, a lesbian activist in Mombasa, said, “It’s easier for women than for gay men or transgender [women]. Mostly, people think you are a tomboy or a footballer and they accept how you dress and behave.” Human Rights Watch interview with Jo, Mombasa, January 13, 2014. According to another lesbian activist, harassment of lesbian women in the coast region is primarily verbal; Human Rights Watch meeting with PEMA Kenya officers, Mombasa, March 15, 2012.

² Queer African Youth Networking Center (QAYN), *Struggling Alone: The Lived Realities of Women who have sex with Women in Burkina Faso, Ghana and Nigeria*, April 2012, <http://static1.squarespace.com/static/54191049e4b0677471aa06c9/t/559ab41ee4boe9796cd263fa/1436202014978/QAYN-LBTQWSW-Publication.pdf> (accessed July 10, 2015). Human Rights Watch has documented violence against lesbians and transgender men in South Africa in *“We’ll Show You You’re a Woman”: Violence and Discrimination against Black Lesbians and Transgender Men in South Africa*, December 5, 2011, <https://www.hrw.org/report/2011/12/05/well-show-you-youre-woman/violence-and-discrimination-against-black-lesbians-and>.

We did not identify any intersex people to interview for this report. Like LGBT people, intersex people exist throughout Kenya, but many are not publicly “out” as intersex. Few are involved in organizations that promote the rights of sexual and gender minorities, and Human Rights Watch and PEMA Kenya have not documented attacks targeting intersex people on the coast. However, elsewhere in Kenya and in Africa, there is evidence that intersex people are often perceived as gay, transgender, or otherwise gender non-conforming, and are subjected to a similar range of human rights abuses, as well as to abuses in the medical sector—such as forced or coercive surgeries – that are particular to intersex people.³

We selected the coastal counties of Kilifi, Mombasa, and Kwale for two reasons. First, previous research has found that LGBT people in the coast region are more likely to have experienced violence than in other parts of Kenya.⁴ Second, all three counties have experienced mob attacks against MSM and trans women, resulting in large numbers of LGBT people fleeing their homes, going into hiding, and in some cases staying away from HIV/AIDS services and other social services.⁵

We did not specifically seek out stories of sex workers, but during the course of our research it emerged that many of those we interviewed who were MSM or trans women were also engaged in sex work, either regularly or occasionally.

Pseudonyms are used for most LGBT respondents for reasons of confidentiality and security. We have used single names rather than first and last names in the cases in which we have used pseudonyms.

³ Kenya Human Rights Commission, *The Outlawed Among Us*, 2011, http://www.khrc.or.ke/component/docman/cat_view/37-downloads/40-equality-and-anti-discrimination.html, p. 26; Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) et. al., *Uganda Report of Violations Based on Sex Determination, Gender Identity, and Sexual Orientation*, October 2014, http://www.hrapf.org/sites/default/files/publications/uganda_violations_report_october_2014_.pdf (accessed June 22, 2015); Transgender Intersex Africa, “Press Release for Intersex Awareness,” November 7, 2014, <http://transgenderintersexafrika.org.za/?p=295> (accessed June 22, 2015).

⁴ Kenya Human Rights Commission, *The Outlawed Among Us*, p. 32. KHRC interviewed 474 LGBTI people in eight regions of Kenya. The highest rates of physical violence, sexual violence, and hateful speech and verbal abuse against LGBTI people were found at the Coast.

⁵ Human Rights Watch and PEMA Kenya are not aware of any such large-scale attacks in Lamu County, the fourth county on Kenya’s coast.

I. Background

The Movement for Human Rights for LGBTI People in Kenya

Kenya is home to an organized and outspoken movement in support of human rights for LGBTI people. Many activists mark 2007 as the year the movement “came out” publicly, through the participation of the Gay and Lesbian Coalition of Kenya (GALCK) at the World Social Forum, a global gathering of progressive movements that was held in Nairobi in 2007.⁶ GALCK established an office and community drop-in center in 2008. It began liaising with the National AIDS Control Council (NACC) to ensure that government HIV programming addressed the needs of men who have sex with men, and enlisted both NACC and the National AIDS and STI Control Programme (NAS COP) as allies in the struggle for access to health and rights.

In 2010, LGBTI activists participated in civil society organizing around Kenya’s Universal Periodic Review (UPR) at the UN Human Rights Council, staking out a place for themselves within the mainstream human rights movement.⁷ The same year, GALCK and the Kenya Human Rights Commission (KHRC), a leading nongovernmental human rights organization, held Kenya’s first public celebration of the International Day Against Homophobia and Transphobia.⁸

Reports issued by KHRC in 2011 and by the Kenya National Commission on Human Rights (KNCHR, a government body distinct from KHRC) in 2012 condemned abuses on the basis of sexual orientation and gender identity. Both reports called for the repeal of penal code provisions that criminalize consensual same-sex conduct.⁹

⁶ Stephen Barris, “Respect for All! Another World is Possible – for African LGBT People Too,” February 26, 2007, <http://humanrightshouse.org/noop/page.php?p=Articles/7802.html&d=1> (accessed May 19, 2015).

⁷ Kenya National Commission on Human Rights, “Accounting For Human Rights Protection Under The UPR: The Difference Kenya’s Stakeholders Made,” September 2011, http://www.knchr.org/Portals/o/InternationalObligationsReports/Accounting_For_Human_Rights_Protection_Under_the_UPR.pdf (accessed May 19, 2015).

⁸ Kenya Human Rights Commission, *The Outlawed Among Us*, p. 6.

⁹ Kenya Human Rights Commission, *The Outlawed Among Us*; Kenya National Commission on Human Rights, *Realising Sexual and Reproductive Health Rights in Kenya: A myth or reality?*, April 2012, http://www.knchr.org/portals/o/reports/reproductive_health_report.pdf (accessed July 8, 2015). KNCHR also called for the decriminalization of sex work, while KHRC’s recommendations included the passage of a comprehensive non-discrimination law and clear policy guidelines on access to health for transgender and intersex people.

In collaboration with Kenyan activists, the Goethe Institute in Nairobi has hosted an annual Queer Film Festival since 2012. In 2014, an award-winning Kenyan writer, Binyavanga Wainaina, publicly came out as gay, and an activist, Kevin Mwachiro, compiled and published personal accounts of LGBTI Kenyans, raising Kenyans' awareness of sexual orientation and gender identity.¹⁰

In recent years, activists have used strategic litigation to open space for LGBTI people through the courts. Court cases resulting in full or partial victories for LGBTI people include the following:

- *Richard Muasya v. the Honorable Attorney General of Kenya*, December 2010: Muasya, an intersex person convicted of robbery, was detained in solitary confinement in a male prison because authorities could not determine whether to place him with the male or female prison population. Although the court dismissed his claim that he had been a victim of discrimination on the basis of his intersex status, it awarded him damages for cruel and degrading treatment suffered in detention, citing the constitution and the Universal Declaration of Human Rights.¹¹
- *Republic v. Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others*, July 2014: Members of Transgender Education and Advocacy (TEA) successfully sued the Non-Governmental Organizations Co-ordination Board (NGO Board), a government entity, for refusal to register their organization, allegedly on grounds that the names and photos of TEA's board members as submitted in registration documents did not match the names and photos on their national identity cards. The court found the NGO Board was discriminating against TEA's officers on the basis of sex, in violation of article 27(4) of the constitution, and ordered it to register TEA.¹²
- *Republic v. Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu*, October 2014: Audrey Mbugua, a transgender woman (and

¹⁰ Binyavanga Wainaina, "I am a homosexual, mum," January 19, 2014, <http://africasacountry.com/i-am-a-homosexual-mum> (accessed July 13, 2014); Kevin Mwachiro, *Invisible: Stories from Kenya's Queer Community* (Goethe Institute Kenya, 2014).

¹¹ *Richard Muasya v. the Hon. Attorney General of Kenya*, December 2010, High Court of Kenya Petition No. 705 of 2007, Judgment, December 2, 2010, <http://icj.wengine.netdna-cdn.com/wp-content/uploads/2012/07/Richard-Muasya-v.-the-Hon.-Attorney-General-High-Court-of-Kenya.pdf> (accessed May 19, 2015).

¹² *Republic v. Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others*, July 2014, <http://kenyalaw.org/caselaw/cases/view/100341/> (accessed May 19, 2015); see also "Victory for Transgender Rights in Kenya," HIVOS, July 30, 2014, <https://hivos.org/news/victory-transgender-rights-kenya> (accessed May 19, 2015).

chairperson of TEA), successfully sued the Kenya National Examinations Council (KNEC) for refusing her request to reissue her school diploma with her female name and gender. The Court suggested KNEC's failure to change the gender marker on the certificate violated Mbugua's dignity, referencing article 28 of the constitution: "Every person has inherent dignity and the right to have that dignity respected and protected."¹³

- *Baby 'A' & another v. Attorney General & 6 others*, December 2014: An intersex child, who had been denied a birth certificate because hospital staff had been unable to determine the child's sex, successfully sued for the right to be issued a birth certificate. The court found that the constitution, the Children's Act, and international treaties to which Kenya is a party protect children against all forms of discrimination, including on the grounds of intersex status, and ordered the government to develop guidelines for the recognition and support of intersex people.¹⁴

In the most recent court victory, in April 2015, the National Gay and Lesbian Human Rights Commission (NGLHRC) successfully sued the NGO Board, winning the right to register as an NGO in a case with far-reaching implications for equality and freedom of association. The NGO Board had rejected the organization's name as "unacceptable," and said that it could not register NGLHRC because Kenya's penal code "criminalizes gay and lesbian liaisons." The High Court, citing a South African case that led to the decriminalization of same-sex conduct, ruled that morality could not serve as a justification to limit fundamental rights.¹⁵

¹³ *Republic v. Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu*, October 2014, The High Court of Kenya at Nairobi, Judicial Review Division, JR Case No. 147 of 2013, Judgment, October 7, 2014, <http://kenyalaw.org/caselaw/cases/view/101979/> (accessed May 19, 2015).

¹⁴ *Baby 'A' (Suing through the Mother E A) & another v. Attorney General & 6 Others*, December 2014, The High Court of Kenya at Nairobi, Constitutional and Human Rights Division, Petition No. 266 of 2013, Judgment, December 5, 2014, <http://kenyalaw.org/caselaw/cases/view/104234/> (accessed May 19, 2015). "Under Article 53 of the Constitution and Section 11 of the Children Act, every child has the right to a name and nationality from birth which grants the child legal recognition and identity acquired through issuance of a birth certificate, a right to access health services and a right not to suffer discrimination of any form arising from their intersex status. These rights are buttressed by international instruments like the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child under Articles 7 and 9, respectively."

¹⁵ *Eric Gitari v. Non-Governmental Organisations Co-ordination Board & 4 Others*, April 2015, The High Court of Kenya at Nairobi, Constitutional and Judicial Review Division, Petition No. 440 of 2013, Judgment, April 24, 2015, <http://kenyalaw.org/caselaw/cases/view/108412/> (accessed July 28, 2015); see also Human Rights Watch, "Kenya: High Court Orders LGBT Group Registration," April 29, 2015, <http://www.hrw.org/news/2015/04/28/kenya-high-court-orders-lgbt-group-registration>.

The decision has been met with some backlash: the NGO Board has appealed the ruling, raising concerns about the Kenyan government's commitment to equality,¹⁶ and a government taskforce charged with amending the legal regime for nongovernmental organizations has proposed that the law explicitly prohibit the registration of groups "involved in promotion and advocacy of indecent acts."¹⁷

Homophobic and Transphobic Discourse: Politicians, Religious Leaders, and the Media

Popular opinion leaders in Kenya, including politicians, religious leaders, and media houses, have demonstrated mixed views on sexual orientation and gender identity.

Politicians

Unlike leaders elsewhere in Africa that have deployed homophobia in bids for political capital, Kenyan President Uhuru Kenyatta, like his predecessor, Mwai Kibaki, has largely maintained silence in public debates around LGBT rights.¹⁸ Only in July 2015 did Kenyatta first publicly comment on LGBT rights in the context of a visit from US President Barack Obama, calling gay rights a "non-issue," in an apparent effort to avoid heated debate.¹⁹ Some LGBT activists took offense at the comment, interpreting it as a statement that issues affecting LGBT people are unimportant, while others were reassured by the comment, reading it as a commitment that the government would not pursue an aggressively homophobic agenda.²⁰

Deputy President William Ruto has repeatedly, both before and after being elected to his current position, expressed views that amount to homophobia. Before assuming the vice presidency, Ruto, as a member of parliament, led the campaign opposing Kenya's progressive new constitution in 2010, claiming that the constitution's equality provisions

¹⁶ "Nongovernmental Organisations Coordination Board v. Eric Gitari and 5 Others, Republic of Kenya in the Court of Appeal at Nairobi, Civil Appeal No. 145 of 2015, Memorandum of Appeal, June 10, 2015, on file with Human Rights Watch.

¹⁷ Hon. Sophia Abdi Noor, MP, Chairperson, remarks made on the occasion of the presentation of the Report by Taskforce on the PBO Act 2013, May 2015, on file with Human Rights Watch.

¹⁸ Kibaki's predecessor, Daniel arap Moi, was openly homophobic, describing homosexuality as a "scourge." "Moi condemns gays," *BBC News, World: Africa*, September 30, 1999, <http://news.bbc.co.uk/2/hi/africa/461626.stm> (accessed May 19, 2015).

¹⁹ "Gay rights 'non-issue,' says Kenyatta," *AFP*, July 21, 2015, <http://www.iol.co.za/news/africa/gay-rights-non-issue-says-kenyatta-1.1888414#.Vbd3M6Sqqko> (accessed July 28, 2015).

²⁰ Human Rights Watch interview with Kenyan LGBT rights activists, Nairobi, August 3, 2015.

would legalize same-sex marriage.²¹ During a 2013 vice-presidential debate, Ruto compared homosexuals to “dogs.”²² Following the court judgment compelling the NGO Board to register the National Gay and Lesbian Human Rights Commission, Ruto stated during a church service in May 2015 that, “There is no room for gays and those others in Kenya.”²³ When the US Supreme Court ruled in favor of marriage equality in June 2015, Ruto condemned the ruling at another church service, saying, “We hear that America has legalized homosexuality and other dirty things.”²⁴

On two occasions in 2014, members of parliament proposed harsh anti-gay bills. To date, nothing has come of their proposals.²⁵

In Kwale County, Governor Salim Mvurya made homophobic remarks following the arrests of the two men on charges of same-sex conduct. According to media reports, he referred to homosexuality as “un-African.”²⁶

Religious Leaders

Much of the virulent homophobic discourse in Kenya comes from religious leaders. Not all religious leaders express homophobic views; some have welcomed LGBT individuals into

²¹ Allan Kisia and Renson Mnyamwezi, “Ruto: Draft Allows Same-Sex Unions,” *The Standard* (Nairobi), July 6, 2010, <http://www.standardmedia.co.ke/article/2000013241/ruto-draft-allows-same-sex-unions> (accessed May 18, 2015). Even once the constitution was overwhelmingly approved by referendum, he continued to call for it to be amended to prohibit homosexuality. Karanja Njoroge, “Ruto Says Ranneburger Cannot Be Trusted,” *The Standard* (Nairobi), December 12, 2010, http://www.standardmedia.co.ke/mobile/?articleID=2000024487&story_title=Ruto%20says%20Ranneberger%20cannot%20be%20trusted (accessed May 18, 2015).

²² “Kenya Deputy Presidential Debate (Part 1),” *Capital FM Kenya*, February 14, 2013, https://www.youtube.com/watch?feature=player_embedded&v=OU7neGAvmAc (accessed June 8, 2015).

