



Case Number:	Petition 150 of 2016
Date Delivered:	02 Jun 2016
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Isaac Lenaola
Citation:	Eric Gitari v Attorney General & another [2016] eKLR
Advocates:	Mr Kanyama for the Interested Party. Mr Obura for the Respondent. Mrs Ligunya for the Applicant.
Case Summary:	<p>A substantial question of law is one which is of general public importance and one that has not been finally settled by the Supreme Court</p> <p>Eric Gitari v Attorney General & another</p> <p>High Court at Nairobi</p> <p>Petition No 150 of 2016</p> <p>I Lenaola J</p> <p>June 2, 2016</p> <p>Reported by Halonyere Andrew & Nowamani Sandrah</p> <p><i>Constitutional law –interpretation of the Constitution- powers of the Chief Justice- powers of the Chief Justice with regard of the enpanelling of a bench- What amounted to substantial question of law that deserved the constitution of a</i></p>

*bench of Judges for hearing and determination-
constitution of Kenya, 2010, Articles 165*

Constitutional law - interpretation of the
Constitution - substantial question of law- matters
that constituted a substantial matter of
law- Whether the petition raised substantial
questions of law and matters of general public
importance as it sought invalidation and striking
out of certain provisions that formed part of the
Penal Code on the basis that those provisions
contravened constitutional principles and common
law- Constitution of Kenya 2010, Article 165(4)

Relevant provisions of the Law.

Article 2 (4) of the Constitution of Kenya, 2010

“Any law, including customary law that is
inconsistent with this Constitution is void to the
extent of the inconsistency, and any act or
omission in contravention of this Constitution is
invalid.”

Article 23 (3) (d) of the Constitution of Kenya,
2010

In any proceedings brought under Article 22, a
court may grant appropriate relief, including--

...a declaration of invalidity of any law that denies,
violates, infringes, or threatens a right or
fundamental freedom in the Bill of Rights and is
not justified under Article 24...”

Article 165 (4) of the Constitution

“Any matter certified by the court as raising a
substantial question of law under clause (3) (b) or
(d) shall be heard by an uneven number of judges,
being not less than three, assigned by the Chief
Justice.”

Penal Code, CAP 63

Section162

“Unnatural offences

Any person who—

(a)-has carnal knowledge of any person against the order of nature; or

-...

(c) Permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony and is liable to imprisonment for fourteen years...”

Section 165 of the Penal Code, CAP 63

“Indecent practices between males

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.”

Brief facts:

The petitioner brought a petition before the High Court seeking inter-alia a declaration of sections 162 and 165 of the Penal Code, CAP 63 (disputed provisions) to be unconstitutional, and accordingly void and invalid to the extent that they purport to criminalise private consensual sexual conduct between adult persons of the same sex, (relevant conduct), as mandated by Articles 2 (4), and 23 (3) (d) of the Constitution;

The Petitioner’s contention was that the petition sought to address matters that raised substantial questions of law and matters of general public importance as it sought invalidation and striking out of certain provisions that formed part of the Penal Code on the basis that those provisions contravened constitutional principles and common law.

The Petitioner submitted that the petition also sought an interpretation whether the existence of the impugned provisions without exclusive interpretation directly violated the rights of the Petitioner and other members of the public who form part of the Lesbian, Gay, Bi-sexual, Transgender, Intersex and Queer (LGBTIQ) community. It was further submitted that the issues raised in the Petition, included the nature and extent of the protection offered by constitutionally protected rights and freedoms; and the extent to which State action and legislation could override those rights and freedoms on the basis of generalized conceptions of public morality and religion, constituted substantive questions of law which required the empanelment of a bench in terms of Article 165 (4) to determine the matter.

The respondent on its part supported the application by submitting that Petition indeed raised substantial questions of law as contemplated under Articles 165 (4), and 165 (3) (d) of the Constitution and therefore justified the empanelling of a bench of an uneven number of Judges of the Court by the Chief Justice, to hear and determine the Petition.

Issue

- I. Whether the petition raised substantial questions of law and matters of general public importance as it sought invalidation and striking out of certain provisions that formed part of the Penal Code on the basis that those provisions contravened constitutional principles and common law.
- II. What are the principles applicable when making a declaration under article 165(4) include:
- III. What amounted to a substantial question of law that deserved the constitution of a bench of Judges for hearing and determination.

