REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu; DCJ & P, Ibrahim, Wanjala, Njoki, & Ouko, SCJJ)

PETITION NO. 16 OF 2019

-BETWEEN-

NGOs CO-ORDINATION BOARD ..... APPELLANT

-AND-

ERIC GITARI ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

AUDREY MBUGUA ITHIBU ..... 3RD RESPONDENT

DANIEL KANDIE..... 4TH RESPONDENT

KENYA CHRISTIAN PROFESSIONALS FORUM.....5TH RESPONDENT

KATIBA INSTITUTE.....AMICUS CURIAE

(Being an Appeal from the Judgment of the Court of Appeal at Nairobi (Waki, Nambuye, Koome, Makhandia and Musinga JJA) in Civil Appeal No. 145 of 2015 dated and delivered on 22nd March 2019)

Representation:

Mr. Charles Kanjama & Ms. Rachael Wambui for the Petitioner

(Muma & Kanjama Advocates)

Mrs. Ligunya for the 1st Respondent

(Ligunya Saende & Associates)

Ms. Omuom for the 2nd Respondent

(Office of the Hon. Attorney General)

Mr. Harrison Kinyanjui for the 5th Respondent

(Harrison Kinyanjui & Company Advocates)

Ms. Nkonge, Mr. Dudley Ochiel, Dr. Muthomi Thiankolu for the *amicus curiae (Katiba Institute & Muthomi & Karanja Advocates)*

JUDGMENT OF THE COURT

A. BACKGROUND

[1] The petition of appeal before Court is dated 6th May 2019 and lodged on even date. The appeal challenges the Judgment of the Court of Appeal (*Waki, Nambuye, Koome, Makhandia and Musinga, JJA*) at Nairobi in Civil Appeal No. 145 of 2015 delivered on 22nd March 2019, which dismissed the appeal in the High Court decision ***Eric Gitari vs Non-Governmental Organisations Co-ordination Board & 4 Others,*** *Petition No.440 of 2013*. The Court of Appeal (by a majority of 3:2) affirmed the decision of the High Court that had declared that the Non-Governmental Organizations Coordination Board (NGO Co-ordination Board) had contravened the provisions of Article 36 of the Constitution in failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice.

[2] This matter can be traced to a letter from the NGO Co-ordination Board dated 25th March 2015 refusing to reserve any of the 1st respondent's proposed names to register a Non-Governmental Organization (NGO) seeking to champion the rights of (Lesbian, Gay, Bisexual, Transgender, Queer or Questioning (LGBTIQ) persons in Kenya. The 1st respondent sought to reserve for registration of an NGO in any of the names: Gay and Lesbian Human Rights Council; Gay and Lesbian Human Rights Observancy; Gay and Lesbian Human Rights Organization; Gay and Lesbian Human Rights Commission; Gay and Lesbian Human Rights Council and Gay and Lesbian Human Rights Collective.

[3] However, the appellant's Executive Director declined to approve any of the proposed names on the grounds that Sections 162, 163 and 165 of the Penal Code criminalizes Gay and Lesbian liaisons. The 1st respondent's efforts to request for a review of the decision from the NGO Coordination Board bore no fruit.

[4] Aggrieved by the appellant's decision, the 1st respondent filed High Court Petition No. 440 of 2013 alleging that the appellant's refusal to register the intended NGO not only contravened the provisions of Articles 20(2), 31(3), 27(4), 28 and 36 of the Constitution, but also those of the Non-Governmental Organizations Co-ordination Act (the NGO Coordination Act).

[5] The trial court (*Lenaola, J* (as he then was), *Ngugi, J* (as she then was), and *Odunga, J (as he then was)* delineated two main issues and several other collateral issues for determination. The primary issues for determination were:

i. *whether LGBIQ have a right to form associations in accordance with the law; and*

ii. *if the answer is in the affirmative, whether the decision of the Board not to allow the registration of the proposed NGO because of the choice of name is a violation of the rights of the 1st respondent under Articles 36 and 27 of the Constitution.*

[6] On 24th April 2015, the court rendered its determination. Before tackling the main issues, the court addressed itself on the issue of whether there was failure by the 1st respondent to exhaust any internal remedies before approaching the court. In this regard, the trial court observed that in rejecting the names, the appellant was not dealing with registration of the proposed NGO but with the question of whether the name(s) that the 1st respondent sought to reserve for the proposed NGO were acceptable. Therefore, the court held that the refusal to reserve the proposed names was not "a decision" contemplated under Section 19 of the NGO Coordination Act under which an appeal to the Minister lies. The trial court also found that the impugned decision was purely administrative and was made pursuant to the NGO Regulations, and not the

NGO Coordination Act. To this end, the court concluded that there was no statutory prescribed internal remedy that was available to the 1st respondent, and that the court could not close its doors on him for failure to exhaust an internal remedy that did not apply to his circumstance.

[7] Further, the trial court held that the State is restricted from determining which convictions and moral judgments one can hold, and that as per the Constitution, the right to freedom of association is not selective, but is guaranteed to, and applies to everyone. The learned Judges also, observed that it did not matter if the views of certain groups or related associations are unpopular or unacceptable to certain persons outside those groups or members of other groups. Moreover, the court observed that if only people with views that are popular were allowed to associate with others, then the room within which to have a rich dialogue and disagree with the government and others in society would be thereby unreasonably limited.

[8] The trial court observed that it was apparent that the appellant took issue with both the name, and the objects and purposes, of the 1st respondent's proposed NGO because it deemed the name to be furthering an illegality. Therefore, the court concluded that whatever mode the Board wished to place in rejecting the name sought to be used by the 1st respondent, its effect was to reject the 1st respondent's application to register an association to advocate for the rights of LGBTIQ. Ultimately, the court found that the appellant's action constituted an infringement of the 1st respondent's right to freedom of association.

[9] On the issue of whether the limitation of the 1st respondent's right to freedom of association was justifiable in a free and democratic society, the trial court recognized that the right to freedom of association is not absolute and can be limited. However, such limitation must be in accordance with Article 24 of the Constitution. Accordingly, the court faulted the appellant's reliance on Sections 162 and 163 of the Penal Code to justify its decision, as those sections do not criminalize homosexuality or the state of being homosexual; the law only

refers to certain sexual acts which are "against the order of nature." Likewise, the learned Judges observed that the fact that the State does not prosecute people who confess to being lesbians and homosexuals in this country, is a clear manifestation that such sexual orientation is not criminalized. To that end, the court found that the Penal Code does not criminalize the right to freedom of association of people based on their sexual orientation nor does it contain any provision that limits the freedom of association of persons based on their sexual orientation. The court concluded therefore that the appellant's reliance on the provisions of the Penal Code to limit the 1st respondent's freedom of association was untenable.

[10] With regard to the right to non-discrimination, the trial court noted that both the Board and the High Court are constitutionally mandated when applying the Constitution to give effect to the non-discrimination provisions in Article 27. Further, it observed that an interpretation of non-discrimination which excludes people based on their sexual orientation would conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination.

[11] Finally, the trial court found the petition had merit and declared the words 'every person' in Article 36 of the Constitution to include all persons living within the Republic of Kenya despite their sexual orientation. The Court further declared that the appellant had contravened the provisions of Article 36 of the Constitution and, that the 1st respondent was entitled to exercise his constitutionally guaranteed right to freedom of association. Consequently, the High Court issued *an order of Mandamus directing the Board to strictly comply with its constitutional duty under Article 27 and 36 of the Constitution, and the relevant provisions of the NGO Co-ordination Act.*

[12] Dissatisfied with the judgment of the High Court, the appellant lodged an appeal at the Court of Appeal in Nairobi, Civil Appeal No. 145 of 2015, challenging the whole judgement and decree of the High Court. The appellant raised eleven grounds stating that the learned Judges erred in law and in fact:

i. *By identifying lesbian, gay, bisexual, transgender and queer as innate attributes of various persons without any or any sufficient evidence in support, and by failing to recognize that these attributes were the consequences of behavioral traits which the society has a right and duty to regulate for the sake of the common good;*

ii. *When they held that the refusal to register the 1st respondent's proposed NGO was not a decision contemplated under Section 19 of the NGO Act for which an appeal lies to the Minister;*

iii. *In failing to recognize the limits of the right to freedom of association and the fact that the right is enjoyed by persons and not based on any attribute they may determine for themselves;*

iv. *In finding that the right to freedom of association extended to the proposed NGO of the 1st respondent;*

v. *By adopting and applying ratio from South Africa without recognizing the distinct and divergent constitutional background of the said country;*

vi. *By disregarding the religious preference in the Constitution and the preambular influence that must be applied in interpreting and applying the various constitutional provisions in issue;*

vii. *By failing to uphold the provisions of the Penal Code that outlaw homosexual behavior, as well as any aiding, abetting, counselling, procuring and other related and inchoate crimes;*

viii. *By effectively reading into the Constitution's non-discrimination clause the ground of sexual orientation;*

ix. *By misunderstanding and misapplying the limitation clause in Article 24 of the Constitution;*

x. *By rejecting the legitimate role of the moral purpose or public policy test in determining whether to accept registration or proposed applications for associations of persons; and*

xi. By granting the declarations sought and the order of mandamus in the Decree appealed against.

[13] Having considered the issues for determination, the Court of Appeal on 22nd March 2019, by a majority of 3-2, dismissed the appeal, affirming the judgment of the High Court. The issues for determination delineated by the court were *whether the 1st respondent had an obligation to exhaust the remedies available under the NGO Coordination Act or whether the 1st respondent's petition before the High Court was premature; whether in rejecting the reservation of the name, the Director of the appellant violated Article 36 on the 1st respondent's right to freedom of association and from discrimination and equality under Articles 36 and 27 of the Constitution respectively, and whether the right under Article 36 is a limited right pursuant to Article 24.*

[14] On the issue of the exhaustion of internal remedies, the majority (*Waki, Koome and Makhandia JJA)* agreed with the reasoning of the High Court. In that regard, the learned Judges observed that the NGO Coordination Act and Regulations therein had not provided for an internal appeal mechanism for applicants to follow when a name is refused for the reservation to register an NGO. Therefore, the court found that requiring the 1st respondent to exhaust internal remedies would have been an exercise in futility given that there was none. The court further agreed with the trial court that courts are the ultimate bastion and custodians of the Constitution and that appellant's decision not only transcended a mere administrative act, but also touched on matters of constitutional interpretation.

[15] On the other hand, the minority (*Nambuye and Musinga JA*) in finding that the petition before the High Court was premature, observed that the genesis of the 1st respondent's petition was purely an administrative action executed by the Director on behalf of the appellant, declining registration of his NGO with no constitutional underpinnings at that point in time. Therefore, the

procedures set out in Section 19 of the NGO Coordination Act ought to have been invoked and exhausted before seeking the court's intervention.

[16] With regards to the violation of the right to freedom of association and limitation thereof, the majority (*Waki, Koome and Makhandia JJA*) found that the Director of the appellant was in breach of Article 36 of the Constitution. The learned Judges noted that there was no contestation from any side that there are people in this country who answer to any of the descriptions in the acronym LBGTIQ; these are 'persons,' and are therefore protected under Article 36 of the Constitution. The court observed that just like everyone else, they have a right to freedom of association which includes the right to form an association of any kind. They further held that the LBGTIQ, just like other citizens, are subject to the law including sections 162, 163 and 165 of the Penal code, and would be subject to sanctions if they were to contravene such law. The court concluded that by refusing to register the NGO, the 1st respondent was convicted before contravening any law, and that such action was retrogressive. The Court of Appeal, by majority, also found that the only limitation to the right of freedom of association as provided under Article 36 of the Constitution is that the activities of the association must be in accordance with the law. If they are not, then the proposed NGO would not be protected by the Constitution and the law would take its cause. They further observed that it was arbitrary to speculate and categorize LGBTIQ, as persons who have the propensity to destroy society by contravening the provisions of the Constitution or the Penal Code, or as a group bent on ruining the institution of marriage or culture.

[17] On the other hand, the minority *(Nambuye and Musinga JJA)* held that the Director of the appellant's action of rejecting the proposed names did not discriminate against the LGBTIQ. They observed that the right to freedom of association as guaranteed under Article 36 of the Constitution was not absolute, and subject to the limitation in terms of Article 24(1) of the Constitution. Further, the learned Judges found that Article 27 (4) prohibits discrimination on the basis of a person's sex (gender) and not sexual orientation. They observed that the law, as it currently stands, does not permit homosexual and lesbian

sexual practices, and the freedom of association of gays and lesbians in Kenya may lawfully be limited by rejecting registration of a proposed NGO, if the country's laws do not permit their sexual practices.

[18] Dissatisfied with the Court of Appeal's decision, the appellant filed an appeal before us presumably under Article 163(4) (a) of the Constitution. The appellant seeks the following orders from the Court:

a. The appeal be allowed with costs.

b. The Judgment and Decree of the Court of Appeal given on 22nd March 2019 disallowing the appeal be reversed and set aside.

c. An Order do issue affirming the right and duty of the appellant to refuse registration to any association intended to be established contrary to public the interest, or public policy, or to advance an agenda or directly or indirectly promoting conduct that is impugned under the laws of this country, including the advancement of any homosexual agenda.