²³ “DP William Ruto: Kenya will not allow homosexuality,” *KTN News Kenya*, May 3, 2015, <https://www.youtube.com/watch?v=alk3Xr9HPJU> (accessed June 8, 2015). The list of anti-LGBT pronouncements by William Ruto goes on: In 2011, Ruto opposed the appointment of Chief Justice Willy Mutunga, a reformist with a strong civil society background, on the grounds that Mutunga wore an earring, implying that the earring called into question Mutunga’s sexuality; Alessia Valenza, “Kenya : Parliament, clergy oppose chief justice nominees over gay issues,” ILGA, May 27, 2011, <http://ilga.org/kenya-parliament-clergy-oppose-chief-justice-nominees-over-gay-issues> (accessed May 19, 2015). In 2013, Ruto struck out at US President Barack Obama for making references to LGBT rights during a visit to Senegal. “Respect our culture, Ruto tells US leader,” *Daily Nation*, June 30, 2013, <http://www.nation.co.ke/News/politics/Ruto-to-Obama-Respect-our-culture/-/1064/1900204/-/13m39bpz/-/index.html> (accessed June 9, 2015).

²⁴ “Deputy President William Ruto condemns move by US Supreme Court to guarantee the right for same sex,” *KTN News Kenya*, July 5, 2015, <https://www.youtube.com/watch?v=bqilMheN5bM> (accessed July 28, 2015).

²⁵ Human Rights Campaign, “Kenya: Draft Bill Proposes Stoning to Death of Gay People,” August 15, 2014, <http://www.hrc.org/blog/entry/kenya-draft-bill-proposes-stoning-to-death-of-gay-people> (accessed June 9, 2015).

²⁶ “‘Un-African’ homosexuality will not be allowed to ruin Diani - Governor Mvurya,” *The Star*, March 12, 2015, <http://www.the-star.co.ke/article/un-african-homosexuality-will-not-be-allowed-ruin-diani-governor-mvurya#sthash.OokMrLKO.dpbs> (accessed May 27, 2015).

their congregations and spoken out on their behalf.²⁷ But the number of incidents of homophobic rhetoric and acts seems to greatly outweigh the number of LGBT friendly acts from religious leaders.

Leaders from both the Council of Imams and Preachers of Kenya (CIPK, a Muslim organization headquartered in Mombasa) and the National Council of Churches of Kenya (NCCCK) incited violence against LGBT people in Mtwapa in 2010 (as discussed further in Section II below), spreading rumors of a “gay wedding” and pledging to “flush out gays.”²⁸ The same year, Christian leaders overwhelmingly opposed the new constitution on the grounds that it purportedly legalized homosexuality and abortion.²⁹ In 2012, religious leaders condemned the Kenya National Commission on Human Rights for its stance in support of the decriminalization of same-sex conduct.³⁰

The Kenya Muslim National Advisory Council (KEMNAC), chaired by Sheikh Juma Ngao of Mombasa, has called for the resignation of, and apologies from, the few government officials who have publicly supported the rights of LGBT people.³¹ In 2014, KEMNAC reportedly accused gay rights activists of “propagating evil,” while Ngao described LGBT people as “sick.”³² Following the passage of the Anti-Homosexuality Act in Uganda in 2014, Sheikh Mohamed Khalifa of the Council of Imams and Preachers of Kenya (CIPK) urged President Kenyatta to “be supportive of [Ugandan President] Yoweri Museveni and support enactment of laws to prevent spread of homosexuality.”³³ Religious leaders have a

²⁷ These include Pastor John Makokha of the Riruta Hope Community Church in Nairobi, and Rev. Micheal Kimindu of Other Sheep Africa-Kenya, an organization that ministers to LGBT Christians. See Carey Lodge, “Christian Leaders Oppose LGBT Rights in Kenya,” *Christianity Today*, April 30, 2015, <http://www.christiantoday.com/article/christian.leaders.oppose.lgbt.rights.in.kenya/53101.htm> (accessed May 20, 2015).

²⁸ Galgalo Bocha, “Gay wedding here? No way, vow preachers,” *Daily Nation*, February 11, 2010, reprinted at <http://humanrightshouse.org/noop/page.php?p=Articles/13392.html&d=1> (accessed May 20, 2015).

²⁹ David Ochami, “Church vows to reject draft,” *The Standard*, April 28, 2010, <http://www.standardmedia.co.ke/article/2000008647/church-vows-to-reject-draft> (accessed June 8, 2015).

³⁰ David Ohito, “Sex rights debate rages,” *The Standard*, May 12, 2012, <http://www.standardmedia.co.ke/article/2000057998/sex-rights-debate-rages> (accessed June 8, 2015).

³¹ Galgalo Bocha, “Murugi urges Kenyans to accept gays,” *Daily Nation*, October 1, 2010, <http://www.nation.co.ke/News/Murugi%20urges%20Kenyans%20to%20accept%20gays%20%20%20/-/1056/1024376/-/14hqsd/-/index.html> (accessed May 20, 2015); Brian Otieno, “Muslims Want CJ’s Apology on Gays Talk,” *The Star*, September 12, 2011, <http://allafrica.com/stories/201109130089.html>.

³² Brian Otieno, “Gay Right Activists Dangerous, Say Muslim Clerics,” *The Star*, February 14, 2014, <http://allafrica.com/stories/201402140500.html> (accessed May 20, 2015).

³³ Ngumbao Kithi, “President Uhuru Kenyatta challenged to declare stand on homosexuality,” *The Standard*, February 26, 2014, <http://www.standardmedia.co.ke/article/2000105581/president-uhuru-kenyatta-challenged-to-declare-stand-on-homosexuality> (accessed May 20, 2015).

particularly strong influence on the coast; as documented in Section II below, they have played a significant role in inciting violence against LGBT people. One imam in Mombasa advised Human Rights Watch not to underestimate the power of religious leaders to sway the masses: “If we say kill, they kill.”³⁴

Religious leaders have opposed recent advances by LGBT civil society groups. The Kenya Christian Professionals Forum (KCPF)—a group founded in opposition to Kenya’s 2010 constitution, and in favor of “a legal and social environment that is supportive of Biblical values”³⁵—made submissions as an interested party opposing the National Gay and Lesbian Human Rights Commission’s High Court petition on the right to register with the NGO Board. The National Council of Churches of Kenya described the ruling in favor of NGLHRC as being “in bad taste,” and expressed support for KCPF’s appeal of the ruling.³⁶

The Media

Attitudes toward LGBT people in Kenya are also influenced by the media. A health worker who conducts outreach to MSM in Mombasa told Human Rights Watch: “The media at some point is always the center point of stigma.”³⁷ A gay man in Mombasa agreed: “The media has been the biggest hurdle. What we do in our bedrooms should never be a part of anyone’s media report.”³⁸

While some national media outlets address LGBT issues objectively, others resort to sensationalist tactics and scandal-mongering. In May 2015, the *Weekly Citizen*, a gossip tabloid, posted an article claiming to unveil Kenya’s “Top Gays.” Although a number of those listed were openly gay activists, others were private individuals for whom the *Weekly Citizen* piece constituted a grave violation of their right to privacy, regardless of whether or not they are actually gay.³⁹

³⁴ Human Rights Watch interview, Mombasa, January 27, 2015.

³⁵ Kenya Christian Professional Forum, “About Us,” <http://www.kcpf.or.ke/about/> (accessed May 20, 2015).

³⁶ National Council of Churches of Kenya, “Embrace Value-Based Leadership - Central Region,” April 30, 2015, <http://www.nccck.org/newsite2/index.php/information/news/391-embrace-value-based-leadership-central-region> (accessed May 20, 2015).

³⁷ Human Rights Watch interview with a health worker (name withheld), Mombasa, March 27, 2015.

³⁸ Human Rights Watch interview with Francis, Mombasa, March 26, 2015.

³⁹ “Top Gays, Lesbians List in Kenya Out,” *Weekly Citizen* (Nairobi), May 10, 2015, <http://weeklicitizennewspaper.blogspot.com/2015/05/top-gays-lesbians-list-in-kenya-out.html>. The print version of the newspaper included the photos of ten alleged gays and lesbians; on file with Human Rights Watch.

The Standard, one of Kenya's largest dailies, claimed in 2014 that Kenyan human rights groups "[fear] losing Western aid if they support anti-homosexuality legislation," denying the agency of these groups in supporting human rights for LGBT people.⁴⁰ In February 2015, the Standard filed a sensational piece preposterously claiming that gays were attacked at a funeral in Watamu (Malindi County) because they were engaged in "gay rituals" during the burial, including attempting to have sex at the deceased's graveside. (According to a rights activist from Kilifi, funeral attendees threatened to attack the group simply for being gender non-conforming.)⁴¹ The piece was subsequently removed from the *Standard's* website, but only after the damage, in shaping readers' perceptions of gay "deviance," had already been done.⁴²

Media outlets also perpetuate myths alleging an "upsurge" in the number of LGBT people in Kenya. *The Star*, a newspaper whose editorial line is generally respectful of human rights, made a baseless claim that the numbers of MSM on the coast were increasing.⁴³ International media outlets in Kenya are also culpable, with Xinhua, the Chinese national news service, proclaiming in 2014 that young Kenyans are turning to homosexuality because it "appears cool and trendy."⁴⁴

Discriminatory Laws

Laws that discriminate on the basis of sexual orientation are another driver of homophobia in Kenya. These laws make it difficult for LGBT Kenyans to seek justice when they are victims of violence.

⁴⁰ Ngumbao Kithi, "President Uhuru Kenyatta challenged to declare stand on homosexuality," *The Standard* (Nairobi), February 26, 2014, <http://www.standardmedia.co.ke/article/2000105581/president-uhuru-kenyatta-challenged-to-declare-stand-on-homosexuality> (accessed April 23, 2015).

⁴¹ Human Rights Watch telephone interview with Douglas Masinde, Tamba Pwani, May 11, 2015.

⁴² Human Rights Watch viewed the original article on *The Standard's* website on February 25, 2015, at the link <http://www.standardmedia.co.ke/thecounties/article/2000152821/suspected-gays-attacked-for-lewd-acts-at-colleague-s-funeral?pageNo=1>. The link was later removed. The article has been reprinted, without credit to *The Standard*, by Out and Proud Diamond Group at <http://www.opdg.org/index.php/11-latest-news/130-suspected-gays-attacked-for-lewd-acts-at-colleague-s-funeral> (accessed May 20, 2015).

⁴³ Martin Mwita, "Mombasa Has 739 Gay Sex Workers," *The Star*, October 9, 2013, <http://allafrica.com/stories/201310090572.html> (accessed May 20, 2015). The article also conflates sex workers and men who have sex with men.

⁴⁴ "Upsurge of homosexual behaviour in Kenya slows down war on HIV/AIDS," *Xinhua*, January 27, 2014, <http://m.news24.com/kenya/National/News/Upsurge-of-homosexual-behaviour-in-Kenya-slows-down-war-on-HIVAIDS-20140127> (accessed June 9, 2015).

Sections 162, 163, and 165 of the Penal Code prohibit “carnal knowledge against the order of nature” and other so-called “unnatural offenses.” The penal code is a relic of the colonial era; the language of the “unnatural offenses” laws, generally understood to target same-sex conduct between men, can be traced directly to Victorian laws that Britain imposed on India during the colonial period, then imported to its other colonies, including Kenya.⁴⁵

Because many gay and bisexual men and transgender women in the coast region are involved in sex work, they are doubly vulnerable: they may also be subjected to laws that prohibit sex work, or more general laws, prohibiting behaviors such as “idle and disorderly” conduct, that are frequently used against sex workers. Prohibitions on sex work can be found in the Penal Code, the Sexual Offenses Act, and the Mombasa municipal bylaws.⁴⁶

It is unclear whether anyone has ever been convicted for consensual adult same-sex relations in Kenya. According to a list produced by former Inspector General of Police David Kimaiyo in 2014, over 500 people were convicted of “unnatural offenses” between 2010 and 2014. The National Gay and Lesbian Human Rights Commission (NGLHRC) conducted an initial analysis of the list and found that it conflated cases of bestiality and rape with cases allegedly involving consensual sex, all of which are categorized under the “unnatural offenses” provisions in the Penal Code. At the time of writing, NGLHRC had not yet determined whether there were in fact any convictions on the record based on consensual same-sex conduct.⁴⁷

Human rights organizations report occasional cases in which LGBT people are arrested, often due to complaints from neighbors, or on the initiative of law enforcement officials seeking bribes. In most cases, they are released within a matter of days. The arrest and prosecution of two men in Kwale on homosexuality charges, described in further detail below, appears to represent an exceptional use of the arm of the law against gay Kenyans.

⁴⁵ “Unnatural offences” were first codified in British colonial law in 1860, in section 377 of the Indian Penal Code. It reads: “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment ... for a term which may extend to 10 years, and shall be liable to fine. Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section.” Human Rights Watch, *This Alien Legacy*, December 2008, <http://www.hrw.org/reports/2008/12/17/alien-legacy-o>, p. 18.

⁴⁶ Laws of Kenya, Cap. 63, Penal Code, sections 153 and 154; Laws of Kenya, The Sexual Offenses Act, No. 3 of 2006, section 17; Municipal Council of Mombasa (General Nuisance) Bylaws 2010, Section 19(m) and (n), “Nuisance.”

⁴⁷ Human Rights Watch interview with Eric Gitari, NGLHRC, Nairobi, April 1, 2015.

In a second unusual case, two men were arrested in Kilifi in July 2012 after one of them reported the other to the police. The Kilifi Magistrate's Court dismissed the case in May 2015 for lack of evidence.⁴⁸

Charges against gay men and transgender women on the grounds of sex work are more common.⁴⁹ Michael Kioko, a Mombasa-based lawyer, said that individuals charged with prostitution-related offenses rarely have lawyers, and almost always plead guilty, in order to pay a fine and quickly finish with the case. If they plead not guilty but cannot make cash bail, they are imprisoned for several months until the next hearing.⁵⁰

⁴⁸ According to one of the men charged, the case originated when his partner attempted to blackmail him by accusing him of rape. Police investigations revealed that the two men were in a consensual relationship, and police proceeded to charge both men. Human Rights Watch interview, Nairobi, July 14, 2015.

⁴⁹ In 2009, two female sex workers in Mombasa filed a case in the High Court of Kenya challenging the constitutionality of their arrest under Mombasa's bylaws, primarily on the grounds that the bylaws were enforced against women in a discriminatory way. The court ruled against them, declaring that there was no evidence the women's constitutional rights had been violated. Republic of Kenya in the High Court of Kenya at Mombasa, Petition No. 286 of 2009, *Lucy Nyambura and another v Town Clerk, Municipal Council of Mombasa & 2 Others*, Ruling, March 25, 2011, <http://kenyalaw.org/caselaw/cases/view/74769> (accessed August 12, 2015).

⁵⁰ Human Rights Watch interview with Michael Kioko, Mombasa, March 28, 2015.

II. Failure to Protect: Mob Attacks and Individual Acts of Violence on the Coast

The government of Kenya is responsible for taking all reasonable steps to ensure the security of its citizens and other people within its territory. But the Kenyan authorities do not do enough to prevent and punish violence against LGBT people.

On the coast, a series of homophobic and transphobic attacks, fueled by the rhetoric of extremist religious leaders, has created an ongoing undercurrent of insecurity. In at least six instances between 2008 and 2015, groups have attacked or threatened to attack LGBT people or health workers serving the LGBT community. Few government officials have condemned the attacks, and police—while in some cases protecting victims from the immediate threat of violence—have not arrested anyone for participating in or inciting these attacks.

LGBT people are also victims of individual acts of violence, including assault and rape. Most victims whom we interviewed said they simply do not report crimes to the police, believing that the police will not help them or, worse, might arrest them.

Mob Attacks and Inconsistent Police Response

The police on the coast, who have the responsibility to prevent violence and protect victims, play an inconsistent role in responding to mob violence against LGBT people. In four of the six cases that follow, police played a positive role in protecting LGBT people (in Likoni, Mtwapa, Mombasa, and Watamu), but in none of the six did they undertake to arrest the perpetrators of violence. In one instance (Malindi), the police were not alerted, whereas in the most recent instance (Kwale), the police played a decidedly negative role, responding to the public clamor by scapegoating two men for arrest without cause.

In three of the incidents, violence or threats of violence against LGBT individuals from residents and local religious leaders led health providers serving MSM populations to temporarily or permanently close their doors or shut down workshops.