Held

1. Although the Kenyan Constitution did not make provision for definition of the term “substantial question of law”, case law had provided apt guidance in determining the same. A substantial question of law was one which was of general public importance or which directly and substantially affected the rights of the parties and which had not been finally settled by the Supreme Court, the Privy or the Federal Court or which was not free from difficulty or which called for discussion of alternative views. If the question was settled by the highest court or the general principles to be applied in determining the questions were well settled and there was a mere question of applying those principles or that the plea raised was palpably absurd, the question would not be substantial.
2. The principles applicable when making a declaration under article 165(4) included:
 - a. whether the matter was complex;
 - b. whether the matter raised a novel point;
 - c. whether the matter by itself required a substantial amount of time to be disposed of;
 - d. the effect of the prayers sought in the Petition and the level of public interest generated by the Petition.

Although such factors were generally accepted to be some of the indicators of the existence of a substantial question of law, the Courts had also indicated that none of those factors were singly decisive and that the list was not exhaustive.

3. There had to be something more to the substantial question than merely novelty or complexity of the issue before the court. It might present unique facts not plainly covered by the controlling precedents.
4. The question as to whether there existed a substantial question of law was left to the individual judge to determine depending on the circumstances and unique facts of each case.
5. The issues in the Petition included but were not limited to:

- a. The criminal or other status of private consensual sexual conduct between adult persons of the same sex in Kenya, especially in light of the spirit of the Constitution of Kenya, 2010.
- b. The constitutionality or otherwise of Sections 162 and 165 of the Penal Code, CAP 63 with regard to the above.
- c. Whether Sections 162 and 165 of the Penal Code, CAP 63 met the threshold for limitation of rights as articulated in Article 24 of the Constitution.
- d. The correct interpretation of Sections 162 and 165 of the Penal Code.
- e. In terms of the extent of the protections they offered in that context, the correct interpretation of: Article 27 on equality and freedom from discrimination; Article 28 on human dignity; Article 29 on freedom and security of the person; Article 31 on privacy; and Article 43 on economic and social rights, specifically the right to health.

the identified issues had not been determined by any other Court in Kenya as that unique aspect of LGBTIQ issues was not one that had been broached by the Courts in the past, especially in light of the previous constitutional dispensation and there were therefore no ready and available answers thereto; therefore those issues clearly raised substantial questions of the law.

6. Where the Petition raised or dealt with an issue of public importance then the balance tilted in favour of empanelment especially if it was also an issue, the determination whereof would affect the rights of both the individual parties as well as the public at large or it was an issue which was yet to be determined and settled by the court or a court superior in hierarchy.
7. The matter affected more than the Petitioner. The entire LGBTIQ community

would be affected by the decision and considering the discussion on the status of the members of the LGBTIQ community in the Republic, was no small exploit. Therefore, the matters raised in the Petition were weighty and had important consequences. In addition, the emotive nature of the issue was also bound impact on varied actions assumed subsequent to determination of the matter.

8. The Court as a curator of the Constitution had to interpret the Constitution in a manner that was enlightened and progressive. That only added to the delicate and complex nature of the issues involved. All those factors led to the conclusion that the issues surrounding interpretation and constitutionality of sections 162 and 165 of the Penal Code, raised substantial questions of law under article 165 (3) (d) of the Constitution.
9. The issues raised in the instant Petition were not only of public importance but were also weighty and required debate. They therefore deserved the constitution of a bench of Judges for hearing and determination.

Application allowed.

Matter referred to the Chief Justice for the Constitution of a bench in terms of article 165 (4) of the Constitution.

Cases

East Africa

1. *Del Monte Kenya Limited v County Government of Muranga & 2 others* Petition No 398 of 2015- (Affirmed)
2. *Kinyanjui, Harrison v Attorney General & another* Petition 74 of 2011- (Explained)
3. *Kiumo ,Amos & 2 others v Cabinet Secretary Ministry of Interior & Coordination of National Government & 3 others* Constitution Petition No 16 of 2013 – (Considered)

