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## BRIEFING PAPER

### KENYA

**Title:** Updates on Kenyan anti-LGBTQ+ legislation and impact on LGBTQ+ health and rights

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**ISSUE:** In Kenya, conservative members of Parliament moved to further criminalize homosexuality in early 2023. In April, Homa Bay Town MP Peter Kaluma, a member of Kenya's opposition Orange Democratic Movement, introduced the Family Protection Act, 2023 to Kenya's National Assembly. The proposed legislation is closely modeled on the extreme Anti-Homosexuality Act in neighboring Uganda.

Kaluma introduced the proposed bill shortly after attending a high-level African Interparliamentary Forum on Family Values and Sovereignty, hosted at the State House in Entebbe, Uganda, attended by delegates from 22 countries. It was co-sponsored by the US evangelical right-wing group, Family Watch International, a leader in the US anti-LGBTQ+ movement. The US group is classified as an anti-LGBTQ+ hate group by the US watchdog Southern Poverty Law Center. FWI has worked closely with Ugandan supporters of the AHA to provide funding, training, and other resources to advance an anti-LGBTQ+ agenda there, as well as in Kenya, Ghana, and other African countries, the SPLC documented.<sup>i</sup>

FWI was a silent co-sponsor of the Entebbe meeting, while its Mormon co-founders, Sharon Slater and her husband, Greg Slater, were featured speakers who adopted cover names to disguise their presence and role, according to a 2023 investigative report by Ipas and Empower.<sup>ii</sup> While FWI publicly maintains that it does not lobby against homosexuality and just promotes family values, SPLC and other watchdog groups have documented considerable evidence of their anti-LGBTQ+ activities and courting of religious and political leaders in East Africa. One week after passage of the first draft of the AHA in Uganda, the Slaters were photographed taking a victory lap of sorts, posing on the steps of the State House in Entebbe with Uganda's First Lady, Janet Museveni, a born-again evangelical Christian, and with FWI's Director of International Activities, Annie Franklin.

At the Entebbe meeting, Kenya's MP Kaluma also rubbed shoulders with FWI, as did officials from Ethiopia, Nigeria, Tanzania, Zambia, and South Sudan – all countries where new anti-LGBTQ+ legislation is being mulled.<sup>iii</sup> After the meeting, Uganda's President Museveni retweeted antigay quotes by Kenya's MP Kaluma, who noted that Kenya, Ghana and Malawi were drafting laws similar to the AHA.<sup>iv</sup>

Kaluma said he was compelled to seek harsher punishments for homosexuality in the wake of a February Kenyan Supreme Court ruling that granted a legal victory to the National Gay and Lesbian Human Rights Commission (NGLHRC) in Kenya. In a closely watched case, the Supreme Court upheld earlier verdicts by lower courts stating that the government could not legally refuse to register the NGLHRC as a civil society organization. As LGBTQ+ groups welcomed the ruling, conservative groups quickly protested and



demanded the ruling be reversed. The ruling has served as a rallying cry to crack down on gay rights.

For his part, Kenya's President William Ruto declared that, while he respected the Supreme Court's ruling, "it doesn't mean we have to agree with it."<sup>v</sup>

In a September 13<sup>th</sup> update, the antigay lobby scored a loss, when Kenya's Supreme Court dismissed their petition to overturn the February ruling. LGBTQ+ and civil society groups applauded the court's decision. But the fight isn't over: Kenya's Attorney General Justin Muturi, vowed to challenge the ruling on behalf of the government.<sup>vi</sup>

**Background.** Kenya punishes sexual acts 'against the order of nature' under Section 162 of the Kenyan Penal Code, which is rooted in 1930's British colonial law, mandating sodomy penalties up to 14 years in prison for consensual same-sex acts, and up to 21 years for same-sex acts with "aggravating" circumstances.<sup>ix</sup> Sex acts between women are mentioned under the gender-neutral term "person" and punished equally as 'unnatural offenses' under Section 162. Section 163 calls for a seven-year sentence for an attempt to commit an unnatural offense, while sexual acts of "gross indecency between males" -- Section 165 -- are deemed a felony punishable by five years in prison.