Kwale, February 2015: Attacks and Arrests Following the Circulation of Photos

In February 2015, a series of photos and videos depicting men engaged in same-sex conduct were disseminated on social media, resulting in a public uproar and vigilante-

style hunts for gay men in Diani and Ukunda, two neighboring towns in Kwale County. Rather than taking steps to ensure the safety of LGBT residents, police committed serious human rights violations, arbitrarily arresting two allegedly gay men and submitting them to illegal and degrading anal exams. The county governor made homophobic statements, fueling feelings of insecurity among LGBT residents.

The source of the photos and videos, and the circumstances under which they were taken, remains contested. Kenyan media outlets reported that some of those pictured were children under 18, with one outlet claiming that “the material includes more than 800 photos of children lured into sex trafficking.”⁵¹ Human Rights Watch spoke to several adult men who said they voluntarily posed for photos—although one said some of the photos were taken at a party and were not intended for public consumption—and to one man who said that several teenagers under 18 were also involved. According to this source, participants were paid by a European pornographer.⁵²

Commercial sexual exploitation of children, which includes the production of pornography involving children, is a crime under Kenyan law, and the Kenyan authorities have an obligation under international law to prevent such acts.⁵³ However, in this case, it appears the publication of photos triggered a witch hunt not against those responsible for exploiting children, but against a wider group of Diani and Ukunda residents perceived as gay or transgender. To date, no one has been arrested on charges of commercial sexual exploitation of children.

In early February, Adam, a 30-year-old Diani resident, was walking home in the evening when a group of men whom he recognized from the neighborhood attacked him. Adam told Human Rights Watch that although he did not appear in the photos, his neighbors suspected him of homosexuality.

⁵¹ Elkana Jacob, “Two gay men arrested in Kwale as Police hunt for suspects behind Diani child porn videos,” *The Star*, February 2015, <http://www.the-star.co.ke/article/two-gay-men-arrested-kwale-police-hunt-suspects-behind-diani-child-porn-videos#sthash.JTdmlh3E.dpuf> (accessed June 9, 2015).

⁵² Human Rights Watch interviews, Mombasa, August 5 and 6, 2015.

⁵³ Laws of Kenya, The Sexual Offenses Act, No. 3 of 2006, art. 16; Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp (No. 49) at 167, U.N. Doc A/44/49 (1989), entered into force 2 September 1990, in accordance with article 49, acceded to by Kenya 1990, art. 34(c).

They came toward me in a bullying way, saying ‘You gays are spoiling men’s respect. How can you sleep with men?’ One of them stepped back and collected a bottle that was just dropped there. I saw him smash it down, and then raise it. I tried to push back, but he slashed me with the bottle on the neck and collarbone, [leaving a gash] going down to my chest.

Adam fell down and lost consciousness. A motorcycle taxi driver who observed the attack rushed to inform a friend of Adam’s, who carried him to the hospital. Adam said, “If my friend hadn’t come so quickly, I could have died.” He spent three days in the hospital and received stitches. When he was released, Adam contemplated filing a police report, but was concerned: “What was I going to tell the police about why I was attacked?”⁵⁴

Around February 11, Tony, a gay man, was hit over the head with a bottle in the street in Ukunda. “They had recognized me,” said Tony, referring to the photos. He sought hospital treatment as a result of the attack, and then went into hiding in Nairobi. He said, “I just left, I didn’t even bother to go to the police or anything because I knew they wouldn’t help me.”⁵⁵

Charles, an activist in Ukunda, told Human Rights Watch that religious leaders, village elders, and “community security representatives” held several community meetings aimed at discussing a response to homosexuality.⁵⁶ A group of residents began going door to door in search of alleged homosexuals, regardless of whether or not they appeared in the photos.⁵⁷

On February 18, police, acting on a tip, arrested two men, Bryan and Adam—the man mentioned above who had been slashed with a bottle and was still recovering from his injuries—and took them to Diani Police Station.⁵⁸ Police charged them with “unnatural offenses” despite not having any evidence that the men had engaged in same-sex conduct.⁵⁹ Police also charged the two men with possession of obscene pictures for the

⁵⁴ Human Rights Watch telephone interview with Adam, July 13, 2015.

⁵⁵ Human Rights Watch telephone interview with Tony, March 29, 2015.

⁵⁶ Human Rights Watch telephone interview with Charles, May 7, 2015.

⁵⁷ Ibid, and Human Rights Watch telephone interview with Esther Adhiambo, PEMA Kenya, July 10, 2015.

⁵⁸ Although the charges against the two men are on the public record, they hope to regain some measure of anonymity when the case against them is closed and the names used here are thus pseudonyms.

⁵⁹ Human Rights Watch telephone interviews with Bryan, May 26, 2015, and with Adam, July 13, 2015.

purpose of distribution, under section 181 of Kenya’s Penal Code⁶⁰—again, despite having no evidence that the two men possessed or had distributed any of the photos.⁶¹ The police had conducted a search of both men’s homes, without a warrant, and in one of the homes, found a DVD of the award-winning British television series “Queer as Folk,” which was confiscated as “evidence.”⁶²

Bryan told Human Rights Watch police threatened to beat him if the two did not confess, but he refused, instead contacting a lawyer.⁶³ According to Adam, police asked him to pay a bribe of 100,000 Kenya shillings (about US \$1000) to have the charges dropped. When he refused, they said “We’re just going to drop you on the street in Ukunda where people will stone you to death. Sign here.” He continued to deny the charges.⁶⁴

Police took the men to Kwale District Court, where the prosecutor requested a court order for the men be taken for “medical examinations.” The magistrate, Christine Njagi, complied. She later told Human Rights Watch that she did not recall issuing the order, and could not say precisely what type of exams the court expected the men to undergo.⁶⁵

Armed with this court order, police escorted the men to Coast General Hospital, Kenya’s second biggest public hospital, for forced anal exams.⁶⁶ Anal exams are a scientifically discredited method to check for “evidence” of homosexual conduct, and have been condemned by the UN Committee against Torture.⁶⁷ The doctor who conducted the exams, Dr. Stephen Kalai, told Human Rights Watch that he instructed the men to lie on a table with their legs in stirrups and to cough, while he used a magnifying glass to visually

⁶⁰ Laws of Kenya, Cap. 63, Penal Code. Section 181 states, “(1) Any person who -(a) for the purpose of or by way of trade or for the purpose of distribution or public exhibition, makes, produces or has in his possession any one or more obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects, or any other object tending to corrupt morals; ... is guilty of a misdemeanour and is liable to imprisonment for two years or to a fine of seven thousand shillings.”

⁶¹ The Kenya Police, Charge Sheet, O.B. 54/18/02/15, on file with Human Rights Watch.

⁶² Human Rights Watch interviews, Mombasa, August 5 and 6, 2015.

⁶³ Human Rights Watch telephone interview with Bryan, May 26, 2015.

⁶⁴ Human Rights Watch telephone interview with Adam, July 13, 2015.

⁶⁵ Human Rights Watch interview with Christine Njagi, Kwale, August 7, 2015.

⁶⁶ Ibid; “Arrested Diani gays to remain in police custody,” *News 24 Kenya*, <http://m.news24.com/kenya/MyNews24/Arrested-Diani-gays-to-remain-in-police-custody-20150220> (accessed July 13, 2014).

⁶⁷ The U.N. Committee against Torture, in its 2002 review of Egypt, investigated the issue of forensic anal examinations and called on the government “to prevent all degrading treatment on the occasion of body searches.” Committee against Torture, “Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and recommendations of the Committee against Torture, Egypt,” CAT/C/CR/29/4, December 23, 2002.

examine them. He then issued reports, using a “Post Rape Care Form”—a form intended to document abuses against rape survivors, but repurposed to report the results of the anal exams. One of the reports states “anal sphincter intact/no homosexuality detected,”⁶⁸ while another purports to find evidence of “repeated penetration by blunt object.”⁶⁹ Dr. Kalai asserted that that he was able to draw these conclusions simply by conducting a visual examination.⁷⁰

At this writing, the case against the two men is ongoing. One man was released on bond after two months at Kwale Medium Prison, while the other was released after four months.⁷¹ Even if charges are eventually dropped, the two men fear that their lives will have been irrevocably affected by the publicity around the case. One of them has already been evicted from the house he rented in Mombasa after being released from prison: he said, “My landlord told me, ‘We can’t have your kind of creature here.’”⁷²

The threat of violence and arrest sent the LGBT community in Kwale County into upheaval. Tony, who was attacked with a bottle, returned to Ukunda, but he told Human Rights Watch in March 2015:

All of us had to go into hiding. I am still in hiding. I don’t go out, I don’t do anything.

The newspapers are publishing our information; when these pictures leaked out, we were approached by the media. The police are really hunting for [us]. The Kenyan Police want to show the public they are working. The community leaders—Muslim and Christian—put pressure on the police.⁷³

⁶⁸ Post Rape Care Form (first victim), February 24, 2015, signed by Kalai S.M. (examining officer) and Salim Yunus (police officer), on file with Human Rights Watch.

⁶⁹ Post Rape Care Form (second victim), February 24, 2015, signed by Kalai S.M. (examining officer) and Salim Yunus (police officer), on file with Human Rights Watch.

⁷⁰ Human Rights Watch interview with Dr. Stephen Kalai, Mombasa, August 7, 2015.

⁷¹ Human Rights Watch telephone interview with Esther Adhiambo, PEMA Kenya, July 10, 2015.

⁷² Human Rights Watch telephone interview with Adam, July 13, 2015.

⁷³ Human Rights Watch telephone interview with Tony, March 29, 2015.

Charles, the Ukunda-based activist, said that about 50 men fled in the wake of the attacks and arrests.⁷⁴ In May, three months after the incident, he reported:

Some of those who fled have come back, those who were employed. The ones who were living with their parents cannot go back. They now have to find their own jobs. They were chased away by their families and villages.⁷⁵

One of those who fled, Francis, said threats from his neighbors compelled him to leave. “I don’t have any nude photos, [but] they were saying ‘You are promoting pornography.’ They were not even taking the time to know what was going on.”⁷⁶

After receiving death threats by telephone, Francis fled to Nairobi, convinced that he couldn’t count on the police to protect him. “What scared me most was that the police arrested two people. I have to run away now, if the police are doing that and can’t help, then I have to run.”⁷⁷

Others, such as Leonard, remained in Kwale County but went underground: “I spend three weeks inside the house and I’m scared out there; you don’t know what people have planned for you. ... Right now gays don’t have rights.”⁷⁸

The Kwale violence and subsequent displacement of MSM and trans women negatively impacted HIV prevention and treatment efforts. Evans Gichuru of the Kenya Medical Research Institute (KEMRI) expressed concern that “people on medicine [antiretroviral treatment] can’t get medicine” if they are in hiding.⁷⁹

UKWELI, a community organization for men who have sex with men, suspended its HIV prevention activities in the wake of the arrests. One of its members, who fled his home in Ukunda because of death threats from neighbors, said:

⁷⁴ Human Rights Watch telephone interview with Charles, March 30, 2015.

⁷⁵ Human Rights Watch telephone interview with Charles, May 7, 2015.

⁷⁶ Human Rights Watch interview with Francis, Mombasa, March 26, 2015.

⁷⁷ Ibid.

⁷⁸ Human Rights Watch interview with Leonard, Mombasa, March 26, 2015.

⁷⁹ Human Rights Watch interview with Evans Gichuru, Mombasa, March 26, 2015.

They threaten us—they told us if we go back they are planning to kill us.

We have a group called UKWELI. ... We try to teach each other and ourselves how to use condoms and to prevent HIV/AIDS. But we can't do that now. If they see us together they think we are planning on how to train to make boys gay. So we are not meeting again.⁸⁰

Watamu (Kilifi County), February 2015: Threats Against LGBT Mourners at a Funeral

In February 2015, when a man in Watamu (Kilifi County) died of an illness, his friends—comprising a number of LGBT people—organized a funeral. According to Douglas Masinde, an activist in Kilifi, local residents “started to react” to the presence of gender non-conforming mourners, threatening to attack them. Someone called the police, who came to the assistance of the LGBT mourners.

Masinde, who has organized trainings for Kilifi police on LGBT human rights, said the incident pointed to the need to sensitize the public as well:

No one was beaten up, but if it was not acted on, a number of them would have been beaten up.

What the police did was the right thing. But there is a need to sensitize the general community on understanding our human sexuality. If the police weren't there, then what?⁸¹

The *Standard* newspaper published an incendiary article claiming that the LGBT mourners were engaged in “gay rituals” at the burial. The article has since been pulled from The *Standard's* website.⁸²

⁸⁰ Human Rights Watch telephone interview with Hamil, March 29, 2015.

⁸¹ Human Rights Watch telephone interview with Douglas Masinde, Tamba Pwani, May 11, 2015.

⁸² See *supra* note 42.

Mombasa, October 2014: Beatings and Threats Following “Pornography” Report

In October 2014, residents of Kisauni, a Mombasa neighborhood, attacked and threatened LGBT residents after a pornographic video, allegedly featuring gay residents, was circulated on social media.

Samir, a gay man who lives in Kisauni, said that a spontaneously organized group of residents beat up a young man who allegedly participated in the video. According to Samir:

It was hectic. They said they wanted to beat all the gay people around the area. [The victim] didn’t go to the police. I don’t know if he went to the hospital because I also ran for refuge—to a friend’s place in Kilifi. I stayed there for two weeks. A lot of people ran away at that time.

Samir noted the ambivalent position of the police in responding to homophobic violence:

The community wanted to protest and go door to door and look for gays. The police intervened and stopped them. But they didn’t arrest the guys who beat [the victim].⁸³

Bettina, a trans woman, said that the uproar around the video served as a pretext for transphobic residents to attack the kiosk where she sold food. “They had been looking for an excuse to attack me but they didn’t have any evidence,” said Bettina.⁸⁴ She added:

I didn’t know about any video thing. I’m not the one in the video. [But] people came and attacked my stall, they threw everything out. They shut it down. So I had to lose everything.

Bettina was told by a relative of the kiosk’s owner that a mob had come the day before, threatening to shut down her kiosk; when the owner took no action to evict her, the crowd made good on its threats.⁸⁵

⁸³ Human Rights Watch telephone interview with Samir, May 14, 2015.

⁸⁴ Human Rights Watch telephone interview with Bettina, May 3, 2015.

⁸⁵ Ibid.

Bettina went to the police. But police refused to provide her with a case number, which crime victims must be given in order to follow up on their cases, seemingly because of her gender identity.

I went to Central Police Station, and gave a written statement. The policeman asked me: ‘Are you male or female?’

And I said, ‘Well what do you see?’ and he then refused to give me the OB number [the case number].

So I left because there was nothing there for me and I have to go.⁸⁶

Likoni (Mombasa County), February 2012: Attack on an HIV Workshop

In February 2012, the Kenya AIDS NGO Consortium (KANCO) held a four-day HIV/AIDS peer education training for men who have sex with men at a community center in Likoni, a town just south of Mombasa.

On February 23, the final day of the workshop, town residents became aware that the center was hosting a workshop for MSM. According to a news report, “about 100 youth led by religious leaders and village elders forced their [way] into the venue.”⁸⁷

Esther Adhiambo of PEMA Kenya described receiving “numerous calls of distress from participants who said they had managed to escape through the ceiling of the training hall and jumped out through the back fence, and they had left some people in the training hall.”⁸⁸ KANCO and other organizations involved in the training reported that the crowd “stormed the premises with a bid to ‘flush out the gays.’”⁸⁹

⁸⁶ Human Rights Watch interview with Bettina, Mombasa, March 27, 2015.

⁸⁷ Daniel Nyassy, “Gays flee as irate residents storm Likoni seminar,” *Africa Review*, February 24, 2012, <http://www.africareview.com/News/Gays+flee+as+irate+residents+storm+Likoni+seminar+/-/979180/1334234/-/a7k5ovz/-/index.html> (accessed May 20, 2015). See also NTV Kenya, “Mkutano wa mashoga na wasagaji watibuka mjini Mombasa,” February 23, 2012, <https://www.youtube.com/watch?v=dcGSnWbeY6k&feature=youtu.be> (accessed June 9, 2015), for video footage of the attack.