	<p>4. <i>Martin Nyaga & 30 others v Speaker County Assembly of Embu & 4 others & Amicus curaie- Embu Petition No 7 & 8 – (Followed)</i></p> <p>5. <i>Njuguna, Gilbert Mwangi v Attorney General Petition 267 OF 2009- (Explained)</i></p> <p>6. <i>Okoiti, Okiya Omtatah v Independent Electoral and Boundaries Commission & 3 others Petition No 465 of 2016- (Affirmed)</i></p> <p>7. <i>Rawal, Kalpana H v Judicial Service Commission & 3 others Petition No 386 of 2015 – (Approved)</i></p> <p>India</p> <p>1. <i>Chunilal v Mehta v Century Spinning and Manufacturing Co Ltd AIR 1962 SC 1314 – (Followed)</i></p> <p>Statutes</p> <p>East Africa</p> <p>1. Constitution of Kenya, 2010 articles 2 (4); 10; 23 (3) (d); 27; 28; 29; 31; 43; 50; 165 (3) (d) (4); 260 – (Interpreted)</p> <p>2. Penal Code (cap 63) 162, 165 - (Interpreted)</p> <p>Advocates</p> <p>1. Mr Anyona h/ b for Mr Kanyama for Interested Party</p> <p>2. Mr Obura for Respondent</p> <p>3. Mrs Ligunya for Applicant</p>
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Matter referred to the Chief Justice for the

	constitution of a bench of judges.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 150 OF 2016

BETWEEN

ERIC GITARI..... PETITIONER

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

KENYA CHRISTIAN PROFESSIONALS FORUM.....INTERESTED PARTY

RULING

Introduction

1. In his Petition dated 15th April 2016, the Petitioner seeks orders that:

a. This Honourable Court declare Sections 162 and 165 of the Penal Code, CAP 63 (disputed provisions) to be unconstitutional, and accordingly void and / or invalid to the extent that they purport to criminalise private consensual sexual conduct between adult persons of the same sex, (relevant conduct), as mandated by Articles 2 (4), and 23 (3) (d) of the Constitution; and or

b. this Honourable Court declare the disputed provisions to be in breach of the legal principle relating to certainty and / or unconstitutional on account of their vagueness and uncertainty, and accordingly strike out those provisions, as mandated by Article 23 (3) (d) of the Constitution; and / or

c. this Honourable Court declare as a matter of interpretation, that the disputed provisions do not apply to the relevant conduct.

2. In the above context, **Section 162** of the **Penal Code, CAP 63** provides:

“Unnatural offences

Any person who—

(a)-has carnal knowledge of any person against the order of nature; or

-...

(c) permits a male person to have carnal knowledge of him or her against the order of nature, is

guilty of a felony and is liable to imprisonment for fourteen years...

3. Section 165 of the Penal Code, CAP 63 provides:

“Indecent practices between males

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.”

4. Article 2 (4) of the Constitution provides:

“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”

5. Article 23 (3) (d) of the Constitution provides:

In any proceedings brought under Article 22, a court may grant appropriate relief, including--

...a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24...”

6. The Petition was premised on grounds that:

a. The disputed provisions, taken individually and / or cumulatively contravene various provisions of the Constitution, specifically: Article 27 on equality and freedom from discrimination; Article 28 on human dignity; Article 29 on freedom and security of the person; Article 31 on privacy; and Article 43 on economic and social rights, specifically the right to health.

b. In accordance with Article 2 of the Constitution, the Constitution is the supreme law of Kenya and the disputed provisions are void to the extent of their inconsistency with the substantive constitutional rights specified.

c. Alternatively, the disputed provisions contravene common law and constitutional principles (including Articles 10 and 50 of the Constitution) relating to legal certainty, on account of their vagueness and uncertainty and consequently cannot operate to create criminal penalties.

7. The sum of the Petitioner’s case is therefore that the disputed provisions ought to be struck down as they are void by virtue of their unconstitutionality or in the alternative that they should be interpreted to exclude the relevant conduct. It is also his case that the State does not act legitimately in seeking to regulate the most intimate and private sphere of conduct of all Kenyans, regardless of their sexual orientation.

8. The Application of 18th May 2016 prays that this Court directs that the main Petition be placed before the Honourable Chief Justice for the purposes of constituting a three Judge bench for hearing the Petition, on priority basis owing to its nature and the impending retirement of the Chief Justice in the month of June 2016. The prayer is based on **Article 165 (4)** of the **Constitution** which provides thus:

“Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”

The Petitioner’s Case

9. The Petitioner’s Case is contained in his Notice of Motion Application and Certificate of Urgency dated 18th May 2016. It is supported by the Affidavit of Eric Gitari, dated 17th May 2016 and the Petitioner’s written submissions, dated 24th May 2016.

10. The Petitioner’s contention is that the Petition, as filed, seeks to address matters that raise substantial questions of law and matters of general public importance as it seeks invalidation and striking out of certain provisions that form part of the **Penal Code, CAP 63** on the basis that these provisions contravene constitutional principles and common law.