The conservative MPs hope to pass a law specifically targeting homosexuality like the AHA, regarded as a legal first of its kind because it outlaws identifying as LGBTQ+, according Human Rights Watch.<sup>x</sup> MP Kaluma's bill aims to consolidate Articles 162 and 165, along with Articles 45 (1) and (2) of Kenya's Constitution into a single, sweeping bill. The proposed legislation is under review by a parliamentary Committee on Social Protection, and as of September, 'version five' was being discussed.<sup>xi</sup> Once amendments are made, the bill can be forwarded to government printers to be officially published, a step called gazettelement, becoming an official bill. It must be introduced to the floor of the house via a motion within a week of gazettelement, then moves to a first meeting.

With public debate raging, the proposed bill has been softened of its most extreme punishments -- death -- but the penalties for same-sex acts remain extremely harsh.<sup>xii</sup> The initial version called for the death penalty for "aggravated homosexuality," defined then as "engaging in homosexual acts with a minor or disabled person and transmitting a terminal disease through sexual means;" now the penalty is a life sentence. The punishment for same-sex acts is not less than ten years, while forced same-sex acts are punished by twenty years in prison.<sup>xiii</sup> "Gross indecency" acts call for a fine of 50,000 Kenyan shillings, or not less than three years in prison, or both.

**Expansive penalties** The proposed Kenyan bill initially sought to impose a complete ban of any activities "that promote homosexuality" and was so broad in scope that, for example, it would be a crime to wear a rainbow pin or emblem associated with the modern LGBTQ+ human rights movement. "The bill will propose a total ban on what the West calls sex-reassignment prescriptions and procedures, and prohibit all activities that promote homosexuality, in terms of... gay parades, drag shows, wearing the colours, the flags, the emblems of the LGBTQ group," Mr. Kaluma told reporters



The initial draft of the bill also called for psychotherapy and rehabilitation of offenders – legalese for forced conversion therapy<sup>xvii</sup> and a ban on Comprehensive Sexuality Education. (CSE). Both are cornerstones of FWI’s global family values agenda, too. So far, these bans remain in version five.

Kenya does not recognize same-sex relationships and same-sex marriage is currently banned under the Constitution. Nor does it provide any explicit legal protections against discrimination on the basis of sexual orientation and gender identity, while adoption by same-sex couples is prohibited. Version five goes further, proposing at least a ten-year sentence for anyone who knowingly helping same-sex couples marry or engage in legal unions. Nor does it recognize the validity of foreign same-sex marriages.

The bill’s authors especially target transgender identity. The proposed bill outlaws seeking sex-reassignment surgery, and imposes stiff penalties on providers, doctors and others who would offer such services or help with gender transition. The bill also targets transgender athletes, banning anyone born male from competing in girl’s sports. The bill even goes after pronouns, pushing for “a term not exceeding one year or a fine not exceeding one hundred thousand shillings, or both.”

“Every person shall be referred to by the pronoun of his or her sex,” the bill language reads. There is no ‘they/them’ -- the pronoun for transgender or non-binary favored by the modern LGBTQ+ movement.<sup>xviii</sup> The bill also calls for stiff penalties for the creation, promotion, or distribution of any number of things viewed as supporting LGBTQ+ identity -- materials, product, objects, rainbow flags and pins, etcetera – acts that are punishable by a fine of at least five million shillings, and ten years in prison, or both.

Finally, the bill criminalizes others across Kenyan civil society -- from landlords and business owners, to service providers -- who might offer housing or a room or office or meeting space to LGBTQ+ individuals. It also outlaws the right of assembly to LGBTQ+ individuals and groups. That’s why the Supreme Court’s new ruling on the NGLHRC registration case is considered a critical victory for LGBTQ+ Kenyans.<sup>xix</sup>

In July, some media reports suggested that Kenya was on the verge of tabling the proposed family values bill,<sup>xx</sup> but the debate rages on. More revisions are anticipated before a final bill is introduced – unless it gets stopped first. That’s what LGBTQ+ and human rights groups are demanding -- before more violence follows.