⁸⁸ Esther Adhiambo, “A Report PEMA Kenya on the MSM Attacks in Likoni,” February 24, 2012, on file with Human Rights Watch.

⁸⁹ National AIDS & STI Control Programme (NASCO), Kenya Alliance of Sex Workers (KESWA), Kenya AIDS NGO Consortium (KANCO), Network of People Living with HIV/AIDS in Kenya (NEPHAK), and Identity Kenya Magazine, “Joint Press Release: Likoni Attack on MSM Training,” February 29, 2012, on file with Human Rights Watch.

KANCO organized a matatu (public minibus) to evacuate some participants. A PEMA Kenya lawyer contacted the Likoni police, who arrived at the venue and escorted remaining participants to safety. However, the mob followed the police when they dropped one of the men off at home. He was forced to relocate the following day due to threats. Another gay man, whose image was shown on television, was evicted by his landlord three days later.⁹⁰

The police did not arrest any of the perpetrators of the attack, nor did they arrest religious leaders who incited it. These included a Muslim leader who, according to a media report, “threatened to mobilise the community to cane the gays if they organised such a meeting again.”⁹¹

A district officer from the Ministry of Youth and Sports defended the seminar, telling reporters “[Gays] have a right to safe sex. By doing this, we are not promoting homosexuality but imparting knowledge.”⁹²

Mtwapa (Kilifi County), February 2010: Attacks on LGBT People and a Health Center

In February 2010, local Christian and Muslim religious leaders in Mombasa spread rumors that a “gay wedding” was to take place in Mtwapa.⁹³ On February 11, they held a press conference stating they were preparing to stop the alleged wedding by any means necessary, and to shut down the local offices of the Kenya Medical Research Institute (KEMRI), a parastatal entity that provides HIV services to MSM, which they accused of counseling “criminals.”⁹⁴

On February 12, a crowd of up to 200 people besieged KEMRI. They attacked several gay and bisexual men and trans women who served as peer educators there.⁹⁵

⁹⁰ Adhiambo, “A Report PEMA Kenya on the MSM Attacks in Likoni,” February 24, 2012.

⁹¹ Nyassy, “Gays flee as irate residents storm Likoni seminar,” *op. cit.*

⁹² *Ibid.*

⁹³ Bishop Lawrence Chai of the Free Kenya Apostolic Church in Mtwapa told Human Rights Watch in 2014 that he was among those who circulated a rumor about a “gay marriage.” Human Rights Watch interview, Mombasa, January 17, 2014.

⁹⁴ Galgalo Bocha, “Gay wedding here? No way, vow preachers,” *Daily Nation*, February 11, 2012, <http://humanrightshouse.org/noop/page.php?p=Articles/13392.html&d=1> (accessed May 20, 2015).

⁹⁵ Human Rights Watch, “Kenya: Halt Anti-Gay Campaign,” February 18, 2010, <http://www.hrw.org/news/2010/02/17/kenya-halt-anti-gay-campaign>.

Kalisa, one of the peer educators who was attacked, said he was beaten by a mob that numbered around 100 people.

They burned me with lighters and cigarettes. I tried to run away, but I have asthma, and fell down. ... I was beaten until I fainted. Someone called the police, and the police came. I was protected and taken by the police.⁹⁶

Richard, a gay man who was at KEMRI at the time, recalled,

The people were yelling, ‘We want to burn this. KEMRI is promoting homosexuality.’ The crowd was very rowdy and led by religious figures.⁹⁷

Police dispersed the crowd and took Kalisa and several other gay men and trans women who had gathered at KEMRI to the police station for their safety.⁹⁸ The attackers, including several religious leaders, followed, threatening to burn down the police station if police did not hand Kalisa over.⁹⁹ Kalisa recalled an imam saying he wanted to “finish all the gays in Kenya.”¹⁰⁰

Human rights activists managed to discreetly bundle Kalisa away from the police station later in the day. He spent seven months in hiding in Nairobi. Others who had narrowly escaped the violence also fled the region for weeks or months.¹⁰¹

According to Kenya Human Rights Commission, police made no effort to investigate and bring to justice those responsible for inciting violence in Mtwapa, including religious leaders.¹⁰²

Malindi (Kilifi County), June 2008: The Closure of an MSM Health Center

In June 2008, an organization providing health services to men who have sex with men (MSM) in Malindi, now part of Kilifi County, was forcibly shut down by local officials.¹⁰³ The

⁹⁶ Human Rights Watch interview with Kalisa, Mombasa, January 14, 2014.

⁹⁷ Human Rights Watch interview with Richard, Kilifi, January 21, 2014.

⁹⁸ Human Rights Watch interview with Bettina, Mombasa, January 13, 2014.

⁹⁹ Human Rights Watch interview with Kalisa, Mombasa, January 14, 2014.

¹⁰⁰ Ibid.

¹⁰¹ Human Rights Watch interview with Richard, Kilifi, January 21, 2014.

¹⁰² Kenya Human Rights Commission, *The Outlawed Among Us*, p. 31, fn 45.

Kenya chapter of the International Center for Reproductive Health (ICRH-Kenya), a research center based in Mombasa that conducts research and intervention projects in areas including sexual health and HIV, had opened a branch in Malindi with the aim of conducting peer education and HIV/STI counseling and screening among men who have sex with men. Nzioki King'ola, Deputy Country Director of ICRH-Kenya, recalled:

The center had been there for about two months. We hadn't even yet launched it officially. When Muslim leaders learned about it, and saw young MSM meeting there, they were opposed to it and threatened to beat up the peer educators and burn it down with petrol.¹⁰⁴

Evans Gichuru was working with ICRH at the time. He recalled:

The boys [young men], about 40 of them, had even come with gas fuel. Some of them even carried machetes. I had to talk to them myself to tell them to cool down. They said they thought the organization was promoting homosexuality.¹⁰⁵

ICRH held a meeting with Muslim leaders, chaired by the area chief, a local government official, with the aim of developing a consensus on the center's activities. The religious leaders insisted the center be shut down. ICRH officials, feeling they had no choice, agreed. They left in place peer education networks, but did not go through with a planned drop-in center with HIV testing and support services.¹⁰⁶

Other Acts of Homophobic and Transphobic Violence

In addition to the attacks by and against groups described above, attacks against individual LGBT people also take place on the coast. At least two known gay men have been murdered on the coast in the last three years. Sixteen of the people we interviewed had experienced physical violence by civilians, either strangers or acquaintances, in

¹⁰³ Gay and Lesbian Coalition of Kenya, "Kenya: Gay and Lesbian Coalition of Kenya Condemns Closure of Centre in Malindi," June 27, 2008, <http://iglhrc.org/content/kenya-gay-and-lesbian-coalition-kenya-condemns-closure-centre-malindi> (accessed May 20, 2015).

¹⁰⁴ Human Rights Watch telephone interview with Nzioki King'ola, ICRH-Kenya, May 19, 2015.

¹⁰⁵ Human Rights Watch telephone interview with Evans Gichuru, May 25, 2015.

¹⁰⁶ *Ibid.*

attacks that they believed to be based on their gender identity or sexual orientation. Gender non-conforming people, including men who are perceived as “effeminate,” are among those most often targeted for abuses.¹⁰⁷

Police and other law enforcement officials have an obligation to provide assistance to LGBT people who are victims of crime, but do not always act accordingly. LGBT people are not unique in being denied adequate protection by the Kenyan police. Human Rights Watch has documented inadequate police protection in the case of terrorist attacks, inter-ethnic violence, and other cases of serious violence.¹⁰⁸ In some ways, LGBT people fare better with the police than other vulnerable groups. Police have sometimes come to the rescue of LGBT people escaping mob violence on the coast, as was the case during the 2010 Mtwapa incident, the 2012 KANCO training in Likoni, and the attack on a funeral in Watamu in 2015, all described above.

Too often, however, police on the coast have responded to cases of violence against LGBT individuals by treating the victims with stigma and discrimination, refusing to take statements or to provide assistance. Most LGBT people we interviewed reported being afraid of the police, and were unwilling to even attempt to file complaints, as documented below.

Even the police response to the Mtwapa attacks in 2010, where police did come to the protection of KEMRI and its MSM and trans peer educators, sent a mixed message. One gay activist said that one of the lessons of the Mtwapa attack was “If I’m gay and I’m attacked, police will take me out of danger. But no legal action will be taken against the perpetrators.”¹⁰⁹

When “Protectors” are Perpetrators

National and international human rights organizations, including Human Rights Watch, have for years have documented patterns of abusive behavior by Kenyan police against vulnerable communities, including refugees, ethnic Somalis, pastoralist communities, and

¹⁰⁷ Human Rights Watch interview with Ishmael, Mombasa, March 25, 2015.

¹⁰⁸ Human Rights Watch and Kenya Human Rights Commission, *Insult to Injury: The 2014 Lamu and Tana River Attacks and Kenya’s Abusive Response*, June 15, 2015, <http://www.hrw.org/report/2015/06/15/insult-injury/2014-lamu-and-tana-river-attacks-and-kenyas-abusive-response>; Human Rights Watch, “*We Were Sent to Kill You*: Gang Attacks in Western Kenya and the Government’s Failed Response”, April 24, 2014, <http://www.hrw.org/report/2014/04/24/we-were-sent-kill-you/gang-attacks-western-kenya-and-governments-failed-response>.

¹⁰⁹ Human Rights Watch interview with Charles, Mombasa, March 15, 2012.

residents of informal settlements.¹¹⁰ The reports reveal a culture of impunity and a lack of responsiveness by the Kenyan government.

LGBT people, too—particularly those who are engaged in sex work—face abuses at the hands of the police. Many gay men and transgender women on the coast—including 39 of the 58 we interviewed—are engaged in occasional or regular sex work. This is in part due to lack of other economic opportunities. Unemployment is exceptionally high in Mombasa for all young people.¹¹¹ For those who face employment discrimination or who did not finish schooling because of discrimination on the basis of their perceived sexual orientation or gender identity, opportunities are few and far between.¹¹²

Like female sex workers, male and trans sex workers are subjected to sexual abuse and extortion at the hands of police officers and county government law enforcement officials, known in Kiswahili slang as *makanjoo* (singular—*kanjoo*). Among the 39 interviewees who sometimes engaged in sex work, 15 reported cases in which police officers or *makanjoo* threatened to arrest them if they refused sex. According to Kenyan law, obtaining consent for sex “by force or by means of threats or intimidation of any kind” is rape.¹¹³

David, 25, told Human Rights Watch that he has been harassed by the police many times for sex work but was not working the night when the police picked him up. He said:

¹¹⁰ Human Rights Watch and Kenya Human Rights Commission, *Insult to Injury*, op. cit.; “*You Are All Terrorists*”: *Kenyan Police Abuse of Refugees in Nairobi*, May 29, 2013, <http://www.hrw.org/report/2013/05/29/you-are-all-terrorists/kenyan-police-abuse-refugees-nairobi>; *Criminal Reprisals: Kenyan Police and Military Abuses against Ethnic Somalis*, May 4, 2012; “*Bring the Gun or You’ll Die*”, <https://www.hrw.org/report/2009/06/29/bring-gun-or-youll-die/torture-rape-and-other-serious-human-rights-violations>; Amnesty International, “*We are like rubbish in this country*”: *Forced evictions in Nairobi, Kenya*, October 7, 2013, <https://www.amnesty.org/en/documents/AFR32/005/2013/en/>.

Torture, Rape, and Other Serious Human Rights Violations by Kenyan Security Forces in the Mandera Triangle, June 29, 2009, <http://www.hrw.org/report/2009/06/29/bring-gun-or-youll-die/torture-rape-and-other-serious-human-rights-violations>.

¹¹¹ According to World Bank statistics, overall youth unemployment in Kenya – referring to the share of the labor force ages 15-24 without work but available for and seeking employment – is at 17 percent, whereas the think tank Adam Smith International places youth employment in Mombasa at 44 percent. The World Bank, Data, “Unemployment, youth total (percent of total labor force ages 15-24) (modeled ILO estimate),” undated, <http://data.worldbank.org/indicator/SL.UEM.1524.ZS> (accessed July 30, 2105); Adam Smith International, “Creating employment opportunities for young people in Mombasa,” undated, <http://www.adamsmithinternational.com/explore-our-work/east-africa/kenya/mombasa-county-youth-employment-programme> (accessed July 30, 2015).

¹¹² A number of young men told Human Rights Watch they had been fired from or not hired for jobs due to their perceived sexual orientation. Human Rights Watch interviews with Samir, Mombasa, January 13, 2014; Haroun, Diani, January 18, 2014; Morris, Diani, January 18, 2014.

¹¹³ The Sexual Offenses Act, art. 3.

I was arrested in September 2013 as I was walking to meet with a friend late at night. The police asked to bribe them but I did not have enough money, so they took me to a spot by Fort Jesus, an old museum where there are no lights. They then raped me, both police officers did.¹¹⁴

County government law enforcement officials—a separate entity from the police—also rape and abuse male sex workers. Guyo described being gang raped by county government law enforcement officers in November 2014:

The *kanjoo* found me in the street and took me in the lorry that they usually use [to conduct raids]. They were raping me inside the lorry while they were driving all over Mombasa. About five of them raped me. They didn't use condoms. They drove me around for about four hours. They arrested me around midnight or 1 a.m. but they took me to the Central Police Station around 4:30. I was taken to court and charged with nuisance and loitering.¹¹⁵

Rape by law enforcement officers is an extremely serious human rights violation. Although Human Rights Watch documented a number of such cases, they are not the primary focus of this report. First, they merit further investigation in order to better assess which branches of law enforcement bear greatest responsibility.¹¹⁶ Second, other organizations have documented similar patterns of law enforcement officers raping female sex workers, on the coast and elsewhere.¹¹⁷ It is not clear that the individuals we interviewed who described such abuses were victimized on the basis of their sexual orientation or gender identity, or simply because, as sex workers, law enforcement officers perceived them as an easy target. In this report, we chose to focus more narrowly on abuses that are clearly perpetrated on the grounds of the victim's gender identity or sexual orientation, while recognizing that for male and transgender sex workers, there is likely some blurring of the lines in perpetrators' motivations.

¹¹⁴ Human Rights Watch interview with David, Mombasa, January 13, 2014.

¹¹⁵ Human Rights Watch telephone interview with Guyo, June 25, 2015.

¹¹⁶ See the Annex to this report on the various branches of the National Police Service and the role of county law enforcement officers.

¹¹⁷ FIDA Kenya, *Documenting Human Rights Violations of Sex Workers in Kenya*, 2008, http://www.opensocietyfoundations.org/sites/default/files/fida_20081201.pdf (accessed May 20, 2015); Kenya Sex Worker Alliance (KESWA), unpublished interviews conducted in 2015, on file with Human Rights Watch.

Even when not motivated by sexual orientation or gender identity, rape by law enforcement personnel, along with other forms of abuse that law enforcement officials perpetrate against LGBT people, has a devastating impact on trust between victims of homophobic violence and the law enforcement agencies that are supposed to be there to protect them.

Ishmael, an activist, captured the ambiguity of the police role in protecting or failing to protect LGBT people:

In Malindi there was a known gay guy's funeral. The police came to rescue the boys from the crowd. Now if there's been an attack, the police will bring the boys to the station [and] wait for the crowd to die down.

So if it's a public issue, in the public sphere, the police will protect. If it's a private issue, then the police will exploit and are corrupt. ... If something is perceived [about you being gay], then you are vulnerable, then they can see if you are available, either for sex or money, and they will take advantage of that.¹¹⁸

Police Discrimination and Refusal to Take Statements from LGBT People

On June 21, 2013, during what the Gay and Lesbian Coalition of Kenya (GALCK) later highlighted as a surge in apparent anti-LGBT violence, a gay man in Mombasa was slashed with a machete in his neck and throat by an unknown assailant. The victim survived the attack and received medical treatment.¹¹⁹

Jo, a lesbian friend of the victim, took him to Mombasa's Central Police Station to file a report. But police refused to receive the case, said Jo: "They took the case lightly. They said 'These gay men are thieves' and said they could not handle the case. They did not take a report."¹²⁰

Had police taken down the victim's story, they might have saved a life. Three days later, on June 24, another gay man in Mombasa was killed in a similar attack; he too was found with

¹¹⁸ Human Rights Watch interview with Ishmael, Mombasa, March 25, 2015.