11. The Petitioner submits that the Petition also seeks an interpretation whether the existence of the impugned provisions without exclusive interpretation directly violates the rights of the Petitioner and other members of the public who form part of the Lesbian, Gay, Bi-sexual, Transgender, Intersex and Queer (LGBTIQ) community.

12. In the above regard, he submits that the members of the said community are a marginalised group requiring special protection of the Court in accordance with **Article 260** of the **Constitution** as LGBTIQ persons in Kenya are perpetually exposed to risk of arrest, prosecution, denial of liberty, intimidation and mistreatment.

13. The Petitioner further submits that the impugned provisions are plainly discriminatory and illegal. That they are also too uncertain and vague to justify the limitation of inherent rights or fundamental freedoms through their existence and enforcement.

14. The Petitioner is of the further view that issues raised in the Petition, including the nature and extent of the protection offered by constitutionally protected rights and freedoms; and the extent to which State action and legislation can override those rights and freedoms on the basis of generalized conceptions of public morality and religion, constitute substantive questions of law which require the empanelment of a bench in terms of **Article 165 (4)** to determine.

15. Relying on the case of **Gilbert Mwangi Njuguna v Attorney General [2012] eKLR**, the Petitioner recognises the mandate of the Chief Justice in constituting a bench in accordance with **Article 165 (4)** of the **Constitution** and in this regard adds that it is of critical importance that this matter be determined in time to allow the Chief Justice to constitute a bench before he retires in June 2016 as the same may occasion unnecessary delay in dispensing with the matter. This concern is addressed by the ruling hereto.

The Respondent’s Case

16. The Respondent’s case supporting the Petitioner’s Application is found in the Respondent’s written submissions dated 25th May 2016.

17. The Respondent submits that the instant Petition indeed raises substantial questions of law as contemplated under **Articles 165 (4)**, and **165 (3) (d)** of the **Constitution** and therefore justifies the empanelling of a bench of an uneven number of Judges of the Court by the Chief Justice, to hear and

determine the Petition.

18. The Respondent relies on the cases of **Harrison Kinyanjui v Attorney General and Another [2012] eKLR** and the Indian case of **Chunilal V. Mehta v Century Spinning and Manufacturing Co. AIR 1962 SC 1314** to highlight the factors that the Court will consider in determining that a matter raises substantial questions of law, including legally settled principles to be applied in determining the issue.

Determination

19. The question before me is whether the Petitioner and the Respondents, as parties to this matter, have demonstrated that a substantial question of law arises from the Petition in order to allow me to make a referral to the Chief Justice in terms of **Article 165 (4)** of the Constitution.

20. Although our Constitution provides no definition for the term “substantial question of law”, case law has provided apt guidance in determining the same.

21. In the case of **Sir Chunilal V. Mehta and Sons Ltd v Century Spinning and Manufacturing Co Ltd 1962 SC 1314** the Supreme Court of India determined the term thus:

“A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial.”

22. Similarly, in **Martin Nyaga and Others v Speaker County Assembly of Embu and 4 Others and Amicus [2014] eKLR**, the Court articulated that the principles applicable when making a declaration under **Article 165(4)** include: whether the matter is complex; whether the matter raises a novel point; whether the matter by itself requires a substantial amount of time to be disposed of; the effect of the prayers sought in the Petition and the level of public interest generated by the Petition.

23. Regarding the above, this Court in **Okiya Omtatah Okiiti v Independent Electoral and Boundaries Commission & 3 others [2016] eKLR** held thus:

“...although factors such as the novelty of the question, complexity, public importance of the matter are generally accepted to be some of the indicators of the existence of a substantial question of law, the Courts have also indicated that none of these factors is singly decisive and that the list is not exhaustive.”

24. In addition, Lesiit J in **Amos Kiumo & 2 others v Cabinet Secretary Ministry of Interior & Coordination of National Government & 3 others [2014] eKLR** opined thus:

“...there must be something more to the substantial question than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents.”

25. I also note that although one may be in agreement with the above descriptions, as I am, they only serve to offer appropriate guidance. That is why Onguto J in **Del Monte Kenya Limited v County**

Government of Muranga & 2 others [2016] eKLR held thus:

*“the question as to whether there exists a substantial question of law, even if one adopted the definition in the **Chunilal Mehta case**, is left to the individual judge to determine depending on the circumstances and unique facts of each case.”*

26. I am in agreement with the above expositions of the law and have expressed similar sentiments in the case of **Okiya Omtatah Okoiti v Independent Electoral and Boundaries Commission & 3 Others [2016] eKLR**.