[19] The appellant contends that the Court of Appeal through its majority decision erred in law in dismissing the appellant's appeal against the decision of the High Court on the following grounds:

a. That the learned Judges erred by failing to recognize that the actions of the Executive Director under the NGO Regulations were made under the delegated authority of the Board whose decision was subject to appeal to the Minister.

b. That the learned Judges erred in law in failing to recognize the limits of the right to freedom of association as provided for under Article 36 of the Constitution of and the fact that the freedom is enjoyed by persons and not based on any attribute, they may determine for themselves.

c. That the learned Judges erred in law in conflating the freedom of association under Article 36 of the Constitution with-

(a) An absolute right to associate any desired label or name.

(b) An unfettered right to pursue any particular activity, objective or policy.

d. ***That the learned Judges erred in law in finding that the freedom of association provided for under Article 36 of the Constitution extended to the 1st respondent's proposed NGO.***
e. ***That the learned Judges erred in law by disregarding the religious preference in the Constitution and its preamble, which influence should be applied in interpreting and applying the various constitutional provisions.***
f. ***That the Learned Judges erred in law by effectively reading into the Constitution non-discrimination clause, Article 27 the ground of sexual orientation.***
g. ***That the learned Judges erred in law by finding that morals and public policy have no legitimate role in the appellants determination on the acceptance of the registration of the proposed NGOs, contrary to Articles 24(5)(a), 36(3),19(2) ,11(1) & (2) of the Constitution and Sections 162, 163 and 165 of the Penal Code.***
h. ***That the learned Judges erred in law by disallowing the appeal before it.***

B. PARTIES' SUBMISSIONS

a. The appellant

[20] The appellant in its submissions filed on 8th August 2019, and supplementary submissions filed on 20th September 2019, argued that Article 36 is not an absolute right and is subject to limitation under Article 24 of the Constitution. The appellant urged that individual rights should be interpreted with due regard to the public interest and the rights of the larger Kenyan community. Further that, in the Constitution, only persons of the opposite sex can contract marriage, and that our Constitution's non-discriminatory clause is different from that of the South African Constitution. In that context, it was submitted that whereas, the South African Constitution expressly enlists sexual orientation as a ground for non-discrimination, our Constitution does not.

[21] It was the appellant's case that its refusal to register the 1st respondent's NGO with any of the proposed names that is, 'National Gay and Lesbian Human

Rights Commission, National Coalition of Gays and Lesbians in Kenya and National Gay and Human Rights Association,' was a reasonable refusal within the meaning of Article 36 of the Constitution.

[22] Further, the appellant submitted that Article 159(2) (c) read alongside Article 165 of the Constitution affirms that the High Court's unlimited jurisdiction should be interpreted in a way that accommodates alternative dispute resolution mechanisms. The appellant buttressed this argument by citing the decisions in ***Mutanga Tea & Coffee Company Ltd vs. Shiakara Limited & Another*** **[2015] eKLR and** ***Vania Investments Pool Limited vs. Capital Markets Authority & Others*** **[2014] eKLR.**

[23] The appellant also argued that the registration of the intended NGO would undermine Sections 162, 163 and 165 of the Penal Code, and therefore, refusal of such registration was a reasonable limitation of the right to freedom of association under Article 36 of the Constitution.

[24] It concluded by submitting that the right to freedom of association under Article 36(3) of the Constitution, allows the legitimate regulatory authority to restrict the use of certain names from the identity of an association that seeks registration on account of public interest and policy.

b. 1st respondent

[25] In response to the appeal, the 1st respondent submitted that the appellant has raised many diversionary issues which obscure the true nature and scope of the dispute before the Court. It was argued that the delegated authority of the Executive Director and availability of an appeal to the Minister, has little or nothing to do with interpretation or application of the Constitution and therefore the Supreme Court does not have jurisdiction to entertain the appeal.

[26] The 1st respondent argued that the rights and fundamental freedoms set out in the Constitution are inherent on all persons including LGBTIQ persons on account of their humanity and inherent dignity. Therefore, the provisions of the Constitution relating to religion do not and cannot constitute a reasonable or valid ground for refusing to reserve names for an NGO whose objectives is to

protect and promote the humanity, dignity and rights and fundamental freedoms of LGBTIQ persons or other groups of persons.

[27] In addition, the 1st respondent submitted that the appellant had in any event conceded at the High Court that the Constitution protects individuals against all forms of discrimination including that of sexual orientation, and in doing so therefore it was clear that the Constitution expressly prohibits discrimination on any ground including the list under Article 27(4) which is merely illustrative and not exhaustive.

c. 2nd respondent

[28] In support of the appeal, the 2nd respondent, the Attorney General (AG) submitted that the NGO Coordination Act provides for a dispute resolution mechanism under Section 19 which provides that an appeal against the decision of the Board lies with the Minister. It was therefore argued that the High Court assumed jurisdiction that it did not have over the matter.

[29] Further it was urged that the High Court dealt with a matter which it ought not to have dealt resulting to a *per incuriam* decision. The AG reinforced this argument with the decisions ***in Marble Muruli vs. Wyclife Ambesta Oparanya & 3 Others*, Supreme Court Petition No. 11 of 2014, [2016] eKLR and *Morelle v. Wakeling* [1955] 2 QB 3379.**

[30] It was the AG's case that the superior courts failed to appreciate the proper context under which the appellant's reason for rejecting the names submitted by the 1st respondent fell and that the right to freedom of association as envisaged in the Constitution is not absolute, and is subject to limitation under Article 24 of the Constitution.

d. Amicus curiae

[31] The *amicus curiae* (Katiba Institute) urged that the denial of registration did not meet the requirements of Article 24 of the Constitution, and that Article 24(3) the Constitution places the onus on the person seeking to justify a limitation to demonstrate grounds justifying the limitation of a right or fundamental freedom; and that the grounds must be premised on human

dignity, equality, and freedom. In that regard, the *amicus curiae* urged this Court to establish whether this onus has been met by the appellant.

C. ISSUES FOR DETERMINATION

[32] Having considered the respective parties' pleadings and submissions in the appeal before us the following issues emerge for determination:

i) ***Whether the 1st respondent was required to exhaust internal remedies under the NGO Coordination Act,***
ii) ***Whether the decision of the Executive Directive of the NGO Coordination Board violated Article 36 of the Constitution, and;***
iii) ***Whether the decision of the NGO Coordination Board was discriminatory and contravened Article 27 of the Constitution.***

D. ANALYSIS AND DETERMINATION

[33] With regard to this Court's jurisdiction to entertain the appeal before us, we find that it is filed as of right pursuant to Article 163(4)(a) of the Constitution. We have perused the Judgments of the superior courts and noted that both courts interrogated the decisions of the Executive Director of the NGO Coordination Board in view of Article 36 and 27 of the Constitution. We have also considered Article 163(4)(a) of the Constitution, Section 15 of the Supreme Court Act, and the guiding principles set by this Court in the Case of ***Lawrence Nduttu & 6000 other v Kenya Breweries Ltd & another***, SC. Pet. No. 3 of 2012, and it is our finding that this matter is properly before us.

[34] Before determining the issues listed above, we find it necessary to emphasize that the matter before us is *not* about the legalization or decriminalization of LBGTIQ, or the morality of same-sex marriage but revolves around the question of whether refusal to register an organization of persons who fall within the LGBTIQ contravened the fundamental rights and freedoms

of association guaranteed in the Constitution and whether the rights to freedom of association and freedom from discrimination of those persons seeking to be registered were infringed upon.

[35] Having so clarified, we now proceed to deal with the issues for determination as follows;

(i)Whether the 1st respondent was required to exhaust the internal dispute resolution mechanism under the NGO Coordination Act?

[36] The appellant supported by the 2nd and 5th respondents argued that there exists an internal dispute resolution mechanism under the NGO Coordination Act and the NGO Organizations Regulations, 1992. Therefore, they urged that the 1st respondent ought to have exhausted the internal dispute resolution mechanism before filing a petition in court. Citing Section 19 of the NGO Act, it was submitted that the rejection of the name by the NGO Coordination Board should have resulted in an appeal to the Minister under Section 19 (3) of the Act. In that context, they maintained that the petition before the High Court was premature. They urged the Court to affirm the dissenting decision of *Musinga, JA,* who observed that name reservation and application for registration of an NGO cannot be separated.

[37] On his part, the 1st respondent supported by the *amicus curiae* argued that the appellant, having refused to reserve the names brought before it by the 1st respondent, directed that the matter be heard in a court of law. The 1st respondent's counsel also submitted that the matter was at the early stages of reservation of names and not the registration of the NGO, and that reservation falls under Regulation 8 of the NGO Co-ordination Regulations, 1992 and not Section 19 of the NGO Act as proposed. Therefore, they urged that there was no remedy available to the 1st respondent under Regulation 8.

[38] According to Article 159 (1) of the Constitution, judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. In that regard, the

Constitution encourages use of alternative means of dispute resolution mechanism.

[39] According to *Gelpe, Marcia R., "Exhaustion of Administrative Remedies: The Lesson from Environmental Cases" (1985). Faculty Scholarship. Paper 81,* exhaustion of administrative remedies aids in protecting administrative autonomy, preserving the separation of powers, gaining judicial economy, avoiding administrative inefficiency, and permitting courts to benefit from an administrative body's determination of facts and exercise of discretion.

[40] The doctrine of exhaustion of administrative remedies was settled by this Court in the case of ***Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme****) SC. Petition No. 3 of 2016; [2019] eKLR*. This Court stated as follows at paragraph 118:

> "*.....Even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute".*

[41] In the persuasive case of ***R vs National Environmental Management Authority,*** *CA No. 84 of 2010; [2011] eKLR the Court of Appeal observed as follows:*

> ***"The principle running through these cases is where there was an alternative remedy and especially <u>where Parliament had provided a statutory appeal procedure</u>, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an***

exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…". **[Emphasis added]**

[42] We are also persuaded by the High Court's reasoning in ***Anthony Miano & others v Attorney General & others***, HC Petition No. E343 of 2020; [2021] eKLR where the court made reference to the doctrine of exhaustion (by citing a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR which had elaborately dealt with the doctrine of exhaustion.) The Court stated at paragraph 35:

"…….What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, the regulatory scheme involved, the nature of the interests involved – including the level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies…". *[Emphasis added.*

[43] From the foregoing decisions, this Court is invited to interrogate whether an internal dispute resolution mechanism was available to the 1st respondent, and the suitability of the internal appellate mechanism to determine the issue. In this context, while the appellant urged that there existed an internal dispute resolution mechanism stipulated under Section 19 of the NGO Coordination Act, the 1st respondent submitted to the contrary. He also submitted that the Executive Director advised that the matters raised were constitutional in nature therefore, beyond his ambit.

[44] Section 19 of the NGO Coordination Act provides as follows:

"19. (1) Any organization which is aggrieved by the decision of the Board made under this Part may, within sixty days from the date of the decision, appeal to the Minister.

(2) On request from the Minister, the Council shall provide written comments on any matter over which an appeal has been submitted to the Minister under this section.

(3) The Minister shall issue a decision on the appeal within thirty days from the date of such an appeal.

(3A) Any organization aggrieved by the decision of the Minister may, within, twenty-eight days of receiving the written decision of the Minister, appeal to the High Court against that decision and in the case of such appeal—

(a) The High Court may give such direction and orders as it deems fit; and

(b) The decision of the High Court shall be final."

[45] Concerning reservation of names, Part II of the NGO Coordination Regulations, 1992 Regulation 8 provides as follows:

> ***"[1] An applicant for the registration of any proposed organization shall prior to such application seek from the Director approval of the name in which the organization is to be registered.***
>
> ***(2) The application for approval under Paragraph (1) shall be in Form 2 set out in the Schedule and accompanied by the fee specified in regulation 33.***
>
> ***(3) The Director shall, on receipt of an application and payment of the fee specified in regulation 33, cause a search to be made in the index of the registered Organizations kept at the***

documentation centre and shall notify the applicant either that—

(a) such name is approved as desirable; or

(b) such name is not approved on the grounds that—

(i) it is identical to or substantially similar to or is so formulated as to bring confusion with the name of a registered body or Organization existing under any law; or

(ii) such name is in the opinion of the Director repugnant to or inconsistent with any law or is otherwise undesirable.

(4) A name which has been approved under paragraph (3)(a) shall be entered in the register of reserved names on behalf of the applicant for a period of thirty days or such longer period, not exceeding sixty days, as the Director may allow, and such period shall commence from the date of notification of such approval to the applicant."

[46] In the instant case, the administrative action concerned was the "**refusal to approve the 1st respondent's name**." So then, does the relevant statute, that is the NGO Coordination Act, provide for a dispute resolution mechanism for the administrative action concerned? The answer is in the negative. Unlike the Companies Act, the NGO Coordination Act does not anticipate that the reservation of names is an administrative action which will attract the dispute resolution mechanism provided for under Section 19. In other words, there are no substantive provisions on approval of names under the NGO Coordination Act. In addition, from the provisions of Regulation 8, it is obvious to us that there are no administrative mechanisms to which the 1st respondent ought to have exhausted, following the Director's decision under the said Regulation.

[47] We therefore agree with the position taken by the two superior courts that neither the NGO Coordination Act nor the NGO Regulations provide for any internal dispute resolution mechanism for a party aggrieved by the decision made by the Director when exercising its mandate under Regulation 8. We also find it necessary to emphasize that an Act of Parliament must clearly provide

for an internal dispute resolution mechanism before an aggrieved party can be bound by such a mechanism.