¹¹⁹ "The Value of a Life," GALCK news release, July 17, 2013, <http://76crimes.com/2013/07/18/kenya-making-progress-but-anti-gay-violence-continues/> (accessed April 9, 2015).

¹²⁰ Human Rights Watch telephone interview with Jo, June 26, 2015.

slash wounds to the neck and throat.¹²¹ Inadequate police investigation has complicated efforts to determine whether the victims were targeted because of their sexual orientation or gender identity or for other reasons.¹²²

Police also engage in blaming the victim when crime victims are sexual or gender minorities. Samir was gang-raped in 2011, at age 20, while waiting for the bus at 12:30 a.m. in Bamburi, Mombasa County. A man grabbed Samir, placed a cold object against his neck, and warned him not to shout. The man forced Samir across the road and into a secluded area, where six other men joined him. They robbed Samir of his phone and 5000 Kenya shillings (about US \$50). Then, Samir said:

They noticed I was gay and stripped me naked, hitting me hard. I was raped in turns. ‘You love whatever men do to you. Now we’ll do it.’

After the rape, Samir informed his mother, who took him to Nyali Police Station. But the police on duty refused to take his statement.

The police asked, ‘Why did you bring a person with such claims? See this, they’re just common showgirls. He deserves whatever he got.’

‘What if he were your son?’ my mom asked.

‘I would want him to die,’ the police said.¹²³

Samir left the police station without filing a complaint.

¹²¹ “The Value of a Life,” GALCK news release. According to GALCK, a talk show on a Mombasa radio station hosted callers on June 23 and 24 who said they were on a mission to “clean up” Mombasa by getting rid of male sex workers.

¹²² In the other known murder of an LGBT person on the coast, on March 23, 2012, a gay man named Jimmy, who worked as a peer educator for Tamba Pwani, was beaten to death in Malindi. Jimmy’s family members told Tamba Pwani that Jimmy received a phone call late at night, went outside to meet someone, and never came back. A neighbor found his body in an open lot near his home. A Tamba Pwani official filed a police statement and told police he suspected Jimmy was killed in a homophobic attack, but said that police never conducted investigations. Human Rights Watch telephone interview with a Tamba Pwani official (name withheld), May 11, 2015.

¹²³ Human Rights Watch interview with Samir, January 13, 2014, Mombasa, and telephone interview, May 14, 2015.

The case of Bettina, the transgender woman whose food kiosk in Mombasa was ransacked by a mob in October 2014, has already been described above: when she went to report the crime, police refused even to provide her with a case number, instead pressing her on whether she was male or female. Bettina also had a bad experience with police after she was beaten by four men in January 2010 when she was engaged in sex work. She told Human Rights Watch:

A gang of four men came where I was standing and asked what I was doing. I was dressed up for work, I did not know what to say to them. So they started insulting me, beating me up. I was slapped, kicked, and insulted. They left me lying there beaten up, bruised and bleeding. ... I was found by some sex worker friends who took me to hospital where I was admitted for a week.

I reported to the police but nothing came out of it. I think that is usual in Kenya, you can report to the police but they don't take you seriously as a sex worker unless you give them money.¹²⁴

While physical violence is the most serious threat facing LGBT people on the coast, other human rights violations, including evictions by homophobic landlords, contribute to insecurity.

Douglas, an activist in Kilifi, told Human Rights Watch that police failed to respond to his complaints over being unlawfully evicted on the basis of his sexual orientation:

I have been evicted from about 10 houses. I've tried to bring it to the police's attention but what they said was that, 'We can't just go tell the landlords to keep you in the house; what you're doing is illegal.'¹²⁵

Fear of Arrest as an Obstacle to Justice

The laws that prohibit same-sex conduct in Kenya, in the few cases in which they have been enforced, have been enforced abusively: suspects are arrested solely on the suspicion that they might be gay, not because there is any concrete evidence that they have violated the law. Fear of arrest for same-sex conduct acts as an impediment to

¹²⁴ Human Rights Watch interview with Bettina, Mombasa, January 14, 2014.

¹²⁵ Human Rights Watch interview with Douglas Masinde, Kilifi, March 24, 2015.

anyone who might wish to report an anti-LGBT hate crime, because in doing so, they would have to reveal their sexual orientation or gender identity to the police.

After residents began attacking and harassing suspected LGBT people in Kwale County in February 2015, Patrick, a gay man, was warned by a police officer not to seek out police assistance, because police might be on the lookout for gay men to arrest following reports of pornographic photos circulating. Patrick was with his friend Tony when Tony was hit with a bottle on the street, as described above:

Someone threw a bottle at [Tony] and we had to take him to the hospital. We called one of our ‘gay friendly’ police, [but he said,] ‘Already this thing [pornography scandal] exists—if you go and report they might arrest you guys.’ We just cancelled on the way to the police.¹²⁶

These incidents, combined with the general perception among LGBT people that police are potential predators, not protectors, leads to fear of reporting crimes to the police, particularly among male sex workers.

Ahmed, a male sex worker, said that in 2012 a group of eight or nine street boys in Mombasa dragged him to the beach, where they beat and raped him. He told Human Rights Watch, “I couldn’t report what happened to the police, because they would ask what I was doing out at night.”¹²⁷

Similarly, David was raped in 2009 by a client who refused to pay him. He explained:

I felt I could not go to the police because they will say, ‘Because you are a *shoga* [gay man], this is what you get.’ One of my fellow male sex workers was told this when he reported being raped. So I would not report.¹²⁸

¹²⁶ Human Rights Watch interview with Patrick, Mombasa, March 26, 2015.

¹²⁷ Human Rights Watch interview with Ahmed, Diani, January 18, 2014.

¹²⁸ Human Rights Watch interview with David, Mombasa, January 13, 2014.

Charles, the activist in Ukunda, described an attack in in 2011 in which Mombasa residents stripped a male sex worker naked in the street. Charles said, “He didn’t go to the police. That’s the broken bridge—people say, I’d much rather suffer in silence than go to the police.”¹²⁹

Police Failure to Investigate Crimes against LGBT Individuals

Crime victims in Kenya frequently express frustration with police failure to investigate complaints. In some cases, such as those documented above, police are clearly discriminating on the grounds of sexual orientation or gender identity, while in other cases they may simply be lax and unmotivated. Until Kenya’s police take measures to improve the thoroughness of their investigations with regard to marginalized communities—as required by the African Commission on Human and People’s Rights resolution on violence—LGBT people will remain vulnerable to perpetrators who believe they can carry out homophobic attacks with impunity.

Ishmael, an activist, received anonymous death threats shortly after he went to Kwale to look into the attacks and police arrests reported above. He found a note under his door in Kiembeni (Mombasa) stating, “We do not want you homosexuals in this village. We will give you five days to vacate or we will come for your head.” Ishmael took the note to Kiembeni police station and filed a statement. He said, “I was assigned an officer to follow up the case, but he just told me to come back and report if I know of a suspect. He didn’t do much.”¹³⁰

Malik, who is HIV positive and works as a peer educator, told Human Rights Watch that after midnight on Christmas Eve, 2012, he was going to a party in Mombasa, dressed as a woman. About eight people in the street saw him and chased him, calling him “shoga,” a derogatory Kiswahili word for homosexual. They cut him, beat him up, stole his wallet and phone, and left him in the street, bleeding. Malik reported the incident to the police the following morning, but did not reveal his sexual orientation. Police took a written report, but to Malik’s knowledge, did not follow up.¹³¹

¹²⁹ Human Rights Watch interview with Charles, Mombasa, March 15, 2012.

¹³⁰ Human Rights Watch telephone interview with Ishmael, May 26, 2015.

¹³¹ Human Rights Watch interview with Malik, Mombasa, January 14, 2014, and telephone interview, June 26, 2015.

III. The Impact of Anti-LGBT Violence and Discrimination on the Right to Health

Health specialists concur that discrimination, violence, and criminal laws against LGBT people constitute a barrier to the effective prevention and treatment of HIV and AIDS. As UNAIDS has concluded:

The criminalization of people who are at higher risk of infection, such as men who have sex with men, sex workers, transgender people and people who use drugs, drives them underground and away from HIV services. This increases their vulnerability to HIV, as well as to stigma, discrimination, marginalization and violence.¹³²

In 2014, UNAIDS noted widespread “extortion, humiliation, discrimination, and violence against gay men and other men who have sex with men, including rape based on sexual orientation and gender identity” around the world. According to UNAIDS:

In many countries, such acts are committed or condoned by officials of national authorities, including law enforcement officials. This leads to a climate of fear that further fuels human rights violations and that also deters gay men and other men who have sex with men from seeking and adhering to HIV prevention, treatment, care and support services.¹³³

¹³² UNAIDS, “Guidance Note 2012: Key Programmes to Reduce Stigma and Discrimination and Increase Access to Justice in National HIV Responses,” p.5, http://www.unaids.org/en/media/unaids/contentassets/documents/document/2012/Key_Human_Rights_Programmes_en_May2012.pdf (accessed May 31, 2013). See also The World Bank, “Increased Targeting of Key Populations Can Accelerate End of Global HIV Epidemic,” November 28, 2012, <http://www.worldbank.org/en/news/press-release/2012/11/28/increased-targeting-key-populations-can-accelerate-end-global-hiv-epidemic>(accessed May 31, 2013).

¹³³ UNAIDS, “The Gap Report 2014: Gay men and other men who have sex with men,” http://www.unaids.org/sites/default/files/media_asset/o7_Gaymenandothermenwhohavesexwithmen.pdf (accessed June 22, 2015). UNAIDS also has reported that “stigma, discrimination, and gender-based sexual violence and a lack of legal recognition of their affirmed gender, and social and economic exclusion, including from education and employment opportunities, represent the fundamental drivers of HIV vulnerability and risk among transgender women worldwide.” UNAIDS, “The Gap Report 2014: Transgender people,” http://www.unaids.org/sites/default/files/media_asset/o8_Transgenderpeople.pdf (accessed June 22, 2015).

The Kenya AIDS Strategic Framework (KASF), published by the National AIDS Control Council (NACC), acknowledges MSM and sex workers as key populations for purposes of HIV programming. While HIV prevalence in Kenya among the general population between the ages of 15 and 49 is estimated at 5.6 percent, it is 18.2 percent among men who have sex with men.¹³⁴ The strategic framework finds that violence against key populations has constituted an impediment to the reduction of new infections.¹³⁵ It calls for county governments and national AIDS control agencies to address violence against key populations, and further recommends the adoption at the national and county level of “legal frameworks to de-criminalise Key Population(s) activities and, thereby, increase their demand for and access to HIV services.”¹³⁶

On Kenya’s coast, violence and discrimination against LGBT people have had a clear impact on HIV programming. In three of the mob attacks described above, violence or threats of violence from residents and local religious leaders caused health providers serving MSM to temporarily or permanently close their doors or shut down workshops. Even when the targets of attacks are individuals and not institutions, HIV prevention programming and adherence to treatment for HIV-positive people are adversely affected. When the two allegedly gay men were arrested and others attacked in Kwale in February 2015, dozens fled the region or stayed in their houses without venturing out for weeks, leading to a notable drop-off in participation in HIV prevention activities at a Mombasa-based health center that served them.¹³⁷

Parinita Bhattacharjee, a HIV specialist, was in Mombasa for a National AIDS and STIs Control Program (NAS COP) meeting with key populations shortly after the February 2014 passage of Uganda’s Anti-Homosexuality Act, when a similar bill was proposed by legislators in Kenya. She explained:

Activists there were afraid of moving around, of how to reach home. Peer educators were afraid to go out and show that they’re peer educators.

¹³⁴ Kenya AIDS Strategic Framework 2014/2015-2018/2019, http://www.nacc.or.ke/images/KASF_F_web.compressed.pdf, p. 8. Factors that lead to a higher prevalence of HIV among MSM than among heterosexual men are both biological (anal sex carries a greater risk of transmission than vaginal sex) and social (legal and social discrimination against MSM make it difficult for them to access prevention and treatment services).

¹³⁵ Kenya AIDS Strategic Framework 2014/2015-2018/2019, p. 15.

¹³⁶ Ibid.

¹³⁷ Human Rights Watch telephone interview with Nzioki King’ola, ICRH-Kenya, May 19, 2015.

Health is never a priority when there's fear. ... If you're worried about your life, HIV/AIDS comes as a much later priority.¹³⁸

Laws prohibiting same-sex conduct may also serve as a deterrent to health providers who might otherwise become engaged in HIV prevention efforts among key populations. Dr. Eduard Sanders of KEMRI told Human Rights Watch:

Training matters. Someone who's not trained might think: 'Are we doing something illegal by helping someone who has same-sex relations?' ... Capacity building is prevented by criminal laws; if we are seen as condoning something that is illegal, it can prevent some from wanting to take part.¹³⁹

Continuing Stigma in Some Healthcare Facilities

Kenya's Ministry of Health is generally considered an ally in the struggle for LGBT equality. It has collaborated with civil society organizations to train healthcare providers on understanding and being sensitive to LGBT health issues. The National AIDS & STI Control Programme (NAS COP) under the Ministry of Health, in particular, takes violence and discrimination against LGBT people seriously and integrates rights initiatives into its programming.¹⁴⁰

On the coast, Coast General Hospital operates a Gender Based Violence Recovery Centre (GBVC), which is reputed to be LGBT-friendly, although the same center carried out forced anal examinations on the men from Kwale, described above. Samir, a gay man in Mombasa, described his experience at Coast General after he was raped by seven men:

I went to the Gender Based Violence Center at Coast General Hospital. They treated me very well and tested me. I was lucky that the GBVC was already

¹³⁸ Human Rights Watch interview with Parinita Bhattacharjee, Senior Technical Adviser, University of Manitoba, Nairobi, April 30, 2015.

¹³⁹ Human Rights Watch interview with Eduard Sanders, KEMRI, Kilifi, March 31, 2015.

¹⁴⁰ NGLHRC presented the Ministry of Health, through NACC and NAS COP, with a "pillar of support" award in 2013 for its "contribution to the health, rights and wellbeing of LGBTIQ individuals in Kenya." "Upinde Awards Gala night," Facebook post by Eric Mawira Gitati, December 23, 2013, <https://www.facebook.com/events/532063193557421/permalink/538319056265168/> (accessed August 11, 2015).

established. What if it wasn't established yet? Where would I have gone?
Some hospitals are very, very harsh.

As Samir suggests, apart from a few institutions, stigma against LGBT people persists in public hospitals and clinics. Human Rights Watch documented four cases in which gay men experienced stigma in the health sector. For instance, Tony said he had faced discrimination at the government hospital in Kwale while seeking assistance for an STI.¹⁴¹ Tyler, a gay man from Mombasa, told Human Rights Watch, "I would only tell the public hospital about STIs in front, I couldn't tell them about any STIs in the back [in the anus]."¹⁴² Abdullah, a 27-year-old gay man who lives in Lunga Lunga (Kwale County), said that in his experience at public hospitals, "The medical staff will say, 'Look, there's a *shoga*.' They look. There's drama. You don't feel comfortable."¹⁴³

Some MSM choose to seek health services through KEMRI or ICRH, where they know they will receive friendly services. KEMRI has also worked with MSM to identify other "friendly" providers, where most MSM in Mombasa and Kilifi counties now go for medical care.¹⁴⁴ As of this writing, no organizations on the coast were providing services specifically tailored to transgender health, and none were providing MSM-friendly services in Kwale County.

¹⁴¹ Human Rights Watch interview with Tony, Diani, January 18, 2014.