**Refugees** The proposed bill’s serious impact on LGBTQ+ refugees and asylum seekers is also alarming.<sup>xxi</sup> The initial draft of the bill called for expulsion of refugees and asylum seekers who identify as LGBTQ+ -- a marked change from current policy. That penalty remains in the latest draft, too. Kenya is presently hailed as the only country in East Africa that doesn’t ask asylum seekers to reveal their sexual orientation. That said, homophobic violence is well-documented in the country’s refugee camps.<sup>xxii</sup> Kenya hosts over a half a million refugees in just two sprawling refugee camps, Kakuma and Dadaab, and more camps dot its territory. Now foreign LGBTQ+ refugees fear fresh persecution and expulsion if the proposed bill becomes law.<sup>xxiii</sup>



**Civil Society Response.** Opposition to the Family Protection Act has been swift and growing in, and outside, Kenya. A growing chorus of civil rights and lawyer’s groups say that the draconian bill runs counter to Kenyan democratic norms. It violates national and international laws, they argue, citing instances “where the proposed law’s provisions infringe on the right to privacy, human dignity, freedom of conscience, religion, belief, and opinion, freedom of expression and the press and freedom of association,” according to some legal analysts.<sup>xxv</sup>

Kenyan human rights groups are actively mobilizing progressives across and outside the country, and pushing Kenyan civil society leaders and members of Parliament to speak out against the proposed bill. They demand that President Ruto firmly reject it, and warn about its negative impacts on Kenyan society, too. The Kenyan Families Coalition, a human rights organization, has petitioned Parliament to reject the proposed bill, while the NGLHCR warned of its dangerous harm to LGBTQ+ Kenyans, citing a rise in 2023 attacks against the community.<sup>xxvi</sup>

**RISE IN VIOLENCE** Over the years, the human rights picture for LGBTQ+ Kenyans has been marked by ongoing persecution, a failure by police and authorities to investigate abuse cases, and limited access to justice, contend human rights groups.<sup>xxvii</sup> Weeks before Kaluma’s parliamentary move, Kenyan headlines reported the grisly murder of fashion designer and model Edwin Chiloba, 25, whose body was found stuffed inside a box by the side of the road, a horrifying case that prompted a national outcry, and demands for an investigation as a possible hate crime.

“It is truly worrisome that we continue to witness escalation in violence targeting LGBTQ+ Kenyans,” the NGLHRC stated about Chiloba’s murder. “Every day, the human rights of LGBTQ+ persons are being violated with little consequence for perpetrators. The commission urged the police “to conduct swift investigations and ensure the killers are apprehended and prosecuted.”<sup>xxviii</sup>

Since February 2023, reported cases of violence against LGBTQ+ persons have risen. So has incitement to violence, especially by political and religious leaders.<sup>xxix</sup> In early 2023, the NGLHRC documented a spike in calls for help it received – cases of abuse, threats, and discrimination -- from 78 in January, when Chiloba’s death shocked the nation, to 117 in February, to 367 in March –a major increase as the family values bill drew headlines.<sup>xxx</sup> Other rights groups report fresh threats, arrests, violence, evictions from homes and public facilities, and cases of vigilante violence. Not all are against Kenyans, either. Many Ugandans have fled to neighboring countries in the wake of the AHA’s passage there. In Kenya, they now find new insecurity.<sup>xxxi</sup>

**REFUGEES** In Canada, Rainbow Railroad has documented a growing demand for internal protection, relocation, and support for asylum petitions by LGBTQ+ persons in Kenya. From January 2023 to September 6, 2023, the agency received 388 requests for help, 145 from Kenyan LGBTQ+ nationals and even more --184 – from Ugandan LGBTQ+ nationals in the country.<sup>xxxii</sup> The situation in refugee centers also remains extremely dangerous, as documented in a joint report released by the NGLHCR and Amnesty International in July



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2023. They conducted research at the Kakuma refugee camp from 2018 to February 2023 and found that LGBTQ+ refugees and asylum seekers in the camp face “intersectional discrimination and violence based on their identity as asylum seekers or refugees and their sexual orientation, gender identity and/or expression, and sex characteristics (SOGIESC)<sup>xxxiii</sup> The joint report documents myriad examples of homophobic treatment of LGBTQ+ asylum seekers by officials and “systematic and pervasive inaction by police in Kakuma refugee camp to effectively, promptly, independently and thoroughly investigate allegations of hate crimes reported by LGBTI asylum seekers and refugees.”<sup>xxxiv</sup>