[48] The above finding, notwithstanding, we note that the petition before the trial court concerned interpretation and application of the Constitution, a jurisdiction bestowed upon that court. The "Minister" therefore, did not have the jurisdiction to entertain issues such as the constitutionality of the decision taken by the Director and the NGO Coordination Board. Therefore, it is our finding that the suit before the High Court was proper. In conclusion, we affirm the decision of the Court of Appeal that there was no internal dispute resolution mechanism under NGO Coordination Act and the NGO Coordination Regulations, 1992 to challenge the impugned decision.

(ii) Whether the decision of the Executive Directive of the NGO Coordination Board violated Article 36 of the Constitution.

[49] The core issue for determination between the parties herein is whether the decision of the Executive Director of the NGO Coordination Board violated Article 36 of the Constitution. In this regard, the appellant argued that in refusing to reserve the names for the proposed NGO, it had formed the opinion that the names and the objects offended public policy as their registration would stand in conflict with Sections 162, 163 and 165 of the Penal Code which provisions outlaw homosexual liaisons. Furthermore, the appellant faulted the two superior courts for failing to appreciate the proper context under which the appellant's reason for rejecting the names proposed by the 1st respondent fell. It was argued that the superior courts disregarded majority interests, the moral principle that is enshrined in the Constitution.

[50] In opposition, the 1st respondent argued that Article 36 of the Constitution expressly provides for the registration of an association of any kind, and that the only group limitations on the freedom of association envisioned by the Constitution are restricted to persons serving in the Kenya Defence Forces or the National Police Service in accordance with Article 24 (5) (b) of the Constitution. It was also submitted that if the drafters of the Constitution

intended to restrict the freedom of association of LGBTIQ persons or any other group of persons, they would have expressly included that group in Article 24(5) of the Constitution.

[51] Article 36 of the Constitution states that:

> ***"(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.***
>
> ***(2) A person shall not be compelled to join an association of any kind.***
>
> ***(3) Any legislation that requires registration of an association of any kind shall provide that—***
>
> ***(a) registration may not be withheld or withdrawn unreasonably.***
>
> ***(b) there shall be a right to have a fair hearing before a registration is cancelled"***

[52] This Court notes that the right to freedom of association is also recognized in international and regional human rights instruments which Kenya has ratified. The right to freedom of association is provided for under Article 22 (1) of the International Covenant on Civil and Political Rights (ICCPR). It states:

> ***"Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests"***

[53] Similarly, Article 10 (1) of the African Charter on Human and Peoples Rights provides inter alia:

> ***"Every individual shall have the right to free association provides he abides by the law"***

[54] Furthermore, Article 260 of the Constitution defines a "person" to include a company, association, or other body of persons whether incorporated or

unincorporated. The question we have asked ourselves is whether in the instant case, the person(s) referred to in the above provisions also include LGBTQ? Our literal reading of Article 36 of the Constitution is that the LGBTQ group is not excluded from the definition under Article 36. Sub-Article (3) requires that any legislation that requires registration of an association of any kind shall provide that registration may not be withheld or withdrawn unreasonably. The right to form an association is an inherent part of the right to freedom of association guaranteed to every person regardless of race, sex, nationality, ethnicity, language, religion, or any other status.

[55] The right to freedom of association cannot be limited unless as provided for under the Constitution. In that regard, Article 24 (1) provides as follows:

> ***" A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including--***
>
> ***(a) the nature of the right or fundamental freedom;***
>
> ***(b) the importance of the purpose of the limitation;***
>
> ***(c) the nature and extent of the limitation;***
>
> ***(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***
>
> ***(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose".***

[56] The parameters of legislative limitation with regard to the right to associate has engaged the minds of judges in other jurisdictions, in both international and domestic courts. In the case of ***Sidiropoulos and Others v. Greece*** (57/1997/841/1047), the European Court of Human Rights held that:

"The Court points out that the right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveal the state of democracy in the country concerned. Certainly, States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions".

[57] Furthermore, the Supreme Court of Canada in the case In ***R. v Oakes*** **[1986] 1 S.C.R 103** developed principles for consideration when determining whether a limitation of a right is justifiable, namely; *a) there has to be a pressing and substantial objective for the law or government's action; b) the means chosen to achieve the objective must be proportional to the burden on the rights of the claimant; c) the objective must be rationally connected to the limit on the Charter right; d) the limitation must minimally impair the Charter right; and d) there should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.*

[58] According to the ***Siracusa Principles on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights,*** clause 3 and 4 in the General Interpretative principles relating to the justification of limitations section, provides that ***"all limitations shall be interpreted strictly and in favour of the right at issue and in the light and context concerned."*** The burden of justifying a limitation upon a right guaranteed under ICCPR lies with the State.

[59] In ***S v Makwanyane and another*** (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1, Chaskalson, P. observed in his lead opinion at paras 103 & 104:

> ***"The criteria prescribed by section 33(1) for any limitation of the rights contained in section 11(2) are that the limitation must be justifiable in an open and democratic society based on the freedom of equality, it must be both reasonable and necessary and it must not negate the essential content of the right.....The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. ..... The fact that different rights have different implications for democracy, and in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question".***

[60] In the present case, the appellant submitted that it declined to approve any of the names as proposed by the 1st respondent on the ground that Sections 162, 163 and 165 of the Penal Code criminalize gay and lesbian liaisons as the same goes against the order of nature. So, is the right to freedom of association absolute under Article 25? Can it be limited? Did the impugned legislation, the Penal Code, provide for the limitation of the right to freedom of association of LGBTQ? Was the limitation of the 1st respondent's right necessary in a democratic society? Was the limitation proportionate to the aim sought? Moreover, there was no evidence placed before the 1st appellant to demonstrate that persons who profess to be LGBTQ are criminals or that it is only they who are capable of committing the offence of "unnatural acts". This was a mere assumption which was not born out of evidence when indeed it is confirmed by empirical data that even heterosexuals commit such offences more often than not most callously.

[61] This Court takes cognizance that not all rights are absolute, and that some rights are subject to limitation. In that context, Article 36 (3) of the Constitution contemplates that the right to freedom of association is subject to limitation. However, any limitation on any fundamental rights and freedom is subject to Article 24 of the Constitution.

[62] Sections 162, 163 and 165 of the Penal Code upon which the Director's decision was premised on provides as follows:

> ***"[162] Any person who—***
> ***(a) has carnal knowledge of any person against the order of nature; or***
> ***(b) has carnal knowledge of an animal; or***
> ***(c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years:***

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

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

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

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

[165] Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years."

[63] Although Sections 162, 163, and 165 prohibits any person from committing acts that go against the order of nature, we observe that the said sections do not distinguish between heterosexual or homosexual offenders. The sections do not limit the perpetrators of such acts to persons who are LGBTQ; indeed, the words, "***any person***", connote a potential offender under those sections who may very well be heterosexual, homosexual, intersex or otherwise.

[64] We have interrogated the above sections of the Penal Code, and it is our finding that they do not, pursuant to the provisions of Article 24 of the Constitution, express the intention to limit LGBTQ's right to freedom of association. Likewise, the sections do not specify the nature and extent of the limitation of the freedom of association, if any. The 1st respondent's intention was to register an organization to *champion for the rights* of LGBTIQ, and this

has no correlation whatsoever with the offences articulated under sections 162, 163 and 165 of the Penal Code.

[65] We find the appellant's interference to the 1st respondent's right to freedom of association did not pursue any legitimate aim such as national security or public safety, the prevention of disorder or crime, the protection of health and morals and the protection of the rights and freedom of others. Therefore, it is our considered view that the appellant's limitation of the right to freedom of association was not proportionate to the aim sought.

[66] We also have looked at case law relating to the freedom of association and registration of LGBTIQ organizations and have taken note of the jurisprudential standards that have been applied elsewhere. In the case of ***Gay Alliance of Students vs. Mathews,*** United States Court of Appeal [4th Cir. 1976) the Court held that the University's refusal to register the Alliance hindered its efforts to recruit the new members and denied to the Alliance the enjoyment of the University's services, which other registered student organizations was afforded, thereby violating their freedom of association.

[67] Furthermore, the European Court of Human Rights in ***Zhdanov and Others vs. Rusia*** (Application No. 12200/08, 35949/11 and 58282/12 found that the Russian courts' decisions refusing registration had interfered with the freedom of association of the applicant organisations and their founders or presidents, the individual applicants. The Court was not convinced that refusing to register the organisations had pursued the legitimate aims of protecting morals, national security and public safety, and the rights and freedoms of others. The only legitimate aim put forward by the authorities for the interference, which the Court assumed to be relevant in the circumstances, was the prevention of hatred and enmity, which could lead to disorder. In particular, the authorities believed that the majority of Russians disapproved of homosexuality and that therefore the applicants could become the victims of aggression.

[68] In ***the People v. Siyah Pembe Üçgen Izmir Association ("Black Pink Triangle"),*** Izmir Court of First Instance No. 6, Turkey, the Court observed that it was not possible to characterize as immoral the fact that someone had a particular involuntary sexual orientation or the use of words such as lesbian, gay, bisexual, travesty or transsexual nor was being gay, lesbian, travesty or transsexual prohibited under national law, therefore the use of such terms in Black Pink Triangle's statute could not be considered immoral or contrary to law. The Court also reasoned that, to characterize an association's aims as immoral, it had to be shown that those aims were against strictly determined morals that are accepted by the whole society. The general aim of the Black Pink Triangle was to strengthen solidarity among LGBT persons, cultivate a freer environment in society and end discrimination against LBGT individuals. In declining to dissolve the association and affirming that lesbian, gay, bisexual, travesty and transsexual individuals have the same rights as everyone else to form an association, the court noted that Turkish laws did not prevent LGBT persons from forming an association.

[69] Closer home, within the African continent, the Court of Appeal of Botswana in case of ***the Attorney General of Botswana v. Thuto Rammoge and 19 Others, Civil Appeal No. 128 of 2014*** grappled with similar questions as those before this Court. The case concerned the constitutionality of the refusal by Botswana's Department of Civil and National Registration to register a civil society group, Lesbians, Gays, and Bisexuals of Botswana (LEGABIBO) which had sought to register as a society under Botswana's Societies Act. The refusal to register LEGABIBO was on the basis that same-sex conduct was at the time criminalized by sections 164 and 167 of the Penal Code of Botswana**.** The Court held that the right to freedom of assembly and association protected the rights of Lesbians, Gays, Bisexuals and their supporters to register a society to promote the rights of the members of the grouping and to lobby for legal reform. Significantly, the Court noted that even though Botswana's Penal Code then prohibited same-sex sexual acts, that

did not extend to preventing gay and lesbian individuals from associating with one another.

[70] We point out at this juncture that the Constitution requires State organs, State officers, public officers to uphold national values and principles of governance such as human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized. In addition, the Constitution, in Article 21 (1) provides that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. Moreover, Article 21(3) imposes an obligation on all State organs and all public officers to address the needs of vulnerable groups within society including members of minorities and marginalised communities. Given that the right to freedom of association is a human right, vital to the functioning of any democratic society as well as an essential prerequisite enjoyment of other fundamental rights and freedoms, we hold that this right is inherent in everyone irrespective of whether the views they are seeking to promote are popular or not.

[71] We are persuaded from aforementioned Constitutional provisions, legal principles and case law, that it would be unconstitutional to limit the right to associate, through denial of registration of an association, purely on the basis of the sexual orientation of the applicants. Therefore, we are of the view that the appellant's decision was unreasonable and unjustified.

[72] As such, we agree with the reasoning of the High Court that just like everyone else, LGBTQ have a right to freedom of association which includes the right to form an association of any kind. It should be noted however that all persons, whether heterosexual, lesbian, gay, intersex or otherwise, will be subject to sanctions if they contravene existing laws, including Sections 162, 163 and 165 of the Penal Code. By refusing to register the NGO, the persons were convicted before they contravened the law. Such action is retrogressive. We, therefore, affirm the decision of the Court of Appeal that the appellant violated

the 1st respondent's right to freedom of association under Article 36 of the Constitution.

(iii) Whether the decision of the NGO Coordination Board was discriminatory against the 1st respondent and violated Article 27(4) of the Constitution?

[73] The appellant argued that sexual orientation is not among the prohibited grounds contemplated under Article 27 (4) of the Constitution. Further, it faulted the majority decision of the Court of Appeal which affirmed the High Court decision which interpreted the term 'including' under Article 27(4) of the Constitution to give room for including sexual orientation in the non-discrimination clause. Article 27(4) of the Constitution provides as follows:

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

[74] Article 2, paragraph 1, of the International Covenant on Civil and Political Rights (ICCPR) obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, **such as** race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Article 26 of the ICCPR not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth, or other status.

[75] Regionally, Article 2 of the African Charter on Human and People's Rights provides that every person shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any

kind **such as** race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, or other status.

[76] Further, according to the Ontario Human Rights Commission, the Glossary of Human Rights Terms, *Sexual orientation* is defined as the direction of one's sexual interest or attraction. It is a personal characteristic that forms part of who one is. It covers the range of human sexuality from lesbian and gay, to bisexual and heterosexual. The UK Equality Act 2010, at Section 12 defines sexual orientation to mean a person's orientation towards persons of the same sex, persons of the opposite sex, or persons of either sex. In relation to the protected characteristic of sexual orientation, a reference to a person who has a particular protected characteristic is a reference to a person who is of a particular sexual orientation; or a reference to persons who share a protected characteristic is a reference to persons who are of the same sexual orientation.