¹⁴² Human Rights Watch interview with Tyler, Mombasa, March 27, 2015.

¹⁴³ Human Rights Watch interview with Abdullah, Diani, January 18, 2014.

¹⁴⁴ Human Rights Watch interview with Eduard Sanders, physician and epidemiologist, KEMRI, March 31, 2015.

IV. Civil Society Initiatives

There's a lot of violence and stigmatizing stories about LGBTI, but our work shows that we give hope to gay people and that something can be done about the violence. The attack on the clinic was a blessing in disguise that showed us that you can turn bad things into being good.¹⁴⁵

—Evans Gichuru, Community Liaison Officer, KEMRI, January 20, 2014

The religious leaders have agreed to be more tolerant and listen, counsel the LGBTI rather than exposing and threatening violence.¹⁴⁶

—Michael Kioko, advocate, January 13, 2014

Activists say the attack on KEMRI and its peer educators in Mtwapa in 2010 was a defining moment that spurred them into action. PEMA Kenya and Tamba Pwani have both developed training programs aimed at sensitizing religious leaders, police, and health workers on issues related to sexual orientation and gender identity, and PEMA Kenya has also trained members of the judiciary and media professionals.¹⁴⁷ Organizations are also exploring the possibility of providing training for motorcycle taxi drivers, an influential constituency within urban street culture.¹⁴⁸

Most of the training programs have been implemented in Mombasa and Kilifi counties. The recent anti-gay violence and arbitrary arrests in Kwale signal the need to expand such programming to that county.¹⁴⁹

Outreach to Religious Leaders

Following the Mtwapa attacks in 2010, PEMA Kenya and KEMRI initiated a training program for religious leaders. Over 12 sessions, PEMA Kenya facilitators, presenting themselves as human rights activists without initially emphasizing their focus on sexual orientation and gender identity, led discussions around public health, HIV prevention and condom use,

¹⁴⁵ Human Rights Watch interview with Evans Gichuru, Community Liaison Officer, KEMRI, Mtwapa, January 20, 2014.

¹⁴⁶ Human Rights Watch interview with Michael Kioko, lawyer, Mombasa, January 13, 2014.

¹⁴⁷ Human Rights Watch telephone interview with Douglas Masinde, July 10, 2015.

¹⁴⁸ Human Rights Watch interview with Michael Kioko, Mombasa, January 13, 2014.

¹⁴⁹ Human Rights Watch telephone interview with Charles, Ukunda-based activist, May 7, 2015.

and the need for compassion for marginalized groups. Toward the end of the training, they turned explicitly to sexual orientation and gender identity, bringing in openly LGBT people to talk about their own experiences. Eleven religious leaders participated, representing Seventh-day Adventists, Catholics, Pentecostals, Anglicans, and Muslims.

Human Rights Watch interviewed several religious leaders who attended the trainings. Bishop Lawrence Chai, an Anglican bishop, told Human Rights Watch in 2014 that when the Mtwapa incident happened in 2010, he was among those inciting residents to “protest” against gays; back then, he said, “We would have been happy if they had been killed.” However, he explained, “When PEMA came to us, we began to understand. I changed from the training we got from PEMA. I learned that Jesus didn’t come to harm people. We have to welcome them and talk to them politely.”¹⁵⁰

Chai continued to assert that homosexuality is a sin and that counseling should be used to get gay people to “change,” but such remarks are a far cry from calling for their extermination.¹⁵¹

Similarly, an imam who participated in the program told Human Rights Watch that while he continued to hold negative views about LGBT people, “What I learned from PEMA and KEMRI is to bring people closer to you. Education and understanding are important.”¹⁵²

A pastor had this to say about the program:

The trainers were clever. They were indirect. They started with talking about other marginalized people and then talked about the science behind same-sex practices, explaining that it is not a choice. We were touched by this and became more sympathetic. When you realize it was not a choice, you think more about these people.

After twelve sessions we felt we had not heard enough. I wanted to know more about abusing or stigmatizing people out of lack of knowledge.

¹⁵⁰ Human Rights Watch interview with Lawrence Chai, Mombasa, January 15, 2014.

¹⁵¹ Ibid.

¹⁵² Human Rights Watch interview with an imam (name withheld), Mombasa, January 15, 2014.

People need to be taught. We can end this stigma. There is ignorance about what people do and it's very important to sensitize the community.

But it has been difficult, he acknowledged. The pastor was kicked out of his church for participating in the trainings. He was later reinstated. "We have some challenges. People don't want to learn, but we decided to soldier on," he said. "As it says in the Bible, 'If you talk the truth, the truth shall set you free.'"¹⁵³

A Catholic nun who participated in the training said:

I had a negative attitude toward lesbians and gays at school in Mtwapa. KEMRI gave us more information about homosexuality. Later, I came to realize that it is not their wish to be gay. We should not judge them, but treat them equally.¹⁵⁴

Not all participants changed their attitudes. One imam said "At KEMRI, the gays went to get help, but God doesn't like what they do. God will punish them."¹⁵⁵

As a result of these civil society initiatives, Michael Kioko, the lawyer who was then working with PEMA, told Human Rights Watch:

In the end most of them agreed that it was inhumane for the LGBTI communities to be subjected to violence, harassment, and sometimes killings, especially at the hands of religious leaders.¹⁵⁶

In 2013, Tamba Pwani held dialogues with religious leaders in Kilifi County. According to one activist, "Dialogue with religious leaders in 2013 has also helped. The police have also warned them not to take the law into their own hands."¹⁵⁷

¹⁵³ Human Rights Watch interview with a pastor (name withheld), Mombasa, January 17, 2014

¹⁵⁴ Human Rights Watch interview with a Catholic nun (name withheld), Mombasa, January 17, 2014.

¹⁵⁵ Human Rights Watch interview with an imam (name withheld), Mombasa, January 17, 2014.

¹⁵⁶ Human Rights Watch interview with Michael Kioko, Mombasa, January 13, 2014.

¹⁵⁷ Human Rights Watch interview with Douglas Masinde, Kilifi, January 2014.

Training of Law Enforcement Officials

In 2013 PEMA Kenya and KEMRI extended the trainings to the police and 17 police officials participated. The facilitators led discussions around the Mtwapa attacks, as well as incidents in which police had not responded adequately to attacks on gay men. According to Michael Kioko, police remained unconvinced:

All argued that they had not violated any human rights, that they were right in acting or omitting to act because homosexuality was against culture, un-African, and [against] religious norms. No one seemed to want to use human rights as universally applied protection mechanisms guaranteed for all people.¹⁵⁸

He nonetheless credited the police trainings with reducing discrimination and violence:

I think generally the violence and homophobia is slowly decreasing. Police seem to be more aware and knowledgeable about their responsibilities to protect everyone without discrimination.

Government health agencies have collaborated with civil society on trainings focused on HIV/AIDS among key populations, including men who have sex with men and sex workers. The National AIDS & STI Control Programme (NASCO), together with ICRH-Kenya and the University of Manitoba, has established an HIV/AIDS “Learning Site” in Mombasa, aimed at identifying best practices to address HIV/AIDS among key populations and serving as a model program that stakeholders from around the country can learn from.

One Learning Site activity was a December 2014 training by ICRH and the National Aids Control Council (NACC) for Mombasa County law enforcement officials on key populations (those most likely to be exposed to HIV or to transmit it, including MSM). Nzioki King’ola of ICRH told Human Rights Watch:

It’s the first time anyone is sensitizing the *kanjoo* on key populations. When we had our first meeting, we had good engagement with senior managers

¹⁵⁸ Human Rights Watch interview with Michael Kioko, Mombasa, January 13, 2014.

[of the county law enforcement officials]. They said before they didn't really understand why these people are on the streets. We brought members of key populations to talk to them about their experiences—how they've suffered at the hands of the *kanjoo*—and when they heard this, they felt sorry. We will do ongoing sensitization. They are willing to engage.¹⁵⁹

Training of Health Care Providers

Civil society organizations on the coast are also engaged in sensitizing health workers on LGBT issues. PEMA Kenya, in collaboration with Liverpool VCT Care and Treatment, a HIV prevention organization, led one such training for 37 health workers in 2014. According to a health officer at PEMA Kenya,

When we started the training, we discovered they had not met any MSMs, [and lacked knowledge of] the issues of health related to MSMs—i.e. anal STI screenings. With the post-training, they were grateful; in fact, one said to me, 'It's amazing that we've never known anything about anal screening and yet we are healthcare providers.'

They've become so friendly and we've noticed their attitudes have changed so much that they encouraged more MSMs to come see them.¹⁶⁰

In Kilifi, Tamba Pwani has also done informal sensitization of health workers. Wanyama, a volunteer at Tamba Pwani, explained:

I accompany some of my clients to hospital. Sometimes the nurses are not friendly, not providing adequate health [care] due to stigma and discrimination. Tamba Pwani visited the hospitals and clinics and talked to the medical staff, nurses especially. Things are better, they are a little more friendly. It would be best if proper training was provided to all health caregivers.¹⁶¹

¹⁵⁹ Human Rights Watch telephone interview with Nzioki King'ola, Deputy Country Director, ICRH-Kenya, May 19, 2015.

¹⁶⁰ Human Rights Watch interview with a health worker (name withheld), Mombasa, March 27, 2015.

¹⁶¹ Human Rights Watch interview with Wanyama, Mombasa, January 14, 2014.

Activists and health advocates engaged in such trainings, however, cautioned that the government should not leave the responsibility of sensitizing health professionals to civil society alone. A health worker who conducts outreach to MSM through an NGO said, “The government itself needs to sensitize more of their health workers countrywide to the needs of MSM as it is outlined in the National Plan.”¹⁶² Similarly, Evans Gichuru of KEMRI said, “If such trainings can be owned or advocated by the government, or made mandatory, that would be helpful.”¹⁶³

¹⁶² Human Rights Watch interview with health worker (name withheld), Mombasa, March 27, 2015.

¹⁶³ Human Rights Watch interview with Evans Gichuru, Mombasa, March 26, 2015.

V. Kenyan and International Law

The government of Kenya is obliged, under domestic and international law, to ensure fair and equal treatment to LGBT people. Above all, it is the ultimate guarantor of their right to security and their right to life—rights which, for the many LGBT people Human Rights Watch interviewed for this report, remain elusive.

Kenyan Law as a Source of Violations

Kenyan law currently fails to provide needed protection for LGBT people. It also makes them a target of arrests, in violation of international law.

Laws Prohibiting Consensual Same-Sex Conduct

Kenya is one of 78 countries worldwide that have laws on the books prohibiting sexual relations between consenting adults of the same sex, in violation of internationally recognized rights to privacy, equality, and non-discrimination.

Section 162, on “unnatural offenses,” punishes “carnal knowledge against the order of nature” with 14 years in prison.¹⁶⁴ “Carnal knowledge against the order of nature,” a term acknowledged to be vague in a recent High Court ruling, is generally understood to mean anal sex, either between men or between a male and a female, although heterosexual couples in Kenya are neither prosecuted nor persecuted for anal sex.

Section 163 prescribes a seven-year sentence for “attempted” carnal knowledge against the order of nature, while section 165 prohibits acts of “gross indecency” between males.

Laws Prohibiting Sex Work

Kenyan law enforcement officials rely on sections 153 and 154 of the Penal Code, which prohibit respectively “living on the earnings of prostitution” and “soliciting or importuning for immoral purposes,” to justify arrests of male, transgender, and female sex workers.¹⁶⁵ Both offenses are defined as felonies, which carry a penalty of imprisonment of “three years or

¹⁶⁴ The same section prohibits having sex with an animal.

¹⁶⁵ Laws of Kenya, The Penal Code, sections 153-154.

more.”¹⁶⁶ Section 182 of the Penal Code on “idle and disorderly persons” empowers police to arrest “every common prostitute behaving in a disorderly or indecent manner in any public place” and “every person who in any public place solicits for immoral purposes.”¹⁶⁷ Like the laws against homosexual conduct, these are colonial era laws. However, the more recent Sexual Offences Act of 2006 reinforces prohibitions on sex work by consenting adults.¹⁶⁸

Local governments in Kenya address sex work through county laws as well as national laws. Under the new system of devolved government, in which Kenya’s 47 counties have greater autonomy from central government than in the past, county laws are replacing municipal bylaws, which municipalities were entitled but not required to put in place under the Local Government Act.¹⁶⁹ Some counties have simply adopted the former municipal bylaws as county laws, although a number of counties are in the process of reforming these laws. In Mombasa, the 2010 bylaws prescribe punishments for any person who, in any street, “loiters or importunes for the purpose of prostitution,” or “procures or attempts to procure a male or female for the purpose of prostitution.”¹⁷⁰

A Note on Commercial Sexual Exploitation of Children

The use, offer, procurement, or provision of a child for sex work is a form of commercial sexual exploitation and violates international human rights law. Kenyan and international law both prohibit the use of children (under 18 years old) in sex work. In Kenya, the Sexual Offences Act 2006 provides for prison terms of “not less than six years” for possession or distribution of “any obscene book, pamphlet, paper, drawing, painting, art, representation or figure or any other obscene object whatsoever which depict the image of any child.”¹⁷¹ Article 27 of the African Charter on the Rights and

¹⁶⁶ Laws of Kenya, The Penal Code, section 4, Interpretation.

¹⁶⁷ Laws of Kenya, Penal Code, Chapter 63, section 182, “Idle and disorderly persons”; see particularly 182(a) and 182(f). Those arrested under this section are charged with a misdemeanor and “are liable for the first offence to imprisonment for one month or to a fine not exceeding one hundred shillings, or to both and for every subsequent offence to imprisonment for one year.”

¹⁶⁸ The Sexual Offences Act of 2006 takes important steps to control commercial sexual exploitation of children and trafficking in persons; see Laws of Kenya, The Sexual Offences Act, No 3 of 2006, sections 15, 18. However, in section 17, it also penalizes anyone who “incites another person to become a prostitute,” regardless of whether the person chooses to engage in sex work of their own free will. Human Rights Watch and PEMA Kenya are not aware of any cases in which sex workers have been prosecuted under the Sexual Offences Act; in most cases we have documented they are prosecuted under the Penal Code or municipal bylaws.

¹⁶⁹ Laws of Kenya, Cap. 265, The Local Government Act, revised 2010, sections 201-211.

¹⁷⁰ Municipal Council of Mombasa (General Nuisance) Bylaws 2010, Section 19(m) and (n), “Nuisance.”

¹⁷¹ Laws of Kenya, The Sexual Offences Act No. 3 of 2006, art. 16.

Welfare of the Child and article 34 of the Convention on the Rights of the Child prohibits the exploitative use of children in pornographic performances and materials.¹⁷²

Children who engage in sex work, or are otherwise commercially sexually exploited—whether male or female—should not be prosecuted or penalized for having been party to illegal sex work, but should receive appropriate assistance. Human Rights Watch believes that the use of a child in sexual activities for remuneration or any other form of consideration should be a criminal offence and anyone who uses, offers, obtains, procures, or provides a child for such use should be prosecuted.

Kenya's Human Rights Obligations

The Kenyan constitution, the African Charter on Human and Peoples' Rights, and the many UN treaties to which Kenya is a state party all provide for the protection of basic human rights, regardless of sexual orientation or gender identity.

Responsibility to Protect under International Law

A landmark resolution passed by the African Commission on Human and People's Rights in November 2013, on "Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity," condemns violence and systematic attacks on the grounds of sexual orientation and gender identity.¹⁷³ It calls on member states to:

End all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of

¹⁷² African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, art. 27; CRC, art. 34(c). Kenya also signed the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography (adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000; entered into force on 18 January 2002), which obliges states to take actions to protect children from these forms of exploitation, but has not acceded to it.