**HEALTH DIMENSIONS** Kenyan health advocates also warn about the potential backslide in health gains and the HIV fight if the proposed bill is allowed to become law, as anti-LGBTQ+ groups deliberately link HIV service provision with the promotion of homosexuality. In next-door Uganda, the AHA’s passage has fueled a rapid decline in community health and HIV service provision in some areas. Post-AHA field surveys document how community health providers and clinics providing HIV and other services with LGBTQ+ clients have shut down, afraid of violating the new law. LGBTQ+ clients are staying away from health centers, afraid of violence or arrest, limiting their access to HIV services. In other cases, LGBTQ+ clients report reported abuses by homophobic health providers.<sup>xxxv</sup>

As in Uganda, Kenyan conservatives are pushing to oppose HIV programs, including US President’s Emergency Plan for AIDS Relief (PEPFAR). In June 2023, ten Kenyan MPs and religious leaders, including MP Kaluma, wrote to several US Congressional officials to caution against reauthorization of PEPFAR funding, arguing that it supported homosexuality and abortion. Kenya is slated to receive over \$341 million in PEPFAR funding for 2023-2024. The current funding cycle ends on September 30<sup>th</sup>.

In a counter-move, 48 Kenyan groups sent an urgent petition to save PEPFAR to the National Assembly on August 31<sup>st</sup>. Failure to reauthorize PEPFAR funding, they pointed out, “...would jeopardize the lives of over 55 million Kenyans who benefit from HIV programs supported by PEPFAR as more than 1.6 million people in the country are living with HIV.<sup>xxxvi</sup> Kenya is currently on the verge of achieving an ambitious UNAIDS 95-95-95 – 95% of people with HIV diagnosed, 95% of them on antiretroviral therapy, and 95% of them virally suppressed –an impressive achievement. They worry the family values bill could seriously reverse these hard-won national health gains.<sup>xxxvii</sup>

PEPFAR backers excoriated the anti-LGBTQ lobby for presenting disinformation about PEPFAR’s mandate to US officials, and accused them of putting their agenda before the lives and health of Kenyans living with HIV who depend on PEPFAR-funded services. A number of leading community grassroots HIV groups signed the petition.<sup>xxxviii</sup>

**GLOBAL RESPONSE** Kenya’s threat to pass an extreme anti-LGBTQ+ bill has also met with growing opposition from progressives around the world. In July, over fifty US civil society groups wrote a letter to US trade officials that called for a halt to bilateral trade talks with Kenya until President Ruto committed to vetoing the proposed family values bill.<sup>xxxix</sup> “We urge you to stand up for the rights of LGBTQI+ people and to cease STIP negotiations until

the Family Protection Bill is defeated,” they wrote, referring to the United States-Kenya Strategic Trade and Investment Partnership (STIP).

At the September UN General Assembly meeting, US progressive groups joined with Kenyan LGBTQ+ activists and civil society groups to deliver a message of global solidarity and to demand greater attention, leadership and action by the UN, Member States, other governments, donors, and civil groups to support Kenyan LGBTQ+ human rights.

<sup>i</sup> www.splcenter.org

<sup>ii</sup> Ipas and Empower, “Pulling Back The Cover: The Roots, Relationships, and Rise of Family Watch International,” Ipas. 2023.

<sup>iii</sup> “Kenya could follow Uganda as East African nations wage war on LGBT rights,” *Reuters*, June 25, 2023.

<sup>iv</sup> McCool, Alice, “Ugandan president calls on Africa to ‘save the world from homosexuality,’” *The Guardian*, April 3, 2023.

<sup>v</sup> Mersie, Ayenat, “For LGBTQ Kenyans, court win prompts backlash as threats escalate,” *Reuters*, April 20, 2023.

<sup>vi</sup> Kisika, Sam, “Kenyan Supreme Court dismisses challenge to ruling that allowed LGBTQ group to register,” *Washington Blade*, September 12, 2023.

<sup>ix</sup> The Kenyan Penal Code of 1930, revised in 2006.

<sup>x</sup> “Why are Kenya and Uganda cracking down on LGBTQ rights?,” *Al Jazeera*, March 23, 2023.

<sup>xi</sup> Author correspondence with Outright International.