[77] Other than the UK Equality Act, most international legal instruments do not expressly provide for the right not to be discriminated on the basis of one's sexual orientation. However, the grounds enumerated in the said instruments, including Article 27(4) of the Kenyan Constitution, are not exhaustive. In that regard, the European Court of Human Rights in the case of ***Salgueiro da Silva Mouta v. Portugal,*** judgment of 21 December 1999, Reports 1999-IX, p. 327, para. 28 ruled that a person's sexual orientation is a concept which is undoubtedly covered under Article 14 of the European Charter on Human Rights. In that regard, Article 14 of the European Charter on Human Rights provides for enjoyment of the rights set forth in this the Convention without discrimination on any ground **such as** sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.

[78] In ***Toonen v Australia, Communication No. 488/1992*****,** **U**.N. Doc CCPR/C/50/D/488/1992 (1994), the Human Rights Committee observed that; ***"in its view the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation".***

[79] Guided by the foregoing legal instruments, comparative analysis, and caselaw, it is our opinion that the use of the word "sex" under Article 27(4) does not connote the act of sex *per se* but refers to the sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex or otherwise. Further we find that the word "**including**" under the same article is not exhaustive, but only illustrative and would also comprise "freedom from discrimination based on a person's sexual orientation." We, therefore, agree with the finding of the High Court to wit, an interpretation of non-discrimination which excludes people based on their sexual orientation would conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination. To put it another way, to allow discrimination based on sexual orientation would be counter to these constitutional principles." Therefore, the appellant's action of refusing to reserve the name of the 1st respondent's intended NGO on the ground that "Sections 162, 163 and 165 of the Penal Code criminalizes Gay and Lesbian liaisons" was discriminatory in view of Section 27(4) of the Constitution. Consequently, we find that the 1st respondent's right not to be discriminated directly or indirectly based on their sexual orientation was violated by the appellant.

[80] From the above analysis and finding, it is our finding that this appeal fails and is for dismissal.

[81] As regards costs, in ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*** SC Pet. No. 4 of 2014; [2014] eKLR, this Court held that it has discretion to award costs to ensure that the ends of justice are met, and that costs shall follow the event. Therefore, the 1st respondent shall have the costs of the appeal.

DISSENTING OPINION OF JUSTICE MOHAMMED K. IBRAHIM

[82] I have had the advantage of reading in draft the majority Judgment in this Appeal and the dissenting opinion of my brother, Justice William Ouko. I am unable to agree with the majority in certain aspects hence this dissent.

[83] The factual background and the summary of the submissions advanced by the parties in this appeal have comprehensively been set out in the majority Judgment. I will therefore not rehash them in this dissent save in limited aspects for purposes of clarity of any point I will be making.

[84] From the Petition of appeal and the parties' submissions, three major issues arise for determination in this appeal. They are: *whether the 1st respondent was required to exhaust internal remedies under the NGO Coordination Act; whether the decision of the Executive Directive of the NGO Coordination Board violated Article 36 of the Constitution; and whether the decision of the NGO Coordination Board was discriminatory and contravened Article 27 of the Constitution.*

[85] I too find it necessary to render a disclaimer that despite the moral and religious concerns, the issue that was before the Court did not concern the legalization or decriminalization of LGBTQI or morality regarding same-sex marriage, families, or any discussions of the differences between Lesbian, Gay, and Bisexual, Transgender, and Intersex people. The core issues concern the registration of an organization and whether the freedom of association and freedom from discrimination were infringed upon.

(i)Whether the 1st respondent was required to exhaust the internal dispute resolution mechanism under the NGO Coordination Act

[86] On this issue, I agree with the majority decision. In this country, it is now firmly established law that in cases where there is an alternative dispute resolution mechanism established by legislation, the courts must exercise restraint in exercising their jurisdiction and accord deference to such dispute resolution bodies under the doctrine of exhaustion. This Court in its previous decisions has settled the jurisprudence regarding the doctrine of exhaustion of administrative remedies. In the case of ***Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others*** *SC. Petition No. 3 of 2016; [2019] eKLR* we underscored the need for the relevant person, bodies, tribunals and

any other quasi-judicial authorities and organs to be given the first opportunity to deal with disputes as provided for in the relevant parent statute. In the case of ***United Millers Limited v. Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others***, SC Petition (Application) No. 4 of 2021; [2021] eKLR we were emphatic that the courts must exercise restraint in exercising their jurisdiction conferred by the Constitution and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.

[87] This is further firmly rooted in Article 159 of the Constitution which requires the Courts to promote alternative dispute resolution mechanisms. The moment a storm begins to brew; courts should not be the first port of call but rather the final resort. Before using the court's jurisdiction, it is essential to exhaust any available alternative dispute resolution options. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his interests within the mechanisms in place for resolution outside the Courts. The exhaustion doctrine acts as a safeguard to delay judicial consideration of cases to ensure that a party is vigilant in protecting his interests within the channels available for dispute settlement methods. In this way, the doctrine serves to promote an efficient justice system and an autonomous administrative state.

[88] That is not to say that where there is evident abuse of discretion by such bodies, when there is arbitrary behaviour, malice, caprice, and disregard for the principles of natural justice, the Courts can sit back. As held by the Court of Appeal in ***Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR***, the Courts have a duty to intervene where the exhaustion requirement would not serve the values enshrined in the Constitution or law.

[89] That said, in the present case, I agree with the majority that the NGO Coordination Act does not contemplate the reservation of a name to be one of the decisions that are appealable under Section 19 of the NGO Coordination Act. There are no substantive provisions for the approval of names under the NGO Coordination Act, rather the name reservation process is governed by Regulation 8 of the NGO Coordination Regulations, 1992. This is unlike the Companies Act, No. 17 of 2015 which has the entire Part V containing sections 48 to 68 dedicated to regulating the choice of names and the reservation process for companies. It is evident that Section 19 of the NGO Coordination Act is intended to deal with substantive decisions of refusal or cancellation of registration.

[90] The appellant was not dealing with the registration of the proposed NGO but with the question of whether the name(s) that the 1st respondent sought to reserve for the proposed NGO were acceptable. The contested decision to refuse to reserve the name was made solely administratively and in accordance with the NGO Regulations rather than the NGO Coordination Act. It therefore did not attract the dispute resolution mechanism provided for under Section 19.

[91] I further concur with the majority that before an aggrieved party may be bound by such a system, a statute must expressly and provide for an internal dispute settlement procedure. In the present suit, there was no clear mechanism of appeal or remedy within the NGO Coordination Act concerning the reservation of a name or names of a proposed NGO. Further to this I agree with the majority that the case raises issues of constitutional interpretation and application, therefore, the administrative forum did not have jurisdiction to hear the parties. With that, the High Court could therefore not shut its door to the appellants for failure to exhaust an internal remedy that did not apply to their circumstances.

(ii)Whether the decision of the Executive Directive of the NGO Coordination Board violated Article 36 of the Constitution

[92] On this issue, I find myself in disagreement with the majority. In the current instance, the appellant claimed that it refused to approve any of the names suggested by the first respondent because Sections 162, 163, and 165 of the Penal Code penalize homosexual and lesbian relationships since they are incompatible with the natural order of things.

[93] Article 36 of the Constitution guarantees every Kenyan the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. It is imperative to stress the significance of this provision. It is widely acknowledged that freedom of association, the right for people to gather and freely express their ideas on anything, is essential for a pluralist and open democratic society. Looking back during the post-independence era the 1980s and 1990s saw the political space expand with the reintroduction of political pluralism and the end of the one-party regime. Trade unions and university student associations must be mentioned alongside political parties as they were also at the forefront of the struggle for political freedom, workers' rights and student concerns. Many of the freedoms and rights Kenyans enjoy today were a result of the agitation and activities of the various associations formed.

[94] The right to associate is used for a wide range of purposes beyond politics, including those related to trade unions to advocate for labour rights, civil societies to champion various causes in society, culture, amusement, athletics, social causes and humanitarian aid. Conversely, the state has a responsibility to refrain from interfering with the establishment of associations, and there must be systems that enable citizens to join associations without official interference to help them achieve different goals.

[95] The freedom of association is in line with international and regional human rights instruments which Kenya has ratified such as Article 22 (1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 10 (1) of the African Charter on Human and Peoples Rights.

[96] However, under Article 24 of the Constitution, limitation of rights and fundamental freedoms is permissible upon certain strict conditions. The conditions are that; first a right or fundamental freedom in the Bill of Rights should only be limited by a law and second, to the extent only that the limitation is reasonable and justifiable in an open and democratic society. Such limitation must be based on human dignity, equality and freedom. In the case of ***Shollei v Judicial Service Commission & another*** (Petition 34 of 2014) [2022] KESC 5 (KLR), this Court endorsed the views of *E.C. Mwita J.* in ***Jack Mukhongo Munialo & 12 others v. Attorney General & 2 others***, HC Petition No 182 of 2017; [2017] eKLR, when he observed as follows pertaining the limitation of rights under Article 24:

> *"Even where the right or fundamental freedom has been limited by law, the yardstick for determining reasonableness and justifiability of the limitation is whether such limitation is acceptable in an open and democratic society.*
>
> *[70]. The court in considering the limitation under article 24(1), must bear in mind that there is no superior right and take into consideration factors such as the nature of the right to be limited, the importance and purpose of the limitation, the nature and extent of the limitation and the need to ensure that enjoyment of rights and fundamental freedoms by one individual does not prejudice the rights of others. This calls for balancing of rights under the principle of proportionality because rights have equal value and therefore maintain the equality of rights."*

[97] The only rights not subject to any limitation are those found in Article 25 of the Constitution and include freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to a fair trial; and the right to an order of habeas corpus.

[98] Democratic societies are governed by laws. Kenya is no different. The moral foundations of our society serve as the basis for our laws found in the

Constitution and the various Statutes enacted by Parliament. The laws must be observed and respected.

[99] One such law is the Non-Governmental Organizations Co-ordination Act, 1990 which was enacted with the key objective of regulating the registration and co-ordination of all national and international Non-Governmental Organizations operating in Kenya. Relevant to the dispute before Court is Regulation 8 (3)(b)(ii) of the Non-Governmental Organizations Co-ordination Regulations, 1992 which gives the Director the discretion to refuse to approve reservation of a name of an organization where *"such a name is in the opinion of the Director repugnant to or inconsistent with any law or is otherwise undesirable."*

[100] The appellant submitted that it declined to approve any of the names as proposed by the 1st respondent on the ground that Sections 162, 163 and 165 of the Penal Code criminalize gay and lesbian liaisons as the same goes against the order of nature.

[101] The Penal Code is another statute that proscribes behaviour and actions that are considered criminal in Kenya. Section 162 sets out categories of "unnatural offences", defined as "carnal knowledge against the order of nature". This phrase has previously been referred to as anal sexual activity. Under Section 162(c), heterosexual couples having anal intercourse may also be subject to this rule, despite the fact that it does not specifically and exclusively address homosexuality. Section 163 prescribes a penalty of imprisonment for seven years for attempts to commit any of the offences specified in section 162. Section 165, on the other hand, is concerned with "gross indecent practices between males", committed either in private or in public. Although the term "indecency" is not defined in the provision, it is required that the conduct be sexual, between men and obscene or indecent depending on the situation.

[102] As explained by my brother, Justice Ouko, Sections 162 and 165 criminalise male homosexual relationships while Section 163 prescribes a penalty of imprisonment for seven years. I find myself in agreement with his

sentiments when he states that due to the usage of the phrase "*having carnal knowledge of any person,"* which is *"against the order of nature,"* Section 162's interpretation allows for the inference that female same-sex relationships are also *"unnatural."* This means that these clauses can be used to prosecute both men and women who are in same-sex relationships.

[103] I am keenly aware that the Constitutionality of Sections 162(a) (c) and 165 of the Penal Code was challenged in ***EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae), HC Petition 150 & 234 of 2016 (Consolidated) (2019) eKLR***. The Court in that matter found the impugned sections not to be unconstitutional. The matter is currently on appeal and the Court of Appeal is yet to render itself on the same.

[104] The implication of which is that Sections 162, 163 and 165 of the Penal Code remain valid edicts of the law.

[105] Due to the continued existence and validity of Sections 162, 163 and 165 of the Penal Code, I fail to see how the appellant could have reserved a name or allowed the formation of an association with the very terms that imply or whose declared purposes are in support of actions that are against the law or expressly banned by it.

[106] The right to freedom of association as enshrined by Article 36 includes the right to form, join or participate in the activities of an association of any kind. Although the wording "of any kind" might seem wide-ranging and open-ended, it is my considered view that the drafters of the Constitution and indeed the people of Kenya who ratified the Constitution did not intend for the formation of groups whose activities or objectives were against the law or the Constitution to be included.

[107] As long as, Sections 162, 163 and 165 of the Penal Code remain valid laws, then the actions of the appellant in refusing to allow the reservations of names which include the terms “gays” and “lesbians”, cannot be considered unreasonable, irrational or illegitimate.

[108] I must commend Justice Ouko for going a step further to propose alternatives that the 1st respondent could pursue in order to secure registration or an organization with his choice of names. Since the avenue of the Courts decriminalizing is pending before Court at the 1st respondent's instigation, a second alternative would be to rally the people of Kenya to pursue Parliament to amend the laws to repeal Sections 162, 163 and 165 of the Penal Code. I can do no more than repeat that other jurisdictions either through legislation or constitutional revisions have amended their laws to remove similar provisions including the United Kingdom in 2013, Scotland in 2014, Northern Ireland in 2019, Canada in 1969, and Australia in 1994 all amended their laws to remove similar provisions. Some countries such as South Africa in 2006 and Australia in 2017 went further to legalize same-sex marriages.