¹⁷³ The Commission can monitor whether member states comply with resolutions, but has no enforcement powers.

perpetrators, and establishing judicial procedures responsive to the needs of victims.¹⁷⁴

The International Covenant on Civil and Political Rights (ICCPR) also obligates Kenya, a state party, to protect all persons within its territory or jurisdiction, including members of marginalized groups, from violence, in upholding their rights to life and to security and freedom from cruel, inhuman, or degrading treatment. The treaty gives states the responsibility to investigate and prosecute violence, whether by state or non-state actors.¹⁷⁵

In order to uphold the African Commission resolution as well as its obligations under the ICCPR, Kenya should take steps to more effectively prevent and more consistently punish such attacks. It should also hold accountable police officers who refuse to take statements from crime victims on the grounds of their gender identity or sexual orientation.

Equality and Non-Discrimination under International Law

The African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights both require Kenya to ensure the right to equality and non-discrimination before the law. The African Commission on Human and People's Rights has specifically ruled that discrimination on the basis of sexual orientation is in violation of non-discrimination provisions in the Charter.¹⁷⁶

Privacy under International Law

The criminalization of same-sex conduct between consenting adults violates the right to privacy, guaranteed under the ICCPR.¹⁷⁷ To arrest someone on the basis of consensual same-sex conduct is also a violation of the prohibition on arbitrary detention.¹⁷⁸

¹⁷⁴ ACHPR, Resolution 275, "Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity," <http://www.achpr.org/sessions/55th/resolutions/275/> (accessed May 21, 2015).

¹⁷⁵ International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, acceded to by Kenya on March 23, 1976, art. 2, 7, 17.

¹⁷⁶ The African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 L.M. 58 (1982), entered into force October 21, 1986, acceded to by Kenya on January 23, 1992, art. 2. See the African Commission on Human and People's Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, sec. 169, AHRLR 128 (ACHPR 2006).

¹⁷⁷ ICCPR, art. 17. See also *Toonen v. Australia*, 50th Sess., Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, April, 14, 1994, sec. 8.7.

¹⁷⁸ See *François Ayissi et al. v. Cameroon*, Working Group on Arbitrary Detention, Opinion No. 22/2006, U.N. Doc. A/HRC/4/40/Add.1 at 91 (2006), on file with Human Rights Watch.

Human Rights Watch believes that the criminalization of the voluntary, commercial exchange of sexual services between consenting adults, as in the case of sex work by consenting adults, also violates the right to privacy, including personal autonomy.¹⁷⁹

Prohibition on Forced Anal Examinations

The practice of forced anal examinations as a “test” of homosexual conduct violates human rights law, and Kenya should categorically ban such examinations. The UN Committee against Torture has found that anal examinations may constitute degrading treatment, prohibited by the Convention against Torture and the International Covenant on Civil and Political Rights.¹⁸⁰ Kenyan law does not specifically prohibit forced anal examinations, but the constitution prohibits cruel, inhuman, and degrading treatment.¹⁸¹ The law provides for the collection of medical samples for forensic testing from suspects charged with offenses under the Sexual Offences Act, but that act does not prohibit consensual same-sex conduct.¹⁸² The National Gay and Lesbian Human Rights Commission is preparing a constitutional challenge to the use of anal exams in the Kwale case.¹⁸³

In 2011, the Office of the High Commissioner of Human Rights stated as follows:

One issue highlighted by United Nations experts is the “medically worthless” practice of subjecting men suspected of homosexual conduct to non-consensual anal examinations to “prove” their homosexuality. Such examinations have been condemned by the Committee against Torture, the Special Rapporteur on torture and the Working Group on Arbitrary Detention, which has held that the practice contravenes the prohibition of torture and ill-treatment.¹⁸⁴

¹⁷⁹ ICCPR, art. 17.

¹⁸⁰ See *supra* note 67.

¹⁸¹ Constitution of Kenya, art. 25.

¹⁸² “[W]here a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.” Laws of Kenya, Sexual Offences Act, no. 3, 2006, art. 36.

¹⁸³ Human Rights Watch telephone interview with Eric Gitari, July 13, 2015.

¹⁸⁴ United Nations High Commissioner for Human Rights, “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity,” November 17, 2011, A/HRC/19/41, http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf, para. 37.

The Right to the Highest Attainable Standard of Health

The right to the highest attainable standard of health is guaranteed under the African Charter on Human and People’s Rights, the International Covenant on Economic, Social and Cultural Rights, and the UN Convention on the Elimination of all Forms of Discrimination against Women.¹⁸⁵ Governments may not discriminate on the basis of sexual orientation or gender identity in upholding the right to health.¹⁸⁶

This right imposes an obligation on states to take necessary steps for the prevention, treatment and control of HIV and other diseases. The UN Economic, Social, and Cultural Rights Committee finds that the right to health is linked to other rights, including the rights to “privacy, access to information, and the freedoms of association, assembly, and movement”—rights that are jeopardized when violence or the threat of violence, as documented in this report, impedes health care workers, LGBT activists, and others from coming together to share information about HIV and sexual health.¹⁸⁷ The right to health specifically includes “access to health-related education and information, including on sexual and reproductive health.”¹⁸⁸

The Right to Housing

Kenya is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which requires states to progressively ensure “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”¹⁸⁹ The UN special rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, has called on states to protect against human

¹⁸⁵ African [Banjul] Charter on Human and Peoples’ Rights, op. cit., art. 16; International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force January 3, 1976, acceded to by Kenya on May 1, 1972, art. 12; Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), adopted December 18, 1979, G.A. Res. 34/180, U.N. Doc. A/34/46, entered into force September 3, 1981 and acceded to by Kenya on March 9, 1984, art. 12.

¹⁸⁶ See UN Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), July 2, 2009, para. 32. While art. 12 guarantees the right to health, art. 2(2) protects individuals from discrimination in the application of all rights guaranteed by the covenant. General Comment 20 clarifies that discrimination is prohibited on the basis of sexual orientation and gender identity.

¹⁸⁷ UN Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000): The right to the highest attainable standard of health, para. 3.

¹⁸⁸ *Ibid*, para. 11.

¹⁸⁹ International Covenant on Economic, Social and Cultural Rights, art. 11.

rights abuses by third parties, including evictions, that contribute to violations of the right to housing of LGBT people and other marginalized groups.¹⁹⁰

Constitutional Rights in Kenya

Many of the rights protected by international law are also guaranteed under Kenya's long fought-for constitution, adopted in August 2010, which contains a substantial bill of rights. The constitution protects the right to equality and non-discrimination (art. 27) and the right to dignity (art. 28). It preserves the right to freedom and security of the person (art. 29), which includes the right to be free from arbitrary arrest and the right not to be "subjected to any form of violence from either public or private sources." It guarantees the right to privacy (art. 31), freedom of expression (art. 33), freedom of association (art. 36), and housing (art. 43(1)(b)), and extends specific protections to "minorities and marginalised groups" (art. 56).¹⁹¹ Kenya's constitution also prohibits torture and cruel, inhuman, or degrading treatment (art. 29(f)).¹⁹²

In addition, art. 2(5) and 2(6) of the constitution incorporate international law and all international treaties ratified by Kenya as part of the country's laws.¹⁹³ This includes both UN and African human rights treaties.

The April 2015 High Court ruling on the petition filed by the National Gay and Lesbian Human Rights Commission (NGLHRC) leaves no doubt that the fundamental rights protected by the constitution apply to all Kenyans, regardless of their sexual orientation or gender identity.¹⁹⁴

Criminal Acts by Kenyan State Agents

This report focuses primarily on violence by private citizens and the government's responsibility to address such violence. But at times, Kenyan officials are direct perpetrators of human rights abuses. When Kenyan law enforcement officials use the

¹⁹⁰ UN Human Rights Council (UNHRC), A/HRC/25/54/Add.1, "Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context," Raquel Rolnik, December 26, 2013.

¹⁹¹ Constitution of Kenya, 2010.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 others*.

threat of arrest to demand or force sexual relations, they are violating the victims' rights to security and freedom from arbitrary arrest. They are also acting in violation of the Penal Code and the Sexual Offenses Act.¹⁹⁵ When they extort money from gay men or sex workers, they are violating the Anti-Corruption and Economic Crimes Act, as well as the Public Officer Ethics Act.¹⁹⁶ Officers who commit such abuses should be held criminally liable.

¹⁹⁵ Sexual Offenses Act, art. 3 and 17.

¹⁹⁶ The Laws of Kenya, Cap. 65, The Anti-Corruption and Economic Crimes Act, 2003 (revised 2012), sections 46 and 48, and Cap. 183, the Public Officer Ethics Act, 2003 (revised 2009), sections 11 and 21.

VII. Kenyan Government Response

The Kenyan government has adopted a nuanced position on LGBT rights. As noted in Section I, the colonial-era Penal Code prohibits same-sex conduct, but successive parliaments have declined to follow in the footsteps of neighboring countries that have enacted new, even harsher legislation. The law on “unnatural offenses” is rarely applied, though the February 2015 arrests in Kwale constitute a worrying exception. Senior government officials, with the exception of the deputy president, rarely make openly homophobic or transphobic statements. But they have also shown little leadership in guiding the Kenyan public toward greater understanding and respect for LGBT people. Police respond to some acts of violence, but turn a blind eye to others; at times, police and county law enforcement officials exploit LGBT people’s vulnerability to commit crimes against them, including rape. While statements such as President Uhuru Kenyatta’s claim that LGBT rights is a “non-issue” could be interpreted as a rejection of fellow politicians’ efforts to legislate homophobia, they may also be construed as indifference toward ongoing violence and discrimination on the grounds of gender identity or sexual orientation.

During the January 2015 Universal Periodic Review process at the UN Human Rights Council in Geneva, the Kenyan government rejected a series of recommendations to decriminalize same-sex conduct. However, it accepted two recommendations that could go a long way toward improving respect for the human rights of LGBT people. These included: to “review its Penal Code to align it with the constitution,”¹⁹⁷ and to “adopt a comprehensive anti-discrimination law affording protection to all individuals, irrespective of their sexual orientation or gender identity.”¹⁹⁸ Because Kenya’s constitution upholds the right to privacy and the right to non-discrimination, a proper review of the Penal Code would likely find that sections 162, 163, and 165, which prohibit consensual same-sex conduct between adults, are out of step with the constitution.¹⁹⁹

¹⁹⁷ UNHRC, “Draft report of the Working Group on the Universal Periodic Review,” January 26, 2015, [https://www.privacyinternational.org/sites/default/files/Report%20A_HRC_WG.6_21_L.7_Kenya%20\(1\)_o.pdf](https://www.privacyinternational.org/sites/default/files/Report%20A_HRC_WG.6_21_L.7_Kenya%20(1)_o.pdf), para 5.4.

¹⁹⁸ “Draft report of the Working Group on the Universal Periodic Review,” para 5.41.

¹⁹⁹ See *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 others*. The High Court cited the South African ruling that led to the decriminalization of same-sex conduct in that country: “In South Africa, the Constitutional Court has held in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 that: [136] ‘A state that recognises difference does not mean a state without morality or one without a point of view. It does not banish concepts of right and wrong, nor envisage a world without good and evil. It is impartial in its dealings with people and groups, but is not neutral in

The Kenya Human Rights Commission (an NGO) noted in *The Outlawed Among Us*:

We appreciate that the government is desirous not to go against public opinion concerning decriminalisation; we note that although the government is there to uphold and abide by public views, it is also there to lead. There is a need to engage in constructive dialogue in order to take people into a new direction. By not doing so, there is the real possibility that public opinion may never change.²⁰⁰

Even in the absence of decriminalization of homosexual conduct, a comprehensive and effective anti-discrimination law would constitute a step toward ensuring that LGBT victims of violence can report such violence without facing discrimination. Victims of arbitrary arrests, unlawful evictions, discrimination in the health care sector, and other abuses documented in this report, would also have recourse to justice.

The Kenya National Commission on Human Rights, a governmental body, took a bold step in recommending the decriminalization of same-sex conduct. Other government bodies with mandates related to equality and the implementation of the constitution, including the National Gender and Equality Commission and the Attorney General's Office, should adopt similar positions.²⁰¹

The Kenyan government has generally respected LGBT activists' right to freedom of expression, but there have been some efforts to stifle them. In 2014, "Stories of Our Lives," a film made by Kenyan director Jim Chuchu about the lives of LGBT Kenyans, was banned by the Film Censorship Board on the grounds that it "promotes homosexuality."²⁰²

its value system. The Constitution certainly does not debar the state from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the state, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself."

²⁰⁰ *The Outlawed Among Us*, p. 49.

²⁰¹ NGECC mandate and functions: <http://www.ngecckenya.org/about/15/Mandate>.

²⁰² "Stories of Our Lives: Not in Kenya," *The Nest Collective*, October 4, 2014, <http://www.thisisthenest.com/news/2015/1/13/stories-of-our-lives-not-in-kenya> (accessed May 20, 2015). The film's executive producer, George Gachara, was also arrested on charges of filming without a license. Charges against him were eventually dropped. "Kenyan filmmaker won't be prosecuted for gay film," *Mamba Online*, March 10, 2015, <http://www.mambaonline.com/2015/03/10/kenyan-filmmaker-wont-prosecuted-gay-film/> (accessed May 20, 2015).

The Ministry of Health, in particular through NACC and NASCOP, has carved out a position in which it is perceived as an ally to the LGBT community. In February 2014, when anti-gay legislators called on the government to arrest gays, civil society activists asked health minister James Macharia to make a statement in support of LGBT rights. Macharia did so, pointing out that criminalization of same-sex conduct inhibits access to health services, stressing the government's responsibility to provide health services to all, and calling for a more sober debate.²⁰³ KEMRI, itself a government body, stressed in an interview with Human Rights Watch that Kenya is making rapid strides on addressing HIV among MSM, and that the simple fact that the government does not interfere in its work with MSM is already a positive starting point.²⁰⁴ A Patients' Rights Charter, published by the Ministry of Health in 2013, states that all patients have the "right to be treated with respect and dignity," although it is not uniformly upheld.²⁰⁵

Through their participation in trainings offered by civil society organizations and health agencies such as NASCOP, and ongoing dialogue with organizations such as PEMA Kenya, the police have taken initial steps toward improving their respect for LGBT rights. However, in an interview with Human Rights Watch in September 2014, a high-ranking Mombasa police official denied allegations of police abuse of male sex workers. He said:

It is not true. We are now a civilized police service, no police can demand money or sex from innocent people. What are they doing out in the streets late at night? Why do men pretend to be women? We will arrest them because they are being used by thugs to commit crimes.²⁰⁶

The Kenyan government has taken some steps toward making the police more accountable, an objective which would serve all Kenyans, not just LGBT people. In 2013, the National Police Service Commission began vetting high-ranking active-duty police officers to evaluate their suitability to continue serving. Although individuals and civil society organizations can submit information about individual officers for consideration, lack of

²⁰³ James Macharia, "Gay debate jeopardizing the anti-AIDS crusade," *Africa Review*, February 28, 2014, <http://www.africareview.com/Opinion/Gay-debate-jeopardising-the-anti-Aids-crusade/-/979188/2225614/-/emv5lrz/-/index.html>, (accessed June 19, 2015).

²⁰⁴ Human Rights Watch interview with Eduard Sanders, KEMRI, Kilifi, March 31, 2015.

²⁰⁵ Ministry of Health, "The Kenya National Patient's Rights Charter," 2013, 1st edition, October 2013, http://medicalboard.co.ke/resources/PATIENTS_CHARTER_2013.pdf (accessed June 19, 2015).

²⁰⁶ Human Rights Watch interview with county police deputy commander, Mombasa, September 8, 2014.

public awareness has resulted in little participation.²⁰⁷ Some police have lost their jobs as a result of vetting, though there is little transparency around which officers are found “fit to serve,” and how such determinations are made.²⁰⁸

In 2011, the government established the Independent Police Oversight Administration (IPOA), a civilian oversight mechanism to complement the pre-existing Internal Affairs Unit of the National Police. Victims of police abuse can file complaints with IPOA, either through its website, or by phone or mail. IPOA then investigates complaints and can refer cases for prosecution.²⁰⁹ However, IPOA lacks sufficient funding, and much of the public remains unaware of IPOA’s existence and mandate.²¹⁰ A lawyer working with LGBT people on the coast said many LGBT people remain skeptical that filing complaints will result in accountability.²¹¹

Under the new system of devolved government, county governments will have a substantial role to play in upholding the constitution and ensuring the protection of all residents, regardless of their sexual orientation and gender identity. Governors and other county officials could show strong leadership on LGBT rights by demonstrating public support for the courageous civil society organizations on the coast that are engaged in daily struggles to protect LGBT people’s rights to health, security, privacy, and non-discrimination.