<sup>xii</sup> Mwanawanjuguna, “MP Kaluma proposes life sentence for homosexuals,” *24/7mirror.com*. Also: *ntvkenya.co.ke*

<sup>xiii</sup> The Family Protection Bill, 2023, Arrangement of Clauses.

<sup>xvii</sup> Add citation - HR

<sup>xviii</sup> Ibid.

<sup>xix</sup> Ibid 101

<sup>xx</sup> “Kenya on the verge of tabling anti-LGBTQ bill in parliament,” *africanews*, July 18, 2023.

<sup>xxi</sup> Kisika, Sam, “Kenyan anti-homosexuality bill would expel LGBTQ refugees,” *Washington Blade*, April 26, 2023.

<sup>xxii</sup> “KENYA: “JUSTICE LIKE ANY OTHER PERSON” HATE CRIMES AND DISCRIMINATION AGAINST LGBTI REFUGEES,” a joint report by Amnesty International and National Gay and Lesbian Rights Commission, May 19, 2023.

<sup>xxiii</sup> “KENYA: “JUSTICE LIKE ANY OTHER PERSON” HATE CRIMES AND DISCRIMINATION AGAINST LGBTI REFUGEES,” a joint report by Amnesty International and National Gay and Lesbian Rights Commission, May 19, 2023.

<sup>xxv</sup> Rahungi, Natasha, “Kenya dispatch: cacophony of voices supporting and opposing anti-LGBTQ bill reflects a struggle for identity,” *Jurist*, July 23, 2023.

<sup>xxvi</sup> Ibid.

<sup>xxvii</sup> Ibid. Note 12.

<sup>xxviii</sup> “Killing of LGBTQ+ activist prompts outcry over anti-gay attacks in Kenya,” *Agence France-Presse*, January 6, 2020.

<sup>xxix</sup> [https://www.youtube.com/watch?v=8Q\\_U1IUOkRg](https://www.youtube.com/watch?v=8Q_U1IUOkRg); <https://www.reuters.com/video/watch/religious-leaders-condemn-kenyan-ruling-idRW195914092023RP1>; <https://www.youtube.com/watch?v=0jZPJLWUFPM>; <https://www.theafricareport.com/292490/kenya-lgbtq-ruling-angers-political-leaders-as-gays-lesbians-live-in-fear/>

<sup>xxx</sup> Ibid. Note 1.

<sup>xxxi</sup> Unpublished documentation based on field monitoring by Rainbow Railroad, shared with African Services, September 2023. See also: *Rainbow Railroad Update on the Situation in Uganda*, June 2023. [www.rainbowrailroad.org](http://www.rainbowrailroad.org)

<sup>xxxii</sup> Ibid.

<sup>xxxiii</sup> Ibid. Note 5.

<sup>xxxiv</sup> Ibid.

<sup>xxxv</sup> Human Rights Awareness and Promotion Forum. *One month after: Increasing cases of violence and violations based on real or presumed sexual orientation an gender identity in the first month of the enforcement of the Anti-Homosexuality Act, 2023*. Kampala, Uganda: Human Rights Awareness and Promotion Forum; July 14 2023;

Magak E. What’s happened to services for key populations in Uganda following the Anti-Homosexuality Act? *aidsmap*. <https://www.aidsmap.com/news/aug-2023/whats-happened-services-key-populations-uganda-following-anti-homosexuality-act>. Published August 1, 2023. Accessed September 13, 2023;

<sup>xxxvi</sup> Omollo, Kevine, “HIV FUNDING SCARE: Lobby up in arms as Kenyan MPs write to US Congress,” *Lake Region Bulletin*, August 31, 2023. <https://lakeregionbulletin.co.ke/2023/08/31/hiv-funding-scare-lobby-up-in-arms-as-kenyan-mps-write-to-us-congress/>

<sup>xxxvii</sup> “PEPFAR in Kenya Factsheet, 2023,” US Embassy in Kenya. 2023.

<sup>xxxviii</sup> Ibid.

<sup>xxxix</sup> Wilkins, Brett, “50+ Groups Urge Biden to Pause Trade Talks Until Kenyan President Vetoes Anti-LGBTQ Bill,” *Common Dreams*, July 17, 2023.