[109] Society's social opinions and concerns are continually changing. If the people of Kenya desire to have these laws removed from Statute, then legislators in their capacity as the voice of the people can enact, amend, and repeal these laws. However, until such time, Sections 162, 163 and 165 remain in our statutes books as law.

(iii)Whether the decision of the NGO Coordination Board was discriminatory against the 1st respondent and violated Article 27(4) of the Constitution

[110] On this issue, the appellant argued that sexual orientation is not among the prohibited grounds contemplated under Article 27 (4) of the Constitution.

[111] Article 27(4) of the Constitution provides that the State shall not discriminate directly or indirectly against any person on grounds including sex. The Constitution does not include sexual orientation as one of the seventeen grounds.

[112] The majority have taken the view that use of the word "including" in Article 27 is not exhaustive but rather only illustrative leaving room to add to the list of grounds. *Ouko SCJ* on the hand is of the view that the framers of the constitution did not intend to include discrimination on grounds of sexual

orientation and had it been, then nothing would have been easier than to state so.

[113] Sex in the Black's Law Dictionary, 9th edition is defined as *"the sum of the peculiarities of structure and function that distinguish a male from a female organism"*. The Britannica Online Encyclopaedia defines sex as *"the sum of features by which members of species can be divided into two groups—male and female—that complement each other reproductively."*

[114] The Black's dictionary defines sexual orientation as *"a person's predisposition or inclination toward a particular type of sexual activity or behavior; heterosexuality, homosexuality or bisexuality."* While the Britannica online Encyclopaedia defines it as *"the enduring pattern of an individual's emotional, sexual, and/or romantic attraction. In science, sexual orientation is often divided into the three components of attraction, behaviour, and self-identification. There are myriad ways to describe sexual orientation, but the most common include: heterosexual, being attracted to the opposite gender; homosexual, being attracted to the same gender; and bisexual, being attracted to more than one gender."*

[115] Looking at the history of our constitutional making process that lasted over ten years, the process was in all aspects consultative with Kenyans voting in a referendum twice, leading to the promulgation of the 2010 Constitution. I find persuasion in John Mutakha Kangu's book *Constitutional Law of Kenya on Devolution,* 2015 where he underscores the importance of preparatory materials in constitutional interpretation when read together with the historical context of the country, as they provide useful background material that defines where the Kenyans were coming from and where they wanted to go. One of the key preparatory materials is the Final Report of the Constitution of Kenya Review Commission, 2005 (the CKRC Report) which captured the views and recommendations of Kenyans.

[116] Chapter 4 of the CKRC Report on the goals and objective of the review, on page 47 the Commission noted that among the critical objectives were the need

to achieve equal rights for all and gender equity being *"the equal treatment of men and women, especially on opportunities to participate in public affairs, commerce and social life, including the family."* The Commission was keen to note that women were victims of family and customary laws that sometimes discriminated against them in their rights to inheritance, custody of children, commercial law and practices especially concerning loans and even hindered their participation in politics or commerce.

[117] From this, the inclusion of sex as one of the grounds in Article 27(4) is not contentious and is clear that the intention of the framers of the Constitution was to achieve gender equality and equality for all on all fronts in society.

[118] On the other hand, the issue of same-sex marriages and homosexuality arose in several instances and is mentioned in the CKRC Report at several stages. On page 100, at the tail end of Chapter 8, the Commission, from the views and profiles of Kenyan Communities, recommended that in family and marriage, same-sex unions should be outlawed. On page 381, the Steering Committee Consensus Building Group, which was tasked with building consensus on contentious issues, after numerous meetings and deliberations, on the character of Marriage, endorsed the recommendation of the Technical Working Group "B" that the draft Constitution should clarify the definition of marriage to prohibit same-sex marriages. The Consensus initiative accordingly recommended that marriage could take place only between persons of the opposite sex.

> *"(c) The Character of Marriage*
> *The Draft Constitution protects the right to marry and found a family. Some delegates feared that this provision may permit homosexual marriages since the draft Constitution did not specify that marriage can only take place between persons of the opposite sex. The Group endorsed the recommendation of the Technical Working Group 'B' on Citizenship and Bill of Rights that the draft should clarify the definition of marriage to prohibit same sex marriages.*

The Consensus initiative accordingly recommended that marriage could take place only between persons of opposite sex.

The Technical Working Committee on Citizenship and Bill of Rights adopted this recommendation."

[119] On page 400, during the general debate, the delegates, one of the issues that elicited controversy was the Bill of Rights. It is reported as follows:

"The issues of controversy on the Bill of Rights were whether all the provisions in the Bill of Rights should apply to all persons without exception, and the exact circumstances under which any of these rights may be qualified.

In addition, a number of delegates were concerned that the Draft Bill of 2002 contained no clear definition of a number of concepts including -

- *when life begins, in the context of scientific, religious pro-life and pro-choice approaches to the issue of abortion;*
- *the right to life;*
- *family and marriage;*
- ***same sex marriages as opposed to "woman to woman" marriages under customary practices;***
- *youth;*
- *older members of society;*
- *persons with disability.*

It was felt that these definitions should take into account the African culture and context, and further clarity on these and similar concepts could eliminate controversy on an otherwise acceptable Bill of Rights."

[120] On pages 436 and 437, the Technical Working Committee "B" from their deliberations recommended that same-sex marriages and homosexuality should be prohibited.

[121] The Committee of Experts established in 2009, embarked on a constitutional review process under the Review Act, 2008 building on the work

of the Constitutional Review Commission of Kenya (CKRC). It was tasked with identifying and preparing a report on contentious and non-contentious issues, inviting representations from all interested persons on the issues and then preparing a harmonized draft constitution. As required by Sections 29 and 30 of the Review Act, 2008 the Committee of Experts took into consideration the views of the people of Kenya as presented to the Constitution of Kenya Review Commission, captured in the CKRC Report as well as the CKRC drafts; the CKRC Draft of September 2001; the draft that came out of the National Constitutional Conference termed the Bomas Draft of 2004; and the referendum draft termed the Proposed New Constitution of 2005. Notably, the Committee of Experts in their Final Report made no mention of the issues in contest herein.

[122] The original views of Kenyans captured in the CKRC Report found final expression in Article 45(2) of the Constitution which provides that "*Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.*"

[123] The CKRC Report must be read in the context that it reflects the intentions and recommendations of the framers of the Constitution, informed by the views of Kenyans. But it must also be read in the context of the fact that it was prepared roughly eighteen (18) years ago. Perhaps the views of Kenyans have since evolved. But this cannot be determined and considered in this judgement. It can only be the subject of a referendum.

[124] However, what is evident is, with these thoughts, comments and recommendations in the CKRC Report, the inclusion of sexual orientation in the Bill of rights was always in contention. It is therefore my considered view that it is problematic to read sexual orientation as one of the grounds to be included in Article 27(4).

[125] In some places where the right against discrimination was meant to include sexual orientation, it has been expressly stated as such in either the statutes or the national constitutions of those countries. These countries include

South Africa, Angola, Mozambique as well as México, Portugal, Sweden, the United Kingdom, Canada Fiji and New Zealand.

[126] In any case, the appellant in rejecting the names proposed did so on grounds that they were inconsistent with the law. I arrive at the conclusion that the appellant's rejection of the names proposed by the 1st respondent did not amount to discrimination on the basis of sex or sexual orientation as it was firmly within the law.

[127] I would have for these reasons allowed the appeal and set aside the decision of the Court of Appeal. However, as these views are in the minority, the decision of the Court is that of the majority.

DISSENTING OPINION OF W. OUKO, SCJ

[128] I have had the advantage of reading the majority decision in this appeal. I agree with the factual background, the summary of the submissions advanced by the parties and the three issues for consideration and determination as framed. I do not therefore intend to recapitulate them here in detail. I am also in agreement with the majority decision on two aspects: first, that this Court has jurisdiction and is properly seized of the appeal; and secondly, in respect of the first issue, that the Petition filed before the High Court was competent to the extent that, in the circumstances of the case the 1st respondent was not bound to exhaust internal dispute resolution mechanisms provided for under Section 19 of the Non-Governmental Organizations Co-Ordination Act, as the decision under challenge did not qualify as one of the decisions to be appealed to the Minister.

[129] I am however, with profound respect, not in agreement with the reasoning, conclusions reached and final orders made by the majority on the remaining two issues. But I am entirely in agreement with the views expressed by my brother Ibrahim, SCJ in his separate dissenting opinion.

[130] The following are the reasons for the path I have chosen to follow.

A. INTRODUCTION

[131] At the heart of this dispute is the alleged violation of constitutional rights and fundamental freedoms of the 1st, 3rd and 4th respondents; the 1st respondent being an Advocate of the High Court and an activist for equality of Lesbian, Gay, Bisexual, Trans, Intersex and Queer (LGBTIQ) persons in Kenya; the 3rd respondent is a transgender woman, while the 4th respondent is a father of an intersex child. The 5th respondent was described in the High Court judgment as a forum for Christian professionals that believes that the registration of the proposed association would advance a cause against public policy by "legalising" criminality, namely homosexuality. The appellant, on the other hand is a body corporate established under the provisions of the Non-Governmental Organisations Co-Ordination Act, (NGO Act) with the mandate of facilitating and co-ordinating the work of all national and international Non-Governmental Organizations operating in Kenya. By the very nature of its mandate, it also maintains a register of all such organizations.

[132] The 1st respondent was aggrieved by the appellant's refusal to "register a proposed" Non-Governmental Organization (NGO) under different variations of proposed names listed below in the succeeding paragraphs. While the 3rd and 4th respondents opposed the proposed NGO's registration and expressed concern that the registration would muddle up issues relating to lesbian, gay, bisexual (LGB) persons with those of transgender and intersex (TI) persons, yet there is a clear distinction between these two groups of persons.

[133] Apparently, the explanation given by the appellant to the 1st respondent for its decision not to reserve any of the proposed names was its discomfort with the use of the terms "gay" and "lesbian" in the names. The appellant was, in fact, according to sworn affidavits, ready and prepared to reserve any of the names so long as the two words were omitted from the proposed names. The 1st respondent, for his part was not prepared to abandon those words. It is this stalemate that prompted the 1st respondent to petition the High Court alleging violations of their constitutional rights.

[134] What's in a name? asked William Shakespeare through one of his characters in ***Romeo and Juliet***, to signify the fact that a name may be a convenient concept for identification but the essence behind it is the distinctive and fundamental nature of identity. An organization will be identified by its unique name and other attributes. To the 1st respondent, therefore the words "gay" and "lesbian" were the unique marks of identification of the proposed organization, without which its objectives, characteristics, affiliations, and social roles would be completely lost.

[135] In the High Court petition, the 1st respondent sought, *inter alia* a judicial interpretation on whether the words 'every person' in Article 36 of the Constitution includes all persons living within the Republic of Kenya despite their **sexual orientation**; a declaration that the appellant contravened Articles 36 of the Constitution in failing to accord just and fair treatment to gay and lesbian persons living in Kenya seeking registration of an association of their choice; a declaration that the 1st respondent is entitled to exercise his constitutionally guaranteed freedom to associate by being able to form an association like any other Kenyan; and a declaration that the appellant's failure to comply with Article 36 infringed on the **"right of marginalised and minority groups in the Republic of Kenya"** to which the 1st respondent and other gay and lesbian persons belong.

[136] The Universal Declaration of Human Rights (UDHR) affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights; and that everyone is entitled to all the rights and freedoms set forth in the instrument, without distinction of any kind, including distinction based on sex. A similar provision is made in the International Covenant on Civil and Political Rights (ICCPR). Both instruments recognize and restate the right to freedom of association with others, for the protection of specific interests; and that no restrictions may be placed on the exercise of this right "**other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the**

protection of public health or morals or the protection of the rights and freedoms of others." [my emphasis].

[137] The African Charter on Human and Peoples' Rights (ACHPR) similarly provides in **Article 10** that every individual shall have the right to free association "**provided that he abides by the law"**. I shall return to these provisions as well as those in the Constitution of Kenya later in this judgment.

B. BACKGROUND

[138] In April 2012, the 1st respondent applied on three separate occasions to the appellant for the reservation of one of the six different variations of names submitted for a proposed NGO to address the violence and human rights abuses suffered by the LGBTIQ community in Kenya. The proposed names were, ***National Gay and Lesbian Human Rights Commission, National Coalition of Gays and Lesbians in Kenya, National Gay and Lesbian Human Rights Association, Gay and Lesbian Human Rights Council, Gay and Lesbian Human Rights Observancy*** and ***Gay and Lesbian Human Rights Organization.*** The only response he received from the appellant was that the names were "unacceptable". Frustrated by the reply, the 1st respondent instructed an advocate to re-apply. It was at this point that the appellant gave a comprehensive explanation why it could not reserve the proposed names or register the association as proposed.

[139] According to the appellant, the proposed names and the objects of the proposed NGO were offensive to public policy and stood in conflict with Sections 162, 163 and 165 of the Penal Code, which outlaw homosexual liaisons. With that, the appellant technically rejected the 1st respondent's application.