27. In the above context, on closer consideration of the Petition presented by the Petitioner, I resolve that the issues in the Petition include but are not limited to:

a. The criminal or other status of private consensual sexual conduct between adult persons of the same sex in Kenya, especially in light of the spirit of the **Constitution of Kenya, 2010**.

b. The constitutionality or otherwise of **Sections 162 and 165 of the Penal Code, CAP 63** with regard to the above.

c. Whether **Sections 162 and 165 of the Penal Code, CAP 63** meet the threshold for limitation of rights as articulated in **Article 24** of the **Constitution**.

d. The correct interpretation of **Sections 162 and 165 of the Penal Code, CAP 63**.

e. In terms of the extent of the protections they offer in this context, the correct interpretation of: **Article 27** on equality and freedom from discrimination; **Article 28** on human dignity; **Article 29** on freedom and security of the person; **Article 31** on privacy; and **Article 43** on economic and social rights, specifically the right to health.

28. These issues, as I have hereby articulated raise several questions. Although on the subject of delivery of public services I am aware that the Kenyan Government has reiterated that it does not support discrimination against the LGBTIQ community, same sex acts, by virtue of the national law such as the **Penal Code, CAP 63** are still considered as offences and as acts that are contrary to culture and the society's morals.

29. There is however huge debate in the public domain with civil society and others arguing that Kenya's laws that discriminate against LGBTIQ persons and their intimate activities based on the grounds of their sexual orientation are unconstitutional and therefore void. The basis of this has been the evolution of thinking around human rights, so that human rights are now considered to include LGBTIQ rights and that human rights cannot be implemented selectively. But others seem to reason that this kind of thinking is based on opportunism by the proponents of human rights for the LGBTIQ community and therefore has no place in law.

30. These views, behind which strong convictions indubitably lie, are varied. A lot of them are informed by the reality that the LGBTIQ community is hardly a popular or accepted group in the Kenyan society. This in turn makes the LGBTIQ community subject to physical and sexual harassment by the police and members of the public, extortion and blackmail etc.

31. Apart from their weightiness, which is evident in the above discussion, I note that the identified issues have not been determined by any other Court in Kenya as this unique aspect of LGBTIQ issues is

not one that has been broached by the Courts in the past, especially in light of the previous constitutional dispensation and there are therefore no ready and available answers thereto; these issues clearly raise substantial questions of the law.

32. The Petitioner also states that the issues affect more than just the Petitioner and that they are of public importance. On this subject, Onguto J in **Del Monte Kenya Limited v County Government of Muranga & 2 others [2016] eKLR** held thus:

“where the Petition raises or deals with an issue of public importance then the balance tilts in favour of empanelment especially if it is also an issue, the determination whereof would affect the rights of both the individual parties as well as the public at large or it is an issue which is yet to be determined and settled by the court or a court superior in hierarchy.”

33. This Court similarly in **Kalpana H Rawal v Judicial Service Commission & 3 Others [2015] eKLR** held thus:

“I should reiterate that the public importance of a matter is a consideration in determining whether a substantial question of law has been raised.”

34. I am in agreement with the above holdings and applying them to the Petitioner’s contention, I resolve that this matter indeed affects more than the Petitioner. The entire LGBTIQ community would be affected by the decision and this, considering the discussion above on the status of the members of this community in the Republic, is no small exploit.

35. Ultimately therefore, in my view, the matters raised in the Petition are weighty and have important consequences. In addition, the emotive nature of the issue is also bound impact on varied actions assumed subsequent to determination of the matter. I am mindful of the duty that this Court as a curator of the Constitution has, to interpret the Constitution in a manner that is enlightened and progressive. This only adds to the delicate and complex nature of the issues involved. All these factors lead me to the conclusion that the issues surrounding interpretation and constitutionality of **Sections 162 and 165** of the **Penal Code, CAP 63** raise substantial questions of law under **Article 165 (3) (d)** of the **Constitution**.

Conclusion

36. Having expressed myself as above, I am satisfied that the issues raised in the instant Petition are not only of public importance but are also weighty and require debate. They deserve therefore, the constitution of a bench of Judges for hearing and determination.

Disposition

37. I therefore certify that the matter be referred to the Chief Justice forthwith for the Constitution of a bench in terms of **Article 165 (4)** of the **Constitution**.

38. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Anyona holding brief for Mr. Kanyama for Interested Party and Mr. Obura for Respondent

Mrs. Ligunya for Applicant

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE



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