Bettina, a transgender woman in Mombasa who has faced violence from neighbors and discrimination by the police, said:

The government has to understand that there are LGBT people in Kenya and be open about it. This will also enable the community to be open and more tolerant. The communities take advantage of the existing laws and bylaws

²⁰⁷ International Center for Transitional Justice, “From Force to Service: Engaging Kenyans in Police Reform,” January 29, 2015, <https://www.ictj.org/news/kenya-police-reform> (accessed June 8, 2015). According to ICTJ, “As of January 2015, 198 senior police officers have been vetted. Out of the 198 vetted, 10 were found unsuitable to continue serving in the police force. Seven of those officers have successfully appealed and will be vetted again.” The police have announced that lower level officers will only be vetted in response to specific complaints against them.

²⁰⁸ Human Rights Watch interview with Steve Ogolla, Programme Officer, ICJ Kenya, Nairobi, April 1, 2015.

²⁰⁹ Independent Policing Oversight Authority, “Frequently Asked Questions,” <http://www.ipoa.go.ke/faqs> (accessed May 4, 2015).

²¹⁰ Human Rights Watch interview with Steve Ogolla, Nairobi, April 1, 2015.

²¹¹ Human Rights Watch interview with Michael Kioko, Mombasa, March 28, 2015.

and adopt the intolerant attitude from the government [as justification] to abuse us, to discriminate [against] us.²¹²

Government officials, both at the national and county levels, would do well to heed Bettina's advice, lest the list of incidents of violence toward LGBT people continues to grow longer.

²¹² Human Rights Watch interview with Bettina, Mombasa, January 14, 2014.

Recommendations

To the President and the Deputy President of the Republic of Kenya

- Publicly condemn any major incidents of homophobic and transphobic violence that occur in Kenya, including mob attacks on individuals or organizations.
- Refrain from making any public comments that denigrate lesbian, gay, bisexual, or transgender people.
- Publicly support legislation that prohibits discrimination, including on the basis of gender identity and sexual orientation, and creates effective mechanisms to identify and rectify incidents of discrimination, direct and indirect. In accordance with commitments made by the Kenyan government during the Universal Periodic Review (UPR) process at the UN Human Rights Council, encourage Parliament to pass such legislation.

To the County Governors and Governments of Mombasa, Kilifi, and Kwale

- Publicly condemn any major instances of homophobic and transphobic violence that occur in their counties.
- Refrain from making any public comments that denigrate lesbian, gay, bisexual, or transgender people.
- Table legislation before County Assemblies to remove bylaws that directly or indirectly criminalize same-sex conduct or sex work.
- Review all county bylaws to ensure that they conform to constitutional guarantees of privacy, non-discrimination, and equal protection of the law.
- Post county laws on the Internet and make print copies widely available to the public.
- Establish programs to protect and provide alternatives to children under 18 who are victims of commercial sexual exploitation.
- Establish county-level complaint mechanisms for residents to report and seek recourse for violations by county law enforcement officials, and widely publicize the existence of such complaint mechanisms. Ensure that such mechanisms are open to all complainants including sex workers and regardless of gender identity or sexual orientation.

- Ensure that all county officials and institutions respect the rights to non-discrimination, equality, and privacy, and do not discriminate in the exercise of their functions.

To the County Assemblies of Mombasa, Kilifi, and Kwale

- Ensure that county laws conform to constitutional guarantees of privacy, non-discrimination, and equal protection of the law.
- Repeal municipal bylaws, including section 19(m) and 19(n) of the Mombasa municipal bylaws, which prohibit sex work between consenting adults.

To the Kenyan Parliament

- Pass comprehensive anti-discrimination legislation that prohibits discrimination on the grounds of gender identity and sexual orientation and includes effective measures to identify and address such discrimination.
- Repeal Sections 162, 163, and 165 of the Kenya Penal Code, which criminalize same-sex relations between consenting adults.
- Repeal Section 153 and 154 of the Kenya Penal Code, which are used to justify the arrest of sex workers.

To the Senate Standing Committee on Legal Affairs and Human Rights

- Working with counterpart County Assembly committees, review laws passed by counties to ensure that they conform to constitutional guarantees of privacy, non-discrimination, and equal protection of the law.

To the National Police Service Commission

- Publicly recognize and commend police officers who undertake active efforts to protect LGBT people from violence and discrimination in order to send a message to the rest of the police force that they should uphold their obligation to protect all people within Kenya.
- Prohibit police officers from ordering, participating in, or carrying out forensic anal examinations on persons suspected of same-sex conduct because such tests are medically unsound and degrading.

- Implement rigorous training of police officers on the Kenyan constitution's Bill of Rights and its applicability to LGBT people, in collaboration with civil society organizations.
- Ensure that all members of the police are clearly identifiable through name and rank by tags on their uniforms.
- As part of the ongoing police vetting process, conduct outreach to civil society groups, including those that represent marginalized groups such as LGBT people and sex workers, to provide them with information about how victims of human rights abuses can come forward with information regarding police officers responsible for such abuses.
- Take all appropriate measures to ensure that all police officers respect the rights to non-discrimination, equality, and privacy, and do not discriminate in the exercise of their functions.

To the Independent Policing Oversight Authority and the Internal Affairs Unit of the Kenya Police

- Conduct outreach to the general public and to civil society groups, including those that represent marginalized groups such as LGBT people and sex workers, to provide them with information about how victims of police abuses can file complaints with IPOA or with the Internal Affairs Unit.
- Thoroughly investigate complaints concerning police abuse against civilians on the basis of their gender identity or sexual orientation, and refer for prosecution police officers responsible for such abuse.

To the Office of Director of Public Prosecutions

- Drop charges against the two men in Kwale charged with consensual same-sex conduct.
- Set out clear guidelines barring prosecution of cases in which arrests of suspects were marred by serious human rights violations, including violations of the right to privacy.

To the Attorney General of the Republic of Kenya

- Draft comprehensive anti-discrimination legislation that includes provisions outlawing discrimination on the basis of sexual orientation and gender identity, and propose further measures to align the Penal Code with the constitution.
- Commit to a policy of not opposing strategic litigation that aims to further LGBT equality in Kenya.
- Uphold the Kenyan constitution by promoting equality, nondiscrimination, and the dignity of all people, regardless of their gender identity or sexual orientation.

To the Commission for the Implementation of the Constitution

- Institute public education initiatives to enhance broad social awareness of the constitutional clauses affirming the right to privacy, equality, and non-discrimination.
- Draft comprehensive anti-discrimination legislation that includes provisions outlawing discrimination on the basis of sexual orientation and gender identity.
- Advocate for the decriminalization of same-sex conduct, and ensure that Kenya upholds its commitment to align the Penal Code with the constitution.
- Advise Parliament, the judiciary, and other officials on Kenya's international treaty obligations, including with regard to privacy and non-discrimination on the grounds of sexual orientation and gender identity.

To the Judiciary

- Prohibit the introduction of evidence in criminal hearings that was obtained by violating suspects' rights, including forensic anal examinations, and prohibit judges from ordering forced anal examinations.
- Ensure that judicial processes uphold the rights guaranteed by the constitution, including the rights to privacy, equality, and non-discrimination.

To the Ministry of Health

- Ensure that training for all doctors, nurses, and other health workers includes a component on non-discrimination and sexual health issues affecting LGBT people.

- In collaboration with community-based organizations, establish sensitization programs for health workers aimed at dismantling stigma towards LGBT people.
- Publicly condemn cases in which clinics, workshops, or outreach workers providing services to LGBT people are targeted or threatened with violence.
- Advocate for the decriminalization of same-sex conduct and sex work in order to improve access to HIV prevention and treatment services.

To the Kenya National Human Rights Commission

- Closely monitor instances of violence and discrimination against LGBT people, including by law enforcement officers.
- Make recommendations to county governments and to the Kenya Police to improve compliance with national and international law with regard to LGBT rights, and monitor their adherence to those laws.

To the National Gender and Equality Commission

- In accordance with section 8 of the National Gender and Equality Commission Act 2011, conduct an audit of the status of LGBT people in Mombasa, Kilifi, and Kwale counties, and make policy recommendations to the government on ending discrimination against these groups.
- In accordance with section 8 of the National Gender and Equality Commission Act 2011, ensure that Kenya complies with its international treaty obligations with regard to the rights of LGBT people.

To the Non-Governmental Organizations (NGO) Coordination Board

- Ensure that no organization is denied registration on the grounds that it represents LGBTI people, or provides services to or advocates for the rights of LGBTI people.

To the Kenya Medical Board

- Prohibit doctors from carrying out forensic anal examinations on persons charged with consensual same-sex conduct.

Annex: Kenyan Law Enforcement

Law enforcement in Kenya takes place at the national level and the county level.²¹³

The National Police Service has jurisdiction throughout all of Kenya. The Inspector General of Police, who reports to the cabinet secretary for internal security, heads the service. The National Police Service has three branches: the Kenya Police, responsible for general public security; the Administration Police, responsible for securing state institutions; and the Directorate of Criminal Investigations. All branches are responsible for enforcing the Penal Code, and are guided by the Criminal Procedure Code. These services are organized at the county level, with county commandants responding to the Deputy Inspector Generals of the Kenya Police and the Administration Police, and the Director of the Directorate of Criminal Investigations, in Nairobi.

In addition, each county government recruits and trains its own county law enforcement officers, who form an institution entirely distinct from the Kenya Police. These county law enforcement officials—known in Kiswahili slang as *makanjoo*—are responsible for enforcing sets of county bylaws, passed by county legislative assemblies. In Mombasa, the bylaws prohibit loitering and soliciting for the purposes of prostitution, among other things.

Those arrested under county bylaws are frequently denied due process. According to a 2014 report issued the Kenyan section of the International Commission of Jurists (ICJ Kenya):

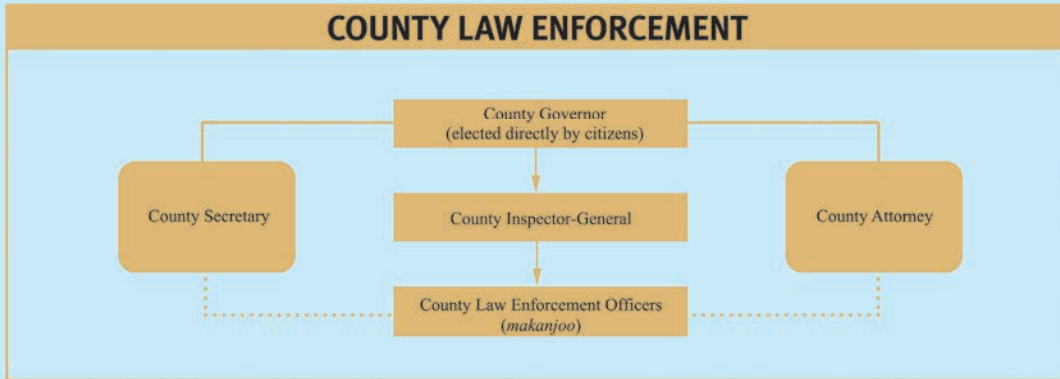
The implementation of county bylaws has subjected persons who find themselves within the province of the laws, many of whom are unaware of their rights, to unparalleled human rights abuses. These abuses include, among others: denial of the right to fair trial; assault and mistreatment during arrest and detention; false arrest; unfair sentencing practices; irregular fines; extortion; profiling and discrimination; and unfair bail terms.²¹⁴

²¹³ For more detail, see Release Political Prisoners Trust, *Your Guide to: the National Police Service Act, the National Police Service Commission Act, and the Independent Policing Oversight Authority*, June 2012, http://www.humanrightsinitiative.org/publications/police/CHRI%20and%20RPP%20Guide%20to%20the%20new%20Kenya%20Police%20Laws_Final.pdf (accessed June 9, 2015).

²¹⁴ ICJ Kenya, “Excessive Laws: Study Reveals Adverse Effects of By-laws on Economic Enterprise and Human Rights,” September 10, 2014, <http://www.icj-kenya.org/index.php/media-centre/news/623-steve-ogolla-a-david-indeje#sthash.NDHalCX5.dpuf> (accessed August 11, 2015).



Kenya's National Police Service (NPS) consists of Kenya Police Service (KPS), the Administration Police Service (APS), and the Directorate of Criminal Investigations (CID). These entities are further divided into subunits and formations, such as GSU and RDU – within the KPS and APS, respectively. The police is overseen by external police oversight bodies – the NPSC and IPOA – as well as by the judiciary and human rights commissions that oversee the whole state machinery. The Internal Affairs Unit (IAU) of the NPS is responsible for internal oversight of the service. Generally, all complaints against the police filed in police stations are addressed by the IAU.



Enforcement of county by-laws is a responsibility of county law enforcement officers, or *makanjoo* (also known as *askari*). They are recruited by and serve within county governments, led by the county governor, who is directly elected by citizens. They are directly subordinate to county inspectors-general. *Makanjoo* are not the police, but their legal status is not defined in law, making it difficult to determine their exact powers and the legal limits on their actions. County law enforcement services were created and evolved prior to the new 2010 Constitution, raising concerns about constitutionality of these institutions. At the moment, the county secretary and county attorney receive complaints from the public about the actions of and mistreatment by *makanjoo*.



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The report was researched and written primarily by Neela Ghoshal, senior researcher in the LGBT Rights Program, and Monica Tabengwa, former LGBT Rights researcher at Human Rights Watch. Rona Peligal, former Africa deputy director, and Kyle Hunter, LGBT Rights consultant, also contributed research. Additional research assistance was provided by Willy Buloso and Chrispinus Wakoko, LGBT Rights interns. The report was edited by Rona Peligal as well as Graeme Reid, LGBT Rights director; Joe Amon, Health and Human Rights director; Otsieno Namwaya, Kenya researcher; and Maria Burnett, senior Africa researcher. It was reviewed by Clive Baldwin, legal advisor, and Joseph Saunders, deputy program director. Additional editorial assistance was provided by Adam Frankel and Elizabeth Wilke, LGBT Rights associates. Production assistance was provided by Kathy Mills, publication specialist; and Fitzroy Hepkins, administrative manager. Oloo Ochieng' and Felix Odimmasi translated sections of the report into Kiswahili.

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Kenya's President Uhuru Kenyatta stated in July 2015 that "gay rights is a non-issue." But for lesbian, gay, bisexual and transgender people living in Kenya's coastal counties of Kilifi, Mombasa and Kwale, the right to be free from violence is a critical issue.

In at least six instances between 2008 and 2015, members of the public have attacked or threatened to attack LGBT people or health workers serving the LGBT community. The authorities' response has been painfully limited. Officials rarely condemn the attacks, and police—while in some cases protecting victims—have not arrested anyone for participating in or inciting these attacks. Many victims do not report crimes, believing that the police will not help them or, worse, might arrest them. In one case, police arrested two men solely on the basis of rumors, subjecting them to humiliating anal examinations in a deeply misguided attempt to "prove" their sexual orientation.

The Issue is Violence documents rights abuses against LGBT people in Kenya's coast region, including mob violence, assault, rape, incitement to violence, and inadequate protection. The report identifies ways in which the Kenyan authorities could improve the response to these abuses and uphold their responsibility to protect all Kenyans.

The African Commission on Human and Peoples' Rights passed a groundbreaking resolution in 2014 calling on governments to prevent and punish all forms of violence targeting persons on the grounds of real or imputed sexual orientation or gender identity. Kenya should uphold this resolution and protect, rather than persecute, sexual and gender minorities.

(above) "Adam" (a pseudonym), arrested and charged with "unnatural offenses" on the basis of a rumor, sorts through police documents.

(front cover) A man in the Coast region shows his scars after being attacked by a group of young men wielding a broken bottle, who accused him of being gay.

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