C. LITIGATION HISTORY

[140] The litigation journey from the High Court through to this Court is comprehensively encapsulated in the majority judgment, save to reiterate briefly that the High Court (*Lenaola, Ngugi,* and *Odunga, JJ*. - as they then were) in determining the substantive question of violations of the respondents'

constitutional rights, found that indeed the respondents' right of association guaranteed by Article 36 of the Constitution were violated by the failure of the appellant to accord just and fair treatment of gay and lesbian persons living in Kenya seeking registration of an association of their choice.

[141] The Court of Appeal, *(Waki, Nambuye, Koome (as she then was), Makhandia and Musinga JJ. A)*, were unanimous that the appeal before them raised only two questions: whether the petition filed before the High Court was competent on account of jurisdiction based on the doctrine of exhaustion of remedies and secondly whether, in rejecting the application for reservation of a name, the appellant breached **Article 36** of the Constitution. They too were in agreement that Section 19 of the NGO Act did not apply to the circumstances of the case. Consequently, the High Court had the requisite jurisdiction to entertain the petition.

[142] But in a split decision of 3:2 the majority (*Waki, Koome (as she then was)* and *Makhandia, JJ.A,* upholding the High Court, found, on the second question that the 1st respondent's rights were violated by the appellant's failure to register the proposed organization, *Nambuye* and *Musinga,* JJA dissenting.

[143] Before the Supreme Court, the following grounds have been identified for determination; whether the 1st respondent was required to exhaust the internal dispute resolution mechanism under the NGO Coordination Act and whether the respondents' rights under Articles 27(4) and 36 of the Constitution were violated.

D. ISSUES FOR DETERMINATION

[144] This appeal seeks answers to the following 3 issues:

i) Whether the 1st respondent was required to exhaust the internal dispute resolution mechanism under the NGO Coordination Act,

ii) Whether the decision of the appellant not to reserve the names of the proposed organization violated Article 36 of the Constitution, and

iii) Whether the decision of the appellant was discriminatory of the respondents and therefore violated Article 27(4) of the Constitution

E. ANALYSIS AND DETERMINATION

Jurisdiction of the Supreme Court

[145] I reiterate that I am in agreement with the majority that this appeal meets the principles for the proper invocation of our jurisdiction under Article 163(4)(a) and as enunciated by the Court in ***Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & another***, SC. Pet. No. 3 of 2012; [2012] eKLR, among other decisions of the Court.

[146] It is apposite too at this stage to clarify that the issue before us is not about the decriminalization of LGBTIQ, or the constitutionality of Sections 162, 163 and 165 of the Penal Code. It is also true that the controversy has nothing to do with morality or same sex marriage, family units and all the fancy arguments around the difference between Lesbian, Gay and Bisexual persons (LGB), and Transgender and Intersex persons (TI). Indeed those in the second category (TI) have expressed serious objection to their inclusion in the quest to register an NGO on behalf of all LGBTIQ persons. According to them, to be classified as LGBTIQ may lead to a misconception that they are gay and lesbian. I reiterate that these arguments do not concern us in this appeal.

[147] Apart from the secondary question relating to the doctrine of exhaustion, argued pursuant to Section 19 of the NGO Act, the central issue in this appeal is about the reservation of a name and whether the appellant's decision in rejecting the names proposed was lawful, reasonable, proportionate and procedurally fair. This question is to be resolved by the interpretation of Articles 27 and 36 of the Constitution which were specifically invoked.

[148] What were the offending names proposed? Initially, in April 2012, the 1st respondent proposed for reservation the following sets of names, Gay and Lesbian Human Rights Council, Gay and Lesbian Human Rights Observancy, and Gay and Lesbian Human Rights Organization. After the appellant advised

him that the names were unacceptable and should be revised, the 1st respondent forwarded more names in March, 2013, Gay and Lesbian Human Rights Commission, Gay and Lesbian Human Rights Council and Gay and Lesbians Human Rights Collective. The common denominator in all the suggested names is **Gay** and **Lesbian**. These terms are not defined in our laws. But they are, no doubt widely used today. Lesbians, bisexuals, gays or homosexuals are generally known as persons who are sexually, emotionally and romantically attracted to people of their same sex. These are clearly matters of personal sexual orientation, which according to Yogyakarta Principles connote;

> **"... a person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."**

[149] It is important to explain that Yogyakarta Principles were promulgated as the outcome of an international meeting of human rights groups in Yogyakarta, Indonesia, in November 2006. Though not binding, these principles have inspired several judicial decisions across the world and shaped policy recommendations in this field.

[150] Prof. Edwin Cameron in ***Sexual Orientation and the Constitution: A Test Case for Human Rights,*** (1993) 110 SALJ 450, authored this definition of sexual orientation:

> **"Sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex."**

[151] I have explained these terms because of their importance in the determination of the question framed in the second ground. It has been part of the respondents' argument that the words 'every person' in Article 36 of the

Constitution includes all persons living within the Republic of Kenya irrespective of their "**sexual orientation"**.

To the first issue,

(i) Whether the 1st respondent was required to exhaust the internal dispute resolution mechanism under the NGO Coordination Act

[152] This ground is based on Regulation 8 of the Non-Governmental Organizations Coordination Regulations, 1992 (NGO Regulations) which essentially deals with the "approval of names" of proposed organizations. Prior to an application for registration being made, the Director may approve the proposed name if it is desirable; or reject it, if it is identical to an existing name and is likely to bring confusion; or if such name, is in the opinion of the Director, repugnant to or inconsistent with any law or is otherwise undesirable.

[153] This process is strictly-speaking a reservation of name task similar to Section 48 of the Companies Act (Reservation of a company name). It has been the appellant's argument from the High Court to this Court, that once the 1st respondent was notified that the proposed names were undesirable, the next course of action, instead of proceeding to the High Court, would have been to invoke Section 19 of the NGO Act, under which,

> **"19. (1) Any organization which is aggrieved by decision of the Board made under this Part may, <u>within sixty days from the date of the decision, appeal to the Minister</u>.**
>
> **(2) On request from the Minister, the Council shall provide written comments on any matter over which an appeal has been submitted to the Minister under this section.**
>
> **(3) The Minister shall issue a decision on the appeal within thirty days from the date of such an appeal.**
>
> **(3A) Any organization aggrieved by the decision of the Minister may, within, twenty-eight days of receiving the**

written decision of the Minister, <u>appeal to the High Court against that decision</u> and in the case of such appeal—

(a) the High Court may give such direction and orders as it deems fit; and

(b) the decision of the High Court shall be final". [my emphasis].

[154] The 1st respondent and all the parties opposed to the appeal have argued that the decision not to reserve the names was made by the Director and not the Board (the appellant). That being the case, the decision in question did not qualify to be taken through the appellate process envisaged under Section 19 aforesaid. Both the High Court and the majority in the Court of Appeal agreed.

[155] The doctrine requiring exhaustion of internal administrative remedies is an innovative way of correcting, reviewing or appealing administrative decisions using the very administration itself. This gives the administrative body a chance to correct its own errors, if any. In addition, it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages.

[156] Presently, the law governing exhaustion of administrative remedies is codified in Section 9 of the Fair Administrative Action Act, which demands that the courts shall not review an administrative action or decision unless the internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. The courts may, however, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

[157] From a long line of decisions spanning the spectrum of the three superior courts, the law is now firmly settled in this country that where there exists an alternative method of dispute resolution established by legislation, the courts

must exercise restraint in exercising their jurisdiction and give deference to such dispute resolution bodies. It is equally common factor that this doctrine was applicable before the promulgation of the Constitution of Kenya in 2010 and remains relevant under it today. It accords with Article 159 of the Constitution which encourages alternative means of dispute resolution. See ***William Odhiambo Ramogi & 3 others v. Attorney General & 4 others***; ***Muslims for Human Rights & 2 others (Interested Parties),*** High Court Constitutional Petition Nos. 159 of 2018 & 201 of 2019; [2020] eKLR; and ***Speaker of National Assembly v. Njenga Karume*** [2008] 1KLR 425, in a long line of many others.

[158] This Court has in the case of ***Albert Chaurembo Mumba & 7 others v. Maurice Munyao & 148 others,*** SC Petition No. 3 of 2016; [2019] eKLR, reviewed several past decisions on this subject, and essentially agreed with the *ratio decidendi* developed in those cases over the years. See also similar pronouncement on this doctrine by this Court in ***United Millers Limited v. Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others***, SC Petition (Application) No. 4 of 2021; [2021] eKLR.

[159] By the provisions of Section 9(4) aforesaid, the courts may, in exceptional circumstances and on application, exempt a party from the obligation of exhausting any remedy if the court considers such exemption to be in the interest of justice. In ***Fleur Investments Limited v. Commissioner of Domestic Taxes & another,*** Civil Appeal No. 158 of 2017; [2018] eKLR, the Court of Appeal found in the passage below that there were exceptional circumstances to exempt the appellant from exhausting internal dispute resolution channels of the respondent;

> **"... Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a**

bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly".

[160] The question to which I now must turn after setting out the foregoing principles, is whether the petition filed in the High Court by the 1st respondent was incompetent for failure to comply with the provisions of Section 19 aforesaid.

[161] It is common factor that the impugned decision was made at the stage of a request to the Director for reservation of a name and not registration. Only decisions made by the Board under Part III of the Act are appealable to the Minister by dint of section 19. Those are decisions that relate to refusal to register an organization, cancellation of a certificate issued to an organization, among others.

[162] For the foregoing reasons, I, like the majority and Ibrahim, SCJ come to the same conclusion that a dispute arising from the reservation of a name is not one of the decisions envisaged to attract internal dispute resolution mechanism provided for under Section 19. Reservation of name is a step toward the registration of an organization, but it does not constitute registration. The answer to this issue is in the negative; that the 1st respondent was not required to exhaust the internal dispute resolution mechanism under section 19 of the NGO Coordination Act.

(ii) Whether the decision to reject the names for the proposed organization violated the right to freedom of association under Article 36 of the Constitution

[163] According to the 1st respondent, the rights and fundamental freedoms set out in the Constitution are inherent in all persons, including LGBTIQ persons; that in declining to register the proposed NGO, the appellant violated the respondents' rights and freedom of association contrary to Article 36; and that the denial also amounted to discrimination on the basis of sexual orientation contrary to Article 27 of the Constitution.

[164] As this ground deals with the right to freedom of association, Article 36 reads as follows;

> **"36. 1. Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.**
>
> **2. A person shall not be compelled to join an association of any kind.**
>
> **3. Any legislation that requires registration of an association of any kind shall provide that**
>
> **a. registration may not be withheld or withdrawn unreasonably; and**
>
> **b. there shall be a right to have a fair hearing before a registration is cancelled."**

[165] It is in this Article that the right to freedom of association to form, join or participate in the activities of an association of any kind is guaranteed. The Article anticipates the enactment of legislation to regulate registration of associations to realize those rights. That legislation which is to provide for, among other things, registration of associations is to ensure that registration of an association is not withheld or withdrawn **unreasonably**.

[166] Of immediate relevance to the question before us, is the acknowledgment by Article 36 that there may be good reasons for withholding registration, hence the qualifying term, **unreasonably**. The right, is for this reason not absolute, but subject to the limitations of Article 24.

[167] The second feature of this Article is its emphasis that "***every person***" has the right to freedom of association, which includes right to form, join or participate in the activities of an "***association of any kind***". Though the phrase "association of any kind" appears wide enough to include nearly any association in any form or character, from my own holistic reading of the Constitution, I do not think an association of "any kind" intended by the framers and Kenyans would include associations whose activities are inconsistent with the Constitution or contrary to the law, or as I have explained elsewhere in this judgment, there cannot be, for instance a right to freedom of association to form, join or participate in the activities of an association whose expressed objective would offend members of a particular community, religious, ethnic or racial group or whose name is obscene, offensive, hateful, derogatory or defamatory; or to adopt names of a proscribed group.

[168] The NGO Act, as the title implies, is one of the statutes enacted by Parliament to make provision for the registration of voluntary grouping of individuals or associations, not operated for commercial purposes but for the benefit of the public at large and for the promotion of social welfare. See Section 2 of the Act.

[169] Under Section 14 of the Act, the appellant may refuse to register any association if the association does not meet certain specified conditions.

[170] Although I am unable to trace on record the letter dated 25th March, 2013 which conveyed the decision of the appellant to the 1st respondent, I am nonetheless satisfied with the full tenor and effect given to it by both the High Court and the Court of Appeal, according to which, the reasons proffered for the rejection of the proposed names were that Section 162 of the Penal Code "criminalises gay or lesbian liaisons"; that under Regulation 8(3)(b) of the Non-Governmental Organizations Coordination Regulations, the Director can reject a name if it is "inconsistent with any law or is otherwise undesirable".

[171] It is my understanding, as it was that of the two superior courts below, that the effect of the said letter of 25th March, 2013 was that, so long as the words

lesbian and gay remained part of the proposed name, the 1st respondent's application stood rejected.

[172] At the heart of this ground is the question whether by deciding in the manner it did, the appellant contravened the provisions of Articles 36 of the Constitution, violating the respondents' right to freedom of association as set out previously. Reading and interpreting the Constitution in the manner it demands in Article 159, a related question may also be asked; did appellant exercise its administrative discretion contrary to Article 47 (1) of the Constitution thereby violating the rights and fundamental freedoms of the respondents? Article 47(1) decrees that;

> **"Every person has the right to administrative action that is <u>expeditious, efficient, lawful, reasonable and procedurally fair</u>".** [my emphasis].

[173] It will shortly become apparent why I have highlighted the words expeditious, efficient, lawful, reasonable and procedurally fair. Suffice, however, at this point to state that these words are replicated in Section 4(1) of the Fair Administrative Action Act, signifying a system that, apart from incorporating these attributes, sets out standards to be observed by administrators and administrative bodies in their decision-making processes.

[174] The Fair Administrative Action Act, was enacted in 2015 pursuant to clause (3) of Article 47, to give effect to the right to a fair administrative action. It is against Articles 24, 36 and 47 of the Constitution, the Fair Administrative Action Act, Section 14 of the NGO Act and Regulation 8 that the appellant's decision to reject the names proposed by the 1st respondent must be measured.

[175] Public authorities or bodies, like the appellant, are generally conferred by the parent statute with powers and duties in relation to their particular areas of competence. It is for that reason, as a general rule, that courts of law will normally be slow to interfere with the exercise of those authorities' administrative discretion on substantive grounds. As a necessary corollary to this, public bodies must inevitably only act within the powers conferred to them

by law. In terms of Article 47(1) of the Constitution and on various provisions of the Fair Administrative Action Act, the courts cannot escape from asking whether a public body in a similar situation, on the material before it, could have reached the same decision as that impugned. As a result, an administrative decision may be challenged and the court may strike down an administrative decision on its illegality, irrationality, procedural impropriety, violation of fundamental human rights, or for lack of proportionality or for being unreasonable. These inherent supervisory powers are reposed in the High Court by Article 23 of the Constitution.

[176] The right to just administrative action is today a constitutional imperative, or what may be called the constitutionalisation of administrative justice. By entrenching the standard of reasonableness, expedition, efficiency, lawfulness, and procedural fairness as the correct measure of judicial scrutiny of administrative decision, Article 47 of the Constitution has revolutionised the general administrative law in Kenya. Section 7(2)(a) to (o) of the Fair Administrative Actions Act, for the first time specifies what the court, in reviewing an administrative action or decision must look at. Again because of its relevance and importance to the issue under review, I reproduce below the part material to that review.

> **"(2) A court or tribunal under subsection (1) may review an administrative action or decision, if–**
>
> **(a) the person who made the decision–**
>
> **(i) was <u>not authorized</u> to do so by the empowering provision;**
>
> **(ii) acted in <u>excess of jurisdiction</u> or power conferred under any written law;**
>
> **....**
>
> **(b) a <u>mandatory and material procedure</u> or condition prescribed by an empowering provision was not complied with;**

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to–

(i) the purpose for which it was taken;

(ii)the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power". [my emphasis].

[177] These provisions mark a breakaway from the common law test and principles for review of public bodies' decisions in Kenya. At common law, the test was laid down in the celebrated English case of ***Associated Provincial Picture Houses v. Wednesbury Corporation***, [1948] 1 K.B. 223, from which the Wednesbury principle of unreasonableness originated. It was said in that case that a public authority acts unreasonably when a decision it makes is "so absurd that no sensible person could ever dream that it lay within the powers of the authority"; the ***Wednesbury*** unreasonableness. Over time, the test of what constitutes reasonableness in English administrative law has become blurred and too sophisticated. It is struggling to survive and judges in that jurisdiction have criticised the ***Wednesbury*** test. Lord Cooke of Thorndon spared no punches in the following speech in the House of Lords case of ***R Regina v. Secretary of State for The Home Department, Ex Parte Daly*** [2001] UKHL 26.

> **"And I think that the day will come when it will be more widely recognised that Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 was an unfortunately retrogressive decision in English administrative law, insofar as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd".**

[178] In April 2003 in ***R. (on the application of Association of British Civilian Internees (Far East Region)) v. Secretary of State for Defence,*** [2003] EWCA Civ 473, the Court of Appeal wondered what justification there was for retaining the **Wednesbury** test. But declined "to perform its burial rites".

[179] While the burial rites have been postponed in England, in Kenya the departure from the common law approach has been accepted and acknowledged by the High Court in ***Dry Associates Limited v. Capital Markets Authority and Another Interested Party Crown Berger (K) Ltd*****,** Petition 328 of 2011; [2012] eKLR, when it said that;

> **"Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act but is to be measured against the standard established by the Constitution."**

[180] The standard of measurement established by the Constitution and the law outlined in the preceding paragraphs leaves no doubt that a contest of administrative action today involves, as a minimum the application of the Constitution. Compared to the common law standard of reasonableness, today's constitutional standard simply turns on whether there was unreasonableness, procedural unfairness, illegality, delay or inefficiency in the decision-making process or in the decision itself. Section 7(2)(a) to (o) of the Fair Administrative Actions Act, following upon these constitutional parameters detail some of the factors to guide the court in reviewing administrative action or decision.

[181] I reiterate that the question to be answered under this ground is, whether the appellant's decision to reject the proposed names was unreasonable, irrational, unlawful or disproportionate.

[182] According to Article 36, application for registration of an association of any kind **"may not be withheld or withdrawn <u>unreasonably</u>".** Except for

the rights listed under Article 25, all the other rights or fundamental freedoms in the Bill of Rights can be limited by law to the extent that the limitation is reasonable and justifiable. See Article 24 of the Constitution.

[183] Section 14 of the NGO Act, on the other hand vests in the appellant the power to "refuse the registration" of a proposed association if—

> **"(a) it is satisfied that its proposed activities or procedures are not in the national interest; or**
> **(b) it is satisfied that the applicant has given false information on the requirements of subsection (3) of section 10; or**
> **(c) it is satisfied, on the recommendation of the Council, that the applicant should not be registered".** [my emphasis].

[184] Under Regulation 8(3)(b)(ii) of the NGOs Regulations;

> **"(1) An applicant for the registration of any proposed organization shall prior to such application seek from the Director approval of the name in which the organization is to be registered.**
> **(2) .....**
> **(3) The Director shall, on receipt of an application and payment of the fee specified in regulation 33, cause a search to be made in the index of the registered Organizations kept at the documentation centre and shall notify the applicant either that—**
> **(a) such name is approved as desirable; or**
> **(b) such name is not approved on the grounds that—**
> **(i) it is identical to or substantially similar to or is so formulated as to bring confusion with the name of a registered body or Organization existing under any law; or**

(ii) such name <u>is in the opinion of the Director repugnant to or inconsistent with any law or is otherwise undesirable</u>".
[my emphasis].

[185] From these provisions I entertain no doubt myself that the appellant had administrative discretion to grant or deny an application for reservation of name or registration of a name of a proposed association. It could reject an application if it was satisfied that the proposed activities or procedures of the association were not in the national interest, were repugnant to or inconsistent with any law or were otherwise undesirable, among other considerations.

[186] The exercise of this discretion, like all discretionary powers, is circumscribed by principles of justice, reasonableness and good faith. The decision-maker must only consider relevant factors, and the decision must not be made arbitrarily or capriciously. See Section 7(2)(a) to (o) set out above. Lord Denning's statement below in the case of ***Breen v. Amalgamated Engineering Union*** [1971] 2 QB 175, is an apt summary of the manner in which administrative discretion must be exercised:

> **"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless, the decision will be set aside."**

[187] As long as the decision to reject the proposed names was made in good faith, without consideration of extraneous matters and according to law, the requirement of Article 36 was satisfied; that registration may only be withheld or withdrawn on reasonable grounds. The appellant explained those grounds primarily to be the prevailing penal system that outlaws acts that may be associated with the proposed names.

[188] Talking of Kenya's penal system, it is interesting to note that the present Penal Code, like some of the laws in this country, was transplanted and adapted to the exigencies of the British colonial administration during the colonial period. Some of those laws have been retained in our statute books to this day. The relevance of some of these laws remains controversial and debatable. Of the laws still in the statute books are Chapter XV of the Penal Code (**Offences Against Morality**) or Chapter XVI, Section 171 creating the offence of bigamy. For our purpose, Sections 162, 163 and 165 of Chapter XV are relevant. Section 162 relates to **unnatural offences** and state as follows:

> **"162. Any person who—**
> **(a) has carnal knowledge of <u>any person against the order of nature</u>; or**
> **(b) has carnal knowledge of <u>an animal</u>; or**
> **(c) permits a <u>male person to have carnal knowledge of him or her</u> against the order of nature, is guilty of a felony and is liable to imprisonment for fourteen years:**
> **Provided that, in the case of an offence under paragraph (a), the offender shall be liable to imprisonment for twenty-one years if—**
> **(i) the offence was committed without the consent of the person who was carnally known; or**
> **(ii) the offence was committed with that person's consent but the consent was obtained by force or by means of threats or intimidation of some kind, or by fear of bodily harm, or by means of false representations as to the nature of the act.**
> **163. Attempt to commit unnatural offences**
> **Any person who attempts to commit any of the offences specified in section 162 is guilty of a felony and is liable to imprisonment for seven years.** [my emphasis].

[189] On the other hand, Section 165 deals specifically with **gross indecent practices** between males. It criminalises;

> **"<u>Any male</u> person who, whether in public or private, commits any act of gross indecency <u>with another male person</u>, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years."** [my emphasis].

[190] Both Sections 162 and 165 criminalise male homosexual relationships. It is a matter of interpretation that the use of the words, "any person who has carnal knowledge **of any person" "against the order of nature"** in Section 162 may be construed to include female same-sex relationships as "unnatural". In contrast Section 377 of the Indian Penal Code, the equivalent of our Section 162, makes explicit provision that the unnatural offence is committed by having "carnal intercourse against the order of nature with any man, **woman** or animal". "Any person" in our Code, by parity of reasoning would similarly extend to woman.

[191] In view of the prevailing penal regime of law that criminalizes same-sex relationships in Kenya, I hold the view that the appellant's decision met the constitutional and legal threshold of reasonableness, rationality, proportionality and procedural fairness. In the face of Sections 162, 163 and 165 of the Penal Code, it is unfathomable how the appellant would have been expected to proceed to reserve a name or register an association whose proposed name or whose expressed objects are in furtherance of activities that are contrary to or inconsistent with the law.

[192] Lindon Otieno, in his affidavit to which reference has been made, acknowledged that indeed the 1st respondent had the right and freedom to register the proposed organization; that gays and lesbians are human beings and are entitled to all other rights enjoyed by every other human being, save for

those rights that are limited under Article 24 of the Constitution and those activities or objects that are repugnant and contrary to the existing laws; that though the appellant was committed and willing to observe and respect the 1st respondent's freedom of association under Article 36 of the Constitution, the latter was not ready to review the name and objectives of the proposed organization so as not to offend the provisions of the law.

[193] I have earlier on in this opinion observed the uniqueness of a name. In this case the only obstacle between the proposed organization and its registration were the two words, gay and lesbian. The 1st respondent was resolute that the words were the identifying mark of the proposed organization and could not be abandoned.

[194] In the discharge of its statutory functions, was the appellant bound to accept willy-nilly the name(s) suggested by the 1st respondent? No. It is not a robot. The Constitution and the law extend to the appellant some latitude of discretion in considering an application for reservation or registration of a name. The same law binds the appellant to reject any application for reservation of a name of any proposed organization for specific reasons.

[195] To avoid stigmatisation, discrimination, State sponsored violence or being caught up by the law, applicants in some jurisdictions have been able to achieve the same objectives to serve LGBTIQ persons and to register organizations in harsher legal environments by pursuing registration using more neutral names and language about their aims and objectives. Some of the groups have simply adopted a rainbow name, an LGBTIQ pride flag, without the mention of any of the words in the acronym LGBTIQ that may be perceived to be offensive. In the United Kingdom, for instance, the African Rainbow Family (ARF), was registered as a grassroots charity that support lesbian, gay, bisexual, transgender, queer and intersex (LGBTIQ) people of African heritage and the wider Black, Asian, Minority Ethnic groups.

[196] But a more pragmatic approach towards opening up the door for registration of the group would be to introduce legislative reforms, including

amendment to the Penal Code and repeal of Sections 162, 163 and 165 to decriminalise acts contemplated by these provisions based on the will and desire of the people of Kenya. This is the course adopted by many countries around the world, as I have been able to establish.

[197] In the United Kingdom, the Buggery Act of 1533 has been over the years replaced by the Marriage (Same-Sex Couples) Act, 2013, the Scottish Marriage and Civil Partnership (Scotland) Act, 2014 and the Northern Irish Northern Ireland (Executive Formation etc) Act, 2019.

[198] Closer home, South Africa's post-apartheid Constitution outlaws discrimination based on sexual orientation. South Africa has also legalised same-sex marriage. Section 9(3) of the South African Constitution, unlike our Article 27 makes express provision against unfair discrimination on the ground of "sexual orientation" in addition to discrimination on the ground of "sex". The Civil Union Act of South Africa came into force on 30th November 2006, to provide for both same-sex and opposite-sex couples to contract unions, and allows couples to choose to call their union either a marriage or a civil partnership.

[199] Until 1969, same-sex sexual activities between consenting adults were considered crimes punishable by imprisonment in Canada. That year, the Canadian Parliament passed an omnibus law decriminalising private sexual acts between two consenting adults.

[200] In addition, in 1996, the Canadian Human Rights Act was amended to specifically include sexual orientation as one of the prohibited grounds of discrimination. The effect of this was to declare that gay, lesbian and bisexuals were entitled to equal opportunities with other individuals in the society.

[201] In Australia the Human Rights (Sexual Conduct) Act 1994 decriminalised homosexual activity. Several years later same-sex marriage was legalized in 2017 by the passage of the Marriage Amendment (Definition and Religious Freedoms) Act.

[202] Based on these developments in those jurisdictions, it is fair to say that social attitudes and concerns are constantly evolving. Lawmakers, as representatives of the people create, modify, and repeal laws to achieve particular behavioural outcomes, often in an effort to respond to perceived changes in the society. But it is emphasized that the decision to repeal or amend these laws to accommodate LGBTIQ community in Kenya is one that can only be made by the people from whom all sovereign power flows or by their elected representatives and again only after the involvement of the people.

[203] The third front or strategy to address discrimination against LGBTIQ persons has been through judicial pronouncements. Courts in other jurisdictions have, through their decisions decriminalised discriminatory laws against LGBTIQ people. Before 2018 in India the courts were categorical that so long as Section 377 of the Indian Penal Code was not repealed, any carnal intercourse against the order of nature with any man, woman or animal, would be a criminal offence punishable with imprisonment for life. An attempt to strike down Section 377 as being discriminatory against LGBTIQ persons was brought through a petition, ***Suresh Kumar Koushal v. Naz Foundation,*** Civil Appeal No. 10972 of 2013. In the first place, the High Court accepted the arguments that consensual same-sex sexual relations done in private between adults should be decriminalised, holding that the existing criminalisation was in contravention of the constitutional rights to life and personal liberty, equality before the law and against non-discrimination. Two Justices of the Supreme Court did not agree and in overturning the judgment found that Section 377 IPC did not violate the Constitution.

[204] Five years after this decision, in 2018 the Supreme Court of India had a change of heart and in unprecedented landmark decision, it decriminalised all consensual sex among adults in the case of ***Navtej Singh Johar v. Union of India,*** AIR 2018 SC 4321**.** It held that Section 377 was violative of the Constitution. It, however, clarified that Section 377 would continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality. To that extent it can be said that the judgment did

not have the effect of repealing the entire Section 377. Its significance is that, for the first time in India that judgment decriminalised consensual sex among adults.

[205] In 2019 the High Court in Botswana, in the case of ***Letsweletse Motshidiemang v. Attorney General***, High Court Civil Case No. MAHGB-000591- 16 declared Sections 164(a), 164(c) and 165 of the Penal Code to be unconstitutional and proclaimed that **"sodomy laws therefore deserve archival mummification, or better still, a museum peg, shelf or cabinet for archival display."** This decision was upheld by the Court of Appeal and with that, both male and female same-sex relationships were decriminalised overturning the 2003 decision in ***Kanane v. The State***, [2003] 2 BLR 67 (CA) where it had been decided that the time had not come to decriminalise homosexual practices even between consenting adult males in private.

[206] I have set out these developments in those foreign countries only to illustrate the fact that through judicial pronouncements LGBTIQ persons can receive some reprieve.

[207] I have endeavoured to steer clear, just like the two courts below, of the constitutionality of Sections 162, 163 and 165 of the Penal Code. All the five Justices of Appeal in their separate judgments drew attention to the fact that that question was pending determination in the High Court at the time they rendered their judgments. Exactly two months later on 24th May, 2019 that decision was indeed delivered. In it, three Judges of the High Court (*Aburili, Mwita & Mativo*, JJ. - *as he then was*) unanimously declared that:

> "**406. In conclusion, therefore, having considered the arguments on both sides, the precedents cited, the Constitution and the law, we are not satisfied that the Petitioners' attack on the constitutional validity of sections 162 and 165 of the Penal Code is sustainable. We find that the impugned sections are not unconstitutional. Accordingly, the consolidated Petitions have**

no merit. We hereby decline the reliefs sought and dismiss the consolidated Petitions". [my emphasis]

[208] I am aware that this decision has been challenged in the Court of Appeal in Civil Appeal No. 536 of 2019, from where the most likely terminus is this Court. Therefore, the less said about it, the safer.

[209] Therefore, in answer to the question posed under this ground, I am satisfied that the limitations imposed by Section 14 of the NGO Act, and the NGO Regulations on the registration of an association meets the requirements under Articles 24 and 36 of the Constitution. By those provisions, the appellant is permitted to refuse the reservation or registration of an association upon being satisfied of certain strictures set out in law and which, in my view, are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[210] It is important as I conclude this ground to restate that, in considering whether an administrative decision is constitutional or lawful where Parliament has conferred the discretion on a particular decision maker, the court will respect the fact that the discretion remains the decision maker's; and it is not for the court to itself exercise that discretion in the decision maker's stead. The practical effect of this approach is that, where the court finds that the decision was unconstitutional or unlawful on any of the grounds explained earlier, the court can only quash it or declare it a nullity.

[211] It is for all the reasons I have given, that I come to the conclusion that the appellant did not violate the respondents' right of association. The appellant, as public body, cognizant of the law, aware of its mandate and guided by relevant considerations, properly and judiciously exercised its discretion.

(iii) Whether the decision of the appellant violated Article 27(4) of the Constitution for being discriminatory against the 1st respondent

[212] The next and final substantive issue for determination is whether, by rejecting the proposed names, the appellant discriminated against the 1st respondent and LGBTIQ persons collectively based on their **sexual orientation** contrary to Article 27(4) of the Constitution.

> **Article 27 (4) states that:**
> **"The State shall not discriminate directly or indirectly against <u>any person on any ground</u>, including race, <u>sex,</u> pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."** [my emphasis]

[213] I have emphasised the words **any person**, **any ground** and **sex**. Before the High Court the 1st respondent's argument was hinged on these words; that all persons living within the Republic of Kenya, despite their **sexual orientation** are protected against all forms of discrimination; and that the appellant contravened Article 27 in failing to accord just and fair treatment to gay and lesbian persons seeking registration of an association of their choice. Although the Article specifically makes reference to **sex**, the respondents argued that the list in clause 4 of Article 27 is not closed and must be taken, from the use of the word **"including"** to encompass **sexual orientation**. Both the High Court and the Court of Appeal were in agreement that the prohibition extends to discrimination based on **sexual orientation**.

[214] It is correct, with respect to state, like the respondents asserted before us and confirmed by the two courts, that the words **"on any ground, including …"** mean that the grounds on this list are merely illustrative rather than exhaustive and could include several other protected characteristics not listed. The appellant too concedes that that is the correct interpretation. Indeed, Article 259 (4) (b) of the Constitution declares that:

> **"4. In this Constitution, unless the context otherwise requires;**
> **b. <u>the word "includes" means "includes, but is not limited to."</u>**
> [my emphasis].

[215] Though the language of Article 27 is plain, we bear in mind the basis rule of constitutional interpretation, that the Constitution must be given a holistic interpretation. Holistic interpretation has been described as;

> **"...interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in the light of its history, of the issues in dispute, and of the prevailing circumstances."**

See ***In the Matter of the Kenya National Commission on Human Rights,*** Advisory Opinion Reference No. 1 of 2012; [2014] eKLR.

[216] Earlier in this opinion I made reference to Yogyakarta Principles and Prof. Edwin Cameron's definition of sexual orientation in the treatise, ***The Constitution: A Test Case for Human Rights,*** (supra). From the definitions proffered, there is clear distinction between '**sex**' and **'sexual orientation'**. To restate; sexual orientation is understood to refer to each person's capacity for emotional affectional and sexual attraction to, and intimate and sexual relations with individuals of a different gender or the same gender or more than one gender.

[217] The word sex, on the other hand is used three times in the Constitution; in the above Article, in Article 42(2) on the right to marry a person of the opposite sex and Article 53(1)(f)(ii) on the detention in custody of a child, in conditions that take account of the child's sex. In the context of these Articles, sex is used in reference to a person's sexual anatomy based on one's sex chromosomes- (male/female). The discrimination that is expressly prohibited by Article 27 is on account of "sex" and not "sexual orientation".

[218] Did the framers intend sexual orientation to be read into the list of seventeen grounds against discrimination in Article 27(4)? I find nothing whatsoever in the Article or on my reading of the Constitution as a whole which suggests that the framers were addressing their minds in any way whatever to

problems of discrimination on grounds of sexual orientation. Had that been the intention, nothing could have been easier than to state so as has been done in some of the constitutions, statutes and international instruments I have alluded to. The intention was to prohibit discrimination based on consideration whether a person is a male or female.

[219] The Constitution has to be read in the social context in which it was adopted. It is recorded part of our history that attempts at constitution-making and the process that finally realized it was consultative. Throughout this course, a lot of information and data were gathered and documented. The information in whatever form constitutes extra textual source which when read in historical context of the country provides essential background that aids in the interpretation of the Constitution. The Committee of Experts (CoE) assumed its mandate to embark on a constitutional review process building on the work of the Constitutional Review Commission of Kenya (CKRC). As a matter of fact, among the reference materials that the CoE reviewed was the CKRC Report. In the Final Report of the Constitution of Kenya Review Commission (2005) at page 381 the Technical Working Committee on Citizenship and Bill of Rights adopted this recommendation regarding the character of marriage:

> **"(c) The Character of Marriage**
> **The Draft Constitution protects the right to marry and found a family. Some delegates feared that this provision may permit homosexual marriages since the draft Constitution did not specify that marriage can only take place between persons of the opposite sex. The Group endorsed the recommendation of the Technical Working Group 'B' on Citizenship and Bill of Rights that the draft should clarify the definition of marriage to prohibit same sex marriages. The consensus initiative accordingly recommended that marriage could take place only between persons of opposite sex."**

[220] The principle of the universality of human rights has not been in contestation, but the inclusion of sexual orientation in the set of human rights has. In other words, human rights are inherent and held simply because of being a human. All human beings, including LGBTIQ persons, are entitled to the full enjoyment of all the rights under Chapter Four of the Constitution, not by reason of their sexual preferences as LGBTIQ but as human beings. Just as the rights enjoyed by heterosexuals are not based on their sexual orientation but by virtue of common humanity.

[221] In jurisdictions where sexual orientation was intended to be part of the right against discrimination, it has been explicitly so provided either in the constitutions of those nations or in the statutes. The South African Constitution from which so much was borrowed in the making of our Constitution, sexual orientation is expressly provided for, along with "sex" under the freedom from discrimination. Section 9(3) of that Constitution reads;

> **[222] "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."** [my emphasis]

[223] In Angola, a new Penal Code, which replaced their 1886 Code, came into effect in January 2021 and has decriminalised same-sex conduct. It has a non-discrimination provision that includes 'sexual orientation' as a protected ground.

[224] In 2015, Mozambique which is regarded as one of the most tolerant countries in Africa towards gays and lesbians repealed colonial-era clause from its Penal Code which outlawed same-sex relationships as "vices against nature". Mozambique Labour Law, **(law nr. 23/2007)** provides for "non-discrimination on grounds of sexual orientation, race or HIV/AIDS status", in addition to granting to "all employees, whether nationals or foreigners, without

distinction based on sex, sexual orientation, the right to receive a wage and to enjoy equal benefits for equal work".

[225] What emerges from this analysis is that there is a clear distinction between sex and sexual orientation. I believe that in Article 27(4) the phrase sexual orientation was deliberately omitted by the framers because they only intended to guarantee the right against discrimination on the ground of a female or male gender.

[226] To augment this conclusion, Section 5 of the Employment Act, prohibits discrimination in employment based on a limited list of grounds including sex but like the Constitution, does not include sexual orientation in that list.

[227] On the international and regional plane, the main human rights and fundamental freedoms instruments, the (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and African Charter on the Human and People's Rights (ACHPR) all of which have been ratified by Kenya, do not make reference to sexual orientation.

[228] Article 2 of UDHR reads as follows;

> **"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".** [my emphasis]

[229] There are similar provisions in the ICCPR as well as in the ACHPR. In all the three instruments, the word sex (highlighted) is used to connote male or female, and not sexual orientation. The instruments also recognize that there may be limitations on the exercise of some of those rights as may be prescribed by law in a democratic society and in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Importantly, they emphasize that the enjoyment of rights must be within and in conformity with the existing law.

[230] From my own research, only a few countries have included discrimination on the grounds of sexual orientation in their Constitution. Those that have, including México, Portugal, Sweden, United Kingdom, Fiji and New Zealand, have done so expressly. See Raub, Amy, Adèle Cassola, Isabel Latz, and Jody Heymann**.** ***"Protections of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions."*** Yale Journal of Law & Feminism 18.149 (2016): 149-69.

[231] For the very same reasons I have given on issue (ii) above, and in view of the clear language of Article 27 (4) of the Constitution, I come to the conclusion on issue (iii) that the appellant's rejection of the names proposed by the 1st respondent did not amount to discrimination on the basis of sex or sexual orientation.

[232] In the result and for the reasons stated, I find merit in this appeal and would have allowed it, and set aside the decision of the Court of Appeal. But as these views are in the minority, the decision of the Court shall be that of the majority.

E. COURT'S DETERMINATION AND ORDERS

[233] Consequently, we find that the appeal is not merited. We make the following orders:

1. The appeal dated 6th May 2019 and lodged on the same date is hereby dismissed.

2. The 1st respondent shall have the costs thereof.

[234] It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **24th** Day of **February** 2023**.**

.....

P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT

OF THE SUPREME COURT

.....	.....
M.K. IBRAHIM	**S.C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
NJOKI NDUNGU